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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 10/31/03
LBP-03-21

SERVED 10/31/03

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

In the Matter of

DUKE COGEMA STONE & WEBSTER

(Savannah River Mixed Oxide Fuel
Fabrication Facility)

Docket No. 070-03098-ML

ASLBP No. 01-790-01-ML

October 31, 2003

MEMORANDUM AND ORDER

(Granting Duke Cogema Stone & Webster's Motion for Summary Disposition on Consolidated
Contention 11)

We have before us the motion of the Applicant, Duke Cogema Stone & Webster (DCS), filed pursuant to 10 C.F.R. §§ 2.749 and 2.1237 for summary disposition of consolidated contention 11.¹ As consolidated and admitted, contention 11 claims, inter alia, that DCS's environmental report (ER) understates the impacts of the waste stream from the aqueous polishing process and fails to analyze the impacts of the high-alpha liquid waste transfer line.² Intervenor, Georgians Against Nuclear Energy (GANE), opposes the motion, arguing that the procedural rules applicable to this Commission-modified Subpart L informal proceeding do not

¹ See Duke Cogema Stone & Webster's Motion for Summary Disposition on Consolidated Contention 11 (July 9, 2003) [hereinafter DCS Motion].

² See LBP-01-35, 54 NRC 403, 442-44, 451-52 (2001); see also Board Memorandum and Order (unpublished) (April 30, 2002) at 2 (consolidating Georgians Against Nuclear Energy's Contention 11 and Blue Ridge Environmental Defense League's Contention 1E). As the designated lead intervenor, GANE is responsible for litigating consolidated contention 11.

permit summary disposition and, in any event, the motion is without merit.³ The NRC Staff supports DCS's motion.⁴ For the reasons set forth below, we grant the motion for summary disposition of consolidated contention 11.

I. Background

This proceeding involves DCS's construction authorization request to build a Mixed Oxide Fuel Fabrication Facility (MOX Facility) at the Department of Energy's (DOE) Savannah River Site. As noted in our ruling admitting the contention, DCS's ER indicated that DCS planned to pipe high-alpha liquid waste from the proposed facility a short distance to the F-Area tank farm at the Savannah River Site.⁵ DCS's revised ER now states that this waste will not be transferred to the tank farm but instead will be transferred to a new DOE waste solidification building.⁶ In DCS's original ER, Table 3-3 shows the estimated annual volume of the waste stream.⁷ Subsequently, in revisions to the ER, DCS amended this table twice.⁸ In February 2003, the Staff issued a draft Environmental Impact Statement (EIS) for the proposed facility containing, inter alia, Table 4.11, which estimates the total waste, both solid and liquid, generated by the proposed MOX facility. The figures in these tables are at the center of controversy over consolidated contention 11.

³ See Georgians Against Nuclear Energy's Opposition to Duke Cogema Stone & Webster's Motion for Summary Disposition on Consolidated Contention 11 (July 29, 2003) [hereinafter GANE Response].

⁴ See NRC Staff's Response to DCS Motion for Summary Disposition on MOX Waste Contention (July 29, 2003) [hereinafter Staff Response].

⁵ See LBP-01-35, 54 NRC at 443.

⁶ See MOX Hearing File item # 161 (ER rev.3), section 3.3.2.2.

⁷ See MOX Hearing File item # 23 (original ER), Table 3-3, reproduced in GANE's Response, Exhibit 1.

⁸ See MOX Hearing File item # 109 (ER rev.2), reproduced in GANE Response, Exhibit 2; MOX Hearing File item # 161, reproduced in GANE Response, Exhibit 4.

DCS argues that summary disposition is appropriate because contention 11 presents no genuine issues of material fact and it is entitled to judgment as a matter of law.⁹ In its motion, DCS first sets out the various stipulations and ER revisions that have had the effect of reducing consolidated contention 11 to a single claim that “the ER understates the impacts of the aqueous polishing stream to remove gallium.”¹⁰ With respect to this single issue, DCS argues that GANE has no substantive basis for its claim, but instead only suspicion and conjecture. As support, DCS points to the deposition of GANE representative Glenn Carroll, who, when asked to explain why GANE believes DCS has underestimated its liquid waste stream from the aqueous polishing system, stated that, “[w]e don’t trust you and you haven’t shown us anything and we don’t trust that. That is the basis for our belief.”¹¹ According to DCS, it is entitled as a matter of law to the grant of its motion for summary disposition of consolidated contention 11 because mere suspicion cannot create a genuine issue of material fact.

