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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

KEEP YELLOWSTONE NUCLEAR FREE, ENVIRONMENTAL DEFENSE INSTITUTE, MARY WOOLLEN, JOHN PEAVEY, DEBRA STANSELL,	)	Civ. No. 07-36-E-BLW
Plaintiffs,	)	
-against-	)	
THE UNITED STATES DEPARTMENT OF ENERGY, and SAMUEL W. BODMAN, SECRETARY, UNITED STATES DEPARTMENT OF ENGERGY,	)	
Defendants.	)	

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF PLAINTIFFS' RULE 59(e) MOTION TO ALTER JUDGMENT

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INTRODUCTION

Plaintiffs Keep Yellowstone Nuclear Free ("KYNF"), Environmental Defense Institute ("EDI"), Mary Woollen, John Peavey and Debra Stansell (collectively "Plaintiffs") submit this reply memorandum of points and authorities in further support of their motion pursuant to F.R.C.P. 59(e) asking that the Court alter its Judgment dated October 30, 2007 (the "Judgment"). In responding to this motion, the DOE has not cited a single document or statement from the administrative record, other than *ad hoc* declarations and memoranda it prepared during the course of this litigation, to support its claim that the Advanced Test Reactor ("ATR") had an originally-intended life span of seventy years or more. The DOE cannot change the record, which makes clear that the ATR had, as originally-designed, a 20-year design life.

In the absence of any record evidence that would support its claims, DOE argues that Plaintiffs are precluded from now raising this issue because Plaintiffs did not argue this point during the course of the parties' briefing on summary judgment. That is wrong. The ATR's originally-intended life span was never an issue in briefing because the DOE never once argued, as the Court has held, that the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. ("NEPA") does not apply to the LEP because the LEP does not extend the operations of the ATR beyond its originally-expected lifetime. Accordingly, Plaintiffs never had any cause to specifically rebut such a claim.

Further, DOE's failure to raise this claim during briefing is telling. The central premise of Plaintiffs' argument in this case is that the ATR has outlived its originally-intended design life and that the decision embodied in the Life Extension Program (the "LEP") triggers the environmental review requirements of the NEPA. Thus, Plaintiffs' complaint, their declarations in support of standing, their memoranda of points and authorities, and their statement of

undisputed facts, all repeatedly and pointedly state that the LEP is necessary – and expressly intended – to extent the operating life of the ATR. While the DOE responded that the ATR *can* be operated indefinitely by virtue of its purportedly robust design, surprisingly good condition, and the DOE's maintenance program, it never once claimed that NEPA did not apply because the ATR was originally-intended to operate indefinitely. The DOE could not have made such a claim because the record evidence, not previously stressed for the Court, is clear: the ATR had an original design life of 20 years.

The Court's careful Memorandum Decision turned on an issue that the parties did not brief. The Court reviewed a number of documents and DOE-contractor evaluations that either predicted or assumed a long life for the ATR, and, from these documents, concluded that, "while these evaluations lack precision, they all assume a long life for the ATR. When they are read together, they predict that the ATR would operate well past 2014, to at least 2035 and perhaps to 2050." Memorandum Decision at 2-3. Thus, the Court found that no NEPA review of the LEP was required. Memorandum Decision at 13-14.

Plaintiffs surely must and do accept the blame for failing to more forcefully demonstrate that the LEP is in fact a life extension program by pointing to the record evidence they now cite. Nonetheless, the precise question now before the Court – what was the originally-expected life span of the ATR – was never argued by either party on summary judgment, and thus the Plaintiffs' mistake is excusable. The Court's Memorandum Decision was based on an error of apprehension, not reasoning, and that error was the result of the parties' failure to brief the issue.

The documents now cited by the Plaintiffs directly contradict the Court's factual conclusion. They do not assume anything and do not lack precision. They state that the ATR had an originally-expected life span – a design life – of 20 years. The opportunity remains for

the Court to correct the manifest error in its Memorandum Decision and the Plaintiffs respectfully request that the Court do so.

ARGUMENT

POINT I

STANDARD OF REVIEW

As Plaintiffs acknowledged in their opening brief on this motion, the standard for obtaining relief under rule 59(e) is difficult to meet, and reconsideration of a final judgment is an extraordinary remedy. As pointed out, however, one purpose of a motion for reconsideration is to correct manifest errors of fact. While it is true, as the DOE stresses, that motions under Rule 59(e) may not be used to reargue a case, or to argue new facts that were inexcusably not previously presented to the court, a motion for reargument is appropriate where the court has "made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." Johnson v. Diamond State Port Corporation, 2002 U.S. App. LEXIS 2339 (3rd Cir. 2002); Gregg v. American Quasar Petroleum Co., 840 F.Supp 1394 (D.Colorado 1993). Both situations apply here. Thus, it is entirely proper for the Plaintiffs to now present evidence not previously presented to the Court and for the Court to reconsider its Judgment in light of that evidence.

POINT II

PLAINTIFFS WERE JUSTIFIED IN NOT PREVIOUSLY PRESENTING TO THE COURT THE RECORD EVIDENCE CITED IN THIS MOTION

A. The DOE Never Argued that the LEP Was Not Subject to NEPA Because the ATR's Originally-Intended Design Life Was Indefinite

In summary judgment briefing the DOE did not argue, as the Court has held, that NEPA

does not apply to the LEP because the LEP is not intended to extend operation of the ATR beyond its originally-intended life expectancy. The DOE did not make this argument in its opening summary judgment brief, or in its reply brief.

In its briefs on summary judgment, the DOE argued that NEPA does not apply to the LEP because the LEP is simply the continuation of the manner in which the DOE has always conducted its ATR maintenance program and that "because ATR operations and maintenance were established prior to enactment of NEPA, NEPA's requirements are not applicable." DOE Summary Judgment Memorandum ("DOE SJ Mem."), Docket No. 32, at 26. In support of this claim, the DOE cited Upper Snake River Chapter of Trout Unlimited v. Hodel, 921 F.2d 232 (9TH Cir. 1990). Plaintiffs rebutted this claim in its summary judgment reply brief by distinguishing the LEP from the routine operational decisions at issue in Upper Snake River, pointing out that the DOE's budget documents distinguish between routine operations and maintenance and the LEP, and drawing an analogy to Nuclear Regulatory Commission and Federal Energy Regulatory Commission re-licensing proceedings, which require NEPA analysis. Plaintiffs Summary Judgment Reply Brief (Docket No. 48) at 31-33.

Even in their reply brief (to which the Plaintiffs had no opportunity to respond) the DOE did not argue that NEPA did not apply because the ATR's design life, or life expectancy, was indefinite. It instead argued, again, that "NEPA would apply to the LEP only if it were an action that 'substantially changes' in (sic.) the manner in which ATR has always been managed." See DOE Reply Memorandum in Support of Summary Judgment, Docket No. 57, at 22. Had the DOE argued, as the Court has now ruled, that NEPA does not apply to the LEP because the ATR's originally-intended operating life contemplated operation well into the 21st century, the Plaintiffs would have had reason to review in detail the design specifications and 1987 Ageing

Evaluation and Life Extension ("AELEX") program documents now presented in this motion, and would have highlighted them for the Court to refute such an argument. That argument was never made by the DOE.

B. Plaintiffs Did Not Concede That the ATR Was Designed to Operate Indefinitely

Plaintiffs never conceded the DOE's claim that the ATR, by virtue of its design and the DOE's maintenance program, could be operated indefinitely. During summary judgment briefing Plaintiffs stressed dozens of times, with citations to the administrative record that the LEP, including its safety posture modernization components and physical upgrades, was and is necessary to extend the life of the ATR.

Plaintiffs' Statement of Undisputed Material Facts, Docket No. 20 ("PSOF") submitted in support of Plaintiffs' motion for summary judgment repeatedly states that, as the DOE's own consultants and contractor had determined, the LEP was necessary to extend the ATR's operating life. See PSOF at 2, 5, 12, 17, 18, 23. Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment, Docket No. 19 ("Plaintiffs' Mem.") also repeatedly emphasizes that this is a challenge to the DOE's decision to extend the life of the ATR without performing the required NEPA review. Plaintiffs' Mem. at 2, 3, 4, 5, 7, 8-9, 11, 13, 14, 19, 20, 21, 23, 25.