In response to DCS, GANE claims that the motion should be denied because it is both procedurally prohibited and without merit.¹² GANE first argues that the motion is procedurally prohibited because, in its order referring the proceeding to the Licensing Board, the Commission set forth a number of additional procedures to be followed in the interest of effective adjudication, but did not include summary disposition.¹³ Thus, GANE argues the Commission’s silence regarding summary disposition procedures was intentional and meant to exclude such motions.

⁹ See DCS Motion; DCS’s Reply to GANE’s Opposition to Motion for Summary Disposition of Consolidated Contention 11 (August 11, 2003) [hereinafter DCS Response].

¹⁰ See DCS Motion at 6.

¹¹ Id., Exhibit 3, at 88:06-88:12.

¹² See GANE Response.

¹³ See CLI-01-12, 53 NRC 478, 480-82 (2001).

GANE also argues that DCS has not met the standards for summary disposition of consolidated contention 11 because there exist several genuine issues of material fact relating to the failure of DCS adequately to address the environmental impacts of the liquid high-alpha waste stream.¹⁴ GANE does not challenge DCS's reduction of consolidated contention 11 to the single proposition that the ER underestimates the impacts of the aqueous polishing stream.

According to GANE, its

position is based on a commonsensical reading of the Environmental Report ("ER") and draft Environmental Impact Statement ("EIS") for the proposed MOX Facility, for which expert testimony is not necessary. GANE believes that the ER and draft EIS for the proposed MOX Facility are missing basic and generally comprehensible information that is necessary for the public to be able to understand and evaluate the environmental impacts of the proposed MOX Facility.¹⁵

Specifically, GANE offers four arguments as to why the environmental impacts have been insufficiently addressed: (1) revision 3 of Table 3-3 of the ER is not credible; (2) it is not clear how the NRC derived EIS Table 4.11 from ER Table 3-3; (3) ER Table 3-3 and EIS Table 4.11 are incomplete because the 84,000 curies of radioactivity from the liquid americium stream do not appear to account for plutonium that is also a component of the waste stream; and (4) ER Table 3-3 and EIS Table 4.11 do not provide enough data on how they were derived for the public meaningfully to refute their results.¹⁶

II. Analysis

Contrary to GANE's assertion, there is no Commission prohibition in this informal Subpart L proceeding to resolution of contested issues by summary disposition. The Commission's Rules of Practice, 10 C.F.R. § 2.749, authorize motions for summary disposition

¹⁴ See GANE Response at 8.

¹⁵ Id. at 2.

¹⁶ See id. at 9-14.

for all or any part of the matters at issue in a proceeding. The summary disposition section is one of the many provisions of Subpart G in Part 2 of the Commission's Rules. Section 2.2 of Part 2 specifically provides that "Subpart G sets forth general rules applicable to all types of proceedings except rule making, and should be read in conjunction with the subpart governing a particular proceeding,"¹⁷ while section 2.3 of that same Part provides that in the event of a conflict between a general Subpart G rule and a special rule in another Part 2 subpart, the special rule governs.¹⁸ Although GANE is correct that Subpart L makes no provisions for summary disposition,¹⁹ the generally applicable Subpart G summary disposition provision of 10 C.F.R. § 2.749 is nevertheless apposite pursuant to 10 C.F.R. § 2.2 because it presents no conflict with any provision of Subpart L. Nor does the Subpart G summary disposition provision create any conflict with the additional procedures the Commission grafted onto the proceeding in its referral order.²⁰ Accordingly, 10 C.F.R. § 2.749 is fully applicable to the modified Subpart L proceeding and DCS's motion for summary disposition is entirely appropriate.

Pursuant to 10 C.F.R. § 2.749, summary disposition of all or any part of the matter involved in a proceeding is warranted "if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law."²¹ In order to succeed on a motion for summary disposition, the movant must demonstrate that there is no genuine issue of material

¹⁷ 10 C.F.R. § 2.2.

¹⁸ 10 C.F.R. § 2.3.

¹⁹ See GANE Response at 5-6.

²⁰ See CLI-01-13, 53 NRC at 480-82.

²¹ 10 C.F.R. § 2.749(d).

fact.²² Because the movant bears the burden of proof, any evidence must be construed in favor of the non-moving party.²³ In response, the non-moving party must set forth specific facts showing that there is a genuine issue of fact.²⁴ It is not enough that the non-moving party merely allege an “issue of fact;” rather, the issue of fact must be “genuine.” In order to be “genuine,” the factual record, in its entirety, must “be enough in doubt so that there is a reason to hold a hearing to resolve the issue.”²⁵

GANE offers several arguments in support of its assertion that a genuine issue of material fact exists as to whether DCS’s ER addresses the environmental impacts of the liquid high-alpha waste stream. As will be seen, however, none of GANE’s arguments presents a genuine issue of material fact that precludes granting DCS’s motion for summary disposition.

GANE first claims, in effect, that ER Table 3-3 is inaccurate because the alternate feed stock (AFS) listing in revision 3 of ER Table 3-3 represents the AFS and the pit disassembly and conversion facility (PDCF) waste combined, and therefore, the values for the AFS estimate should always be larger than the PDCF estimate.²⁶ For the excess acid stream, GANE cites from the table the value for PDCF as 2,378 gallons and the value for AFS as 1,321 gallons. According to GANE, these values make no sense.²⁷

²² See Advanced Medical Sys., Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993).

²³ See Sequoyah Fuels Corp. and General Atomics Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361, aff’d CLI-94-11, 40 NRC 55 (1994).

²⁴ 10 C.F.R. § 2.749(b).

²⁵ Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-46, 18 NRC 218, 223 (1983); see generally James Wm. Moore et al., Moore’s Federal Practice ¶ 56.11[3] (3d ed. 1999).

²⁶ See GANE Response at 9-10.

²⁷ See id.

GANE's assertions are based upon a misapprehension of Table 3-3. In revision 3 of ER Table 3-3, the AFS and PDCF labels identify two different waste streams. GANE's assumption that the AFS category represents the combined PDCF and AFS is simply incorrect. As seen in column two of the revised Table 3-3, the maximum annual volume of excess acid stream for PDCF is 2,378 gallons while that for AFS is 1,321 gallons. There is no inconsistency between these two numbers and, contrary to GANE's assertion, the two waste streams are distinct and should not be combined. GANE's argument thus is without merit, although DCS's reference errors in its summary disposition motion, and its labeling and arithmetical errors in various changes to Table 3-3 in two subsequent revisions to the ER, likely have not helped GANE's understanding of the information contained in the chart.²⁸

GANE's second assertion likewise fails to raise a genuine issue of material fact. GANE asserts that the relationship between Table 3-3 of the ER and Table 4.11 of the EIS is unclear. Because the EIS is based upon DCS's ER and, pursuant to the Commission's referral order, GANE has not yet had the opportunity to conduct discovery against the NRC Staff, it argues that summary disposition regarding the basis for the estimates in EIS Table 4.11 should not be granted.²⁹ Again, GANE apparently misapprehends the relationship between the numbers in revision 3 of ER Table 3-3 and EIS Table 4.11, which chart two different things. As DCS correctly states, the two charts are "apples and oranges."³⁰ ER Table 3-3 lists the maximum annual volume of the aqueous polishing waste streams produced by the PDCF and the AFS. The chart addresses only the liquid wastes produced by the MOX Facility aqueous polishing

²⁸ Compare Duke Cogema Stone & Webster's Corrections Regarding Motion for Summary Disposition on Consolidated Contention 11 (July 22, 2003), with DCS Motion, Exhibit 2, ¶ 5, and Supplemental Affidavit of Mary Birch, ¶ 3 (July 28, 2003).

²⁹ See GANE Response at 10-11.

³⁰ See DCS Response at 5.

process. On the other hand, EIS Table 4.11 identifies the waste volumes of the entire MOX Facility, in addition to wastes generated by the PDCF and the DOE waste solidification building. GANE's unilateral misunderstanding of Table 3-3 and Table 4.11 neither creates a genuine issue of material fact nor provides any basis for deferring ruling on DCS's motion until GANE can conduct discovery against the NRC Staff.

GANE's third and fourth grounds for seeking a denial of summary disposition likewise fail to establish a genuine issue of material fact. GANE declares that ER Table 3-3 is incomplete because it fails to detail all of the radioactivity contained in the liquid waste stream. According to GANE, the table only provides a value of 84,000 curies for liquid americium, but this figure gives neither the radioactivity for the plutonium-component noted in the table nor the radioactivity of the excess acid and alkaline waste streams.³¹ GANE also claims that ER Table 3-3 is unsupported because it fails to furnish any information regarding the assumptions or calculations for the waste stream volume estimates.³² Further, GANE claims that EIS Table 4.11 needs to account for the radioactivity levels of each component of the waste stream in addition to providing their volumes.³³ These arguments are unpersuasive.