In response to DOE's cross-motion for summary judgment, Plaintiffs filed declarations in support of Plaintiffs' standing. Those declarations further repeatedly and clearly state that the DOE had embarked on the LEP, not as part of routine maintenance, but in order to extend the operating life of the ATR. See e.g., Stansell Declaration ¶¶ 12, 14, 15; Broscious Declaration ¶ 33; Woollen Declaration ¶ 17, 29; Peavey Declaration ¶ 18, 19. Finally, Plaintiff's Reply Memorandum of Points and Authorities in Further Support of Plaintiffs' Motion for Summary

Judgment, Docket No. 48 ("Plaintiffs' Reply Mem."), repeatedly stresses, with references to various documents in the administrative record, that the LEP is necessary to extend the ATR's operating life. See Plaintiffs' Reply Mem. at 16-30.

As demonstrated above, it cannot be claimed that the Plaintiffs conceded that, with routine maintenance, the ATR can be operated indefinitely, let alone that the ATR was originally-designed to be operated indefinitely. On the contrary, with multiple citations to the record, and in a variety of contexts, Plaintiffs stressed that the LEP goes well beyond routine maintenance and is indeed necessary and intended by the DOE to extend the operating life of the ATR.

The DOE also argues that the Plaintiffs did not file a response to the Federal Defendants' statement of facts, purportedly in contravention of Local Rule 7.1(c)(2), and that the DOE is entitled to summary judgment for that reason alone. DOE Mem. at 2. To the extent that the DOE's statement of facts can be read to assert that the ATR, as originally designed, had an "indefinite" design life (and it does not in fact anywhere state that), there was no reason for the Plaintiffs to dispute such a claim. As set forth above, even assuming such a factual claim were made by the DOE, it was never tied to any NEPA-related defense by the DOE. Therefore, such a factual claim was not material to any defense the DOE had raised.[1]

1 In addition, the Case Management Order, Docket No. 12, which set the briefing schedule and which Plaintiffs' followed, did not require Plaintiffs to file a statement of disputed facts in response to Defendants' cross-motion for summary judgment. To the extent that Local Rule 7.1(c)(2) supersedes that order, Plaintiffs were remiss. However, Plaintiffs had already put in their own statement of facts (Docket No. 20), which DOE answered with a 40-page response contesting virtually every statement made in Plaintiffs' statement of facts. See Docket No. 34. Thus, Plaintiffs believed that the material facts that were in dispute had been clearly established and Plaintiffs saw no reason for further debate on the subject.

POINT III

THE ATR HAD AN ORIGINALLY-INTENDED 20 YEAR DESIGN LIFE

A. The Only Record Evidence on the Subject States that the ATR Had a Design Life of 20 Years

Other than *ad hoc* claims made by DOE personnel during the course of this litigation, the only record evidence providing the original "design life" for the ATR, the original Ebasco Design Specifications for its key components and the AELEX program documents prepared after 20 years of operation, state that the ATR had a 20 year "design life." The "ATR Specification for Primary Heat Exchangers" (Specification M-3) states: "The design life shall be a **nominal 20 years.**" AR 017156 (emphasis added). The "ATR Specification for Reactor Vessel" (Specification M-130) states, under the heading "Design Life": "**Normal 20 years** for all metal parts exclusive of irradiation effects." AR 017185 (emphasis added). The ATR Specification for Outlet Flow Pipe Assemblies (Specification M-103) states as their "Design Life": "2000 temperature and pressure cycles over **a twenty (20) year period**." AR 017208 (emphasis added).

The DOE claims that the 20-year "design life" for individual components of the reactor does not translate into a 20-year design life for the ATR as a whole. See DOE Mem. at 11. However, consistent with the "design life" set forth in the ATR design specifications quoted above, in 1987, after 20 years of operation (the ATR first went critical in 1967), the DOE embarked on the first life extension program, the AELEX. The DOE reports generated during the AELEX expressly confirm that the design life of the ATR as a whole, as originally designed, was 20 years. The February 22, 1991 "Aging Evaluation of the ATR Vessel Support Assembly," states:

The Advanced Test Reactor (ATR) at the Idaho National Engineering Laboratory

> began full power operation in August 1969 and has been operating successfully ever since. **Initial design of the reactor and supporting equipment was generally based on an expected 20 year lifetime.**

AR 025913 (emphasis added). The May 1989 "ATR Reactor Vessel Internals Lifetime Scoping Analysis," (AR 025468-025907) states:

> The Advanced Test Reactor (ATR) first achieved full-power operation in August of 1969, nearly twenty years ago. The **original design life of various equipment at that time (including the reactor vessel) was twenty years of full-power operation.**

AR 025472 (emphasis added).

The AELEX program's review of the effects of aging on the ATR was not confined to the three reactor components for which the design specifications explicitly state a 20 year design life. The 221 page "ATR Aging Evaluation and Life Extension Program Interim Report – Phase 1 and Phase 2 Results" dated April, 1988, reports the interim results of aging evaluations of 47 separate "critical components." AR 013445 – 013666. It also promised that assessments of hundreds of "noncritical components" would be performed once the full Phase 3 assessment of the critical components had first been completed.[2] AR 013523 While the Phase 3 assessment of critical components (representing detailed evaluation of those components), and the assessment of "noncritical" components, were never performed due to budget constraints that ended the AELEX program (AR 011323), the comprehensive nature of the program's *intended* review demonstrates that after 20 years of operation, aging was a concern for the entire facility, and not

2 The "noncritical components" are defined in part by their cost to replace and the effect on plant operations, not simply their role in the safe operation of the reactor. Thus, hundreds of essential systems, including primary coolant system components, liquid waste disposal components, firewater system components, diesel generator components, monitoring system components, experiment facility components, and reactor shutdown components, were termed "noncritical" (AR 013526 – 013663) and thus never evaluated during the AELEX program, because the program was terminated before it reached that stage due to funding constraints. AR 011323.

just the three major components with explicitly specified 20-year design lives, and that life extension measures were necessary to ensure safe continued operation.

When confronted with the plain statements in the AELEX documents reflecting a 20 year design life for the ATR as a whole, the DOE's response is to disavow them. The DOE claims that these quotations "appear[] to be little more than a reference to the "general" minimum design life specifications for the various ATR components discussed above…" and "appear [] to be incorrect". DOE Mem at 15 and Declaration of Robert Boston (the "Boston Declaration") at 34.

The AELEX program was embarked upon 20 years after the ATR first became operational. The statements made during the AELEX program confirm the 20-year design life for essential ATR components (the vessel, the heat exchangers and the outlet flow assemblies), none of which have been replaced, and for the reactor as a whole. AR 025913 and 25472. And, the AELEX program reviewed the effects of ageing on the ATR as a whole, including hundreds of different components (although that review was never completed). AR 013445 – 013666.

As the Supreme Court has stated, an agency position that is inconsistent with the agency's prior positions, is "entitled to considerably less deference" than a consistently held view. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), at 458 note 30; see also Watt v. Alaska, 451 U.S. 259 (1981) (stating that an agency's "contemporaneous construction carries persuasive weight"); Resident Councils of Washington v. Leavitt, 500 F.3d 1025, 1036 (9th Cir. 2007). The ATR Design Specifications giving a 20 year "design life" were written more than 40 years ago. The entirely consistent AELEX statements stating that the ATR's components, and as a whole, had a 20 year design life, were made 20 years ago. Theses statements are entitled to greater weight than the DOE's *ad hoc* and unsupported litigation position that these statements "appear

incorrect" and that the ATR has an "indefinite" originally-intended life span.

B. The Current Condition of the ATR's Critical Components Has No Bearing On This Motion

The Boston Declaration and the DOE Memorandum attempt to reassure the Court that, the components for which the ATR specifications give a 20 year design life have been inspected, are in good condition, can continue to function indefinitely, and in any event could be replaced if necessary. See Boston Declaration ¶¶ 15-27; DOE Mem. 11-17. Whatever their merit, these claims, which simply reiterate the DOE's position during summary judgment that the ATR *can* be operated indefinitely, are nothing more than a red herring. The only relevant question now before the Court is what was the originally-intended design life of the ATR?

C. The Reactor Vessel's 20 Year Design Life Was Not "Superseded"

In an attempt to cloud the plain meaning of the ATR vessel specification giving a 20 year "design life" (AR 017156) the Boston Declaration claims that this specification "was effectively superseded" when the design was changed to a stainless steel vessel, and that "this change, coupled with the overall design of the reactor, made the reactor design life indefinite." Boston Declaration ¶ 12. This claim is flatly contradicted by the administrative record.

The switch to stainless steel did not have any effect on the ATR's specified "design life." The switch occurred as part of revision 3 to the reactor vessel specification on June 1, 1962. The specification states that at that time it was "completely updated, and revised for procurement of a solid stainless steel vessel only. All previous revisions of this specification are hereby voided." AR 01715 (emphasis added). After that, the specification was revised six more times over the course of more than two years. Id. Still, the "design life" of the reactor vessel remained "20 years for all metal parts." AR 017185. Thus, Mr. Boston's claim that this specification was "superseded" is pure speculation, and is in fact contradicted by the repeated and explicit

revisions to the specification itself. It is further contradicted by the May, 1989 ATR Reactor Vessel Internals Lifetime Scoping Anslyis, which state: "The original design life of various equipment at that time (including the reactor vessel) was twenty years of full-power operation." AR 025472.