While Table 3-3 does not provide a measurement of the radioactivity of the plutonium present in the liquid americium stream, GANE is incorrect in assuming that the amount of plutonium is large enough to affect significantly the radioactivity level of the stream or its environmental impacts. As ER Table 3-3 indicates, the amount of americium-241 in the liquid americium stream is 24.5 kilograms per year and contributes 84,000 curies of radioactivity.³⁴

³¹ See GANE Response at 12-13.

³² See id. at 13-14.

³³ See id.

³⁴ See MOX Hearing File item # 161 (ER rev.3), Table 3-3, reproduced in GANE Response, Exhibit 4.

The quantity of plutonium, however, is only 205 grams per year and, therefore, contributes a very small and insignificant amount of radioactivity compared to the americium-241. Indeed, as DCS points out in the uncontroverted affidavit of its expert, Mary Birch, supporting the motion for summary disposition, the 84,000 curies of radioactivity from americium is over 99 percent of the radioactivity of the high-alpha waste stream.³⁵ The revised ER also states that 99.7 percent of the total annual radioactivity in the waste streams would come from the liquid americium waste stream.³⁶ Therefore, the 84,000 curies of radioactivity in the waste stream accounted for in ER Table 3-3 necessarily identifies the 24.5 kilograms of americium-241 as the only radioactive isotope that significantly contributes to environmental impacts. Additionally, as both DCS and the Staff note, the quantity of radioactive material in a given waste stream may be expressed in a number of reasonable units, including mass as well as radioactivity.³⁷ Therefore, this claim presents no genuine issue of material fact.

As noted by GANE, Table 3-3 does not list the radioactivity of the excess acid and alkaline waste streams, the other two components of the high-alpha waste stream. Rather, the table provides only the mass of the radioactive isotope-components of each of those streams, including 14 milligrams of americium in the acid waste as well as 16 grams of plutonium and 13 grams of uranium in the alkaline waste. According to DCS, these radioactivity levels are not included in the table because both streams produce only a nominal amount of radioactivity. Specifically, DCS's expert affiant states that the acid stream accounts for 0.04 curies of radioactivity while the alkaline stream accounts for 18 curies of radioactivity.³⁸ Thus, like the

³⁵ See DCS Motion, Exhibit 2, ¶ 6.

³⁶ See MOX Hearing File item #161 (ER rev.3), Appendix G.

³⁷ See NRC Response, Exhibit 1, ¶ 8; DCS Motion at 9.

³⁸ See DCS Motion, Exhibit 2, ¶ 6; Supplemental Affidavit of Mary Birch, ¶ 3 (July 28, 2003).

plutonium in the waste stream, the acid and alkaline waste stream components contribute an insignificant amount of radioactivity to the high-alpha liquid waste stream compared to the 84,000 curies of radioactivity from americium. Hence, this issue also does not present the Board with an issue of material fact to adjudicate.

GANE's argument that ER Table 3-3 is unsupported because it fails to furnish the assumptions and calculations used to derive the volume estimates is belied by the voluminous information found in the ER. For example, the ER describes the entire MOX fuel fabrication process in section 3.2 and supplements this description with several figures and tables, including Figure 3-4, which illustrates the flow of plutonium through such a process; Figure 3-5 which schematically represents the plutonium polishing process; Table 3-2 which lists the annual chemical consumption and onsite inventory; and Table 3-4, which lists the solid wastes produced by the dry subprocesses illustrated in Figure 3-7.³⁹ The ER then continues in sections 3.3, and G.1.2 to describe the breakdown of the waste management system and provides Tables 3-3 and 3-4, which summarize the waste volumes; Figure 3-6, which illustrates the primary source of liquid waste generated by the aqueous polishing process; Figures 3-10, 3-11, and 3-12, which summarize the treatment of airborne, liquid, and solid waste respectively; and Table G-1, which looks at the liquid waste streams processed by the Waste Solidification Building.⁴⁰ As the ER states, these processes are based on actual experience from other facilities.⁴¹ Additionally, there is no requirement that ER Table 3-3 must synthesize all other information in the ER. Indeed, such a feat would not be practicable. There is thus no foundation for GANE's claim that the ER lacks support. Because "bald assertions" such as

³⁹ See MOX Hearing File item #161 (ER rev.3).

⁴⁰ See id.

⁴¹ See id. at ES-4 and ES-6.

those put forth by GANE do not create a genuine issue of material fact, summary disposition of this matter is appropriate.⁴²

Lastly, GANE claims that the EIS Table 4.11 should provide the radioactivity figures of the waste streams in addition to providing their volumes. This claim, however, is outside the scope of consolidated contention 11 and untimely asserted. On April 30, 2002, the Board issued an order establishing a 30-day time period in which to file contentions in situations where a newly filed document gave rise to either a late-filed contention or an amendment to an already admitted contention. Specifically the Board stated:

Any party filing a late-filed contention must, in addition to meeting the requirements of 10 C.F.R. § 2.714(b)(2), address each of the five factors set forth in 10 C.F.R. § 2.714(a)(1). All late-filed contentions shall be filed within 30 days of the initiating action, event, or document underlying the late-filed contention Absent extraordinary circumstances, a late-filed contention filed beyond the 30-day period will be found to lack good cause for the untimely filing. Finally, the Board reminds the Intervenor that they may need to file a late-filed contention or a late-filed amendment to an admitted contention if, for example, the scope, data, or conclusions set out in the draft EIS or the draft SER differ significantly from DCS's environmental report or construction authorization request. Failure to file a new late-filed contention or a late-filed amendment to an admitted contention may, upon a proper motion, result in the dismissal of an admitted contention.⁴³

Further, the Commissions regulations, 10 C.F.R. § 2.714(b)(2)(iii), provide that a late-filed contention must be filed "if there are data . . . in the NRC draft or final environmental impact statement . . . that differ[s] significantly from data . . . in the applicant's document." Here, because DCS's ER Table 3-3 included data on the radioactivity of the contributor of over 99 percent of the radioactivity of the high-alpha waste stream, but the draft EIS excluded the same information, the data in the draft EIS necessarily differed significantly from that in the ER.

⁴² See Advanced Medical Sys., Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 306-07 (1994), aff'd, Advanced Medical Sys., Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995).

⁴³ Board Memorandum and Order (unpublished) (April 30, 2003) at 3.

Thus, pursuant to the Rules of Practice and the Board's earlier order, GANE was required to file a late-filed contention asserting the deficiency in the draft EIS within 30 days of the publication of that document. Having failed to proffer such a late-filed contention, GANE's attempt to expand consolidated contention 11 to address a deficiency in the draft EIS in order to defeat DCS's motion for summary disposition is both untimely and improper.

For the foregoing reasons, DCS's motion for summary disposition of consolidated contention 11 is granted.⁴⁴ GANE has failed to establish any genuine issue of material fact. Absent such a demonstration, DCS is entitled to the dismissal of contention 11.

THE ATOMIC SAFETY
AND LICENSING BOARD⁴⁵
/RA/

Thomas S. Moore
ADMINISTRATIVE JUDGE
/RA by G.P. Bollwerk For/

Dr. Charles N. Kelber
ADMINISTRATIVE JUDGE
/RA/

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 31, 2003

⁴⁴ As should be self-evident, we find, in accordance with the Commission's Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 20-21 (1998) calling for such a written finding, that the grant of DCS's summary disposition motion of consolidated contention 11 reduces the number of issues to be resolved and thereby aids in expediting the proceeding. Indeed, due to the long delay injected into this case by the Applicant as a result of DOE's change in plans for the MOX facility and the subsequent Staff delay in producing the final EIS and safety evaluation report -- a delay totaling some 15 months at this juncture -- summary disposition is a highly efficient procedure for resolving a number of the issues in the proceeding.

⁴⁵ Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to (1) GANE; (2) BREDL; (3) DCS; and (4) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
)	
DUKE COGEMA STONE & WEBSTER)	Docket No. 70-3098-ML
)	
(Savannah River Mixed Oxide Fuel)	
Fabrication Facility))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (GRANTING DUKE COGEMA STONE & WEBSTER'S MOTION FOR SUMMARY DISPOSITION ON CONSOLIDATED CONTENTION 11) (LBP-03-21) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 70-3098-ML
LB MEMORANDUM AND ORDER
(GRANTING DUKE COGEMA
STONE & WEBSTER'S MOTION
FOR SUMMARY DISPOSITION ON
CONSOLIDATED CONTENTION 11) (LBP-03-21)

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 31st day of October 2003