Providing a further *ad hoc* rationale for dismissing the "20 year design life" specified for the reactor vessel, Mr. Boston spends several pages trying to convince the Court that two common reactor aging phenomena, corrosion and irradiation embrittlement, are not and never were a concern for the ATR because of its stainless steel construction. Boston Dec. ¶¶ 12-16. Mr. Boston claims that at the time of the ATR's construction the Atomic Energy Comission "understood that corrosion would not limit the useful life of the ATR reactor vessel." Boston at ¶ 15. Mr. Boston fails to support these claims with citations to documents that are available to opposing counsel and the Court, much less documents found in the administrative record. See Boston Dec. ¶¶ 15, 16 (citing the "original ATR safety analysis report," the AEC's purported approval thereof, and 1992 testing of "additional specimens," none of which are in the 31,000 page record). Mr. Boston then further claims that when the ATR was designed, "It was understood at the time" that "the stainless steel construction of the reactor vessel would further make the reactor vessel resilient from the effects of radiation." Boston Dec. ¶ 16. Again, these claims are contradicted by the administrative record, as set forth below.

In 1987 – after 20 years of operation – as part of its AELEX program, the DOE performed a detailed assessment of the possible effects of corrosion and irradiation embrittlement,[3] the very same aging phenomena that Mr. Boston now claims were never a concern for the ATR because of its stainless steel vessel construction. The result was a 163 page

3 That assessment also evaluated the possible effects of stress-cycle conditions, an aging phenomena nowhere addressed by Mr. Boston.

report evaluating these aging concerns. AR 24993 – 25156. Thus, Mr. Boston's claim that stainless steel construction voided any concern about the age of the facility, and rendered its original design life "indefinite," is belied by this record. The DOE embarked on the AELEX after 20 years of operation because the ATR had reached the end of its original design life and a detailed assessment of the effects of aging, including radiation embrittlement and corrosion, was required at that time to safely extend its operation.

D. Life Extension Efforts Undertaken for the HFIR Are Relevant

As Plaintiffs pointed out in their initial brief in support of this motion, the High Flux Isotope Reactor ("HFIR") in Tennessee, a DOE test reactor that, like the ATR, was built in the late 1960s and commenced full-power operation in 1969, also had a 20 year design life, and therefore also underwent life extension measures in the late 1980s. In response, the Boston Declaration attempts to draw a distinction between HFIR's "full power years" and "calendar years." Mr. Boston's math is wrong and a correction of his error illustrates Plaintiffs' position. Mr. Boston states: "Since the HFIR commenced operation in 1969, it was approximately 27 years later in 1986 when it had completed 17.2 full power years." Boston Declaration ¶ 28. Of course, there are only 17 years from 1969 to 1986. Thus, after 17 calendar years, the DOE embarked on life extension measures for the HFIR and the parallel drawn by Plaintiffs between ATR and HFIR is entirely valid. The DOE's test reactors both had a design life of 20 years, and both required life extension measures after 20 years of operation.

CONCLUSION

The DOE claims that "not one of the Administrative Record documents that Plaintiffs cite states that the design life of ATR was 20 years." DOE Mem. at 11. That is simply not true and the DOE cannot escape its own past statement: "Initial Design of the reactor and supporting equipment was generally based on an expected 20 year lifetime." AR 025913. This is a direct quote from a DOE document generated during the first life extension program, the AELEX, commenced in 1987 – exactly 20 years after the ATR first became operational.

The DOE argues that the Plaintiffs' only recourse is an appeal. DOE Mem. at 10. The DOE is mistaken. One purpose of a Rule 59(e) motion is to allow the Court an opportunity to correct a manifest error of fact, particularly where its decision turned upon issues that were outside of the adversarial arguments the parties presented. Plaintiffs therefore respectfully request that the Court vacate its Judgment, grant Plaintiffs' motion for summary judgment and direct the DOE to comply with NEPA for the LEP by immediately beginning to prepare an environmental impact statement.

Respectfully submitted,

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December 13, 2007

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