RAS 8448

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	
LOUISIANA ENERGY SERVICES, L.P.	Docket No. 70-3103-ML
(National Enrichment Facility)	ASLBP No. 04-826-01-ML

NEW MEXICO ATTORNEY GENERAL'S BRIEF IN RESPONSE TO COMMISSION'S ORDER ON NIRS/PC CONTENTION D AND ATTORNEY GENERAL'S LATE-FILED CONTENTION

In CLI-04-25, the Commission recognized that the waste classification of the enrichment tails presented a "novel legal or policy question" and asked for briefs from interested parties with a view to deciding the waste classification itself. The Attorney General of New Mexico ("Attorney General") presents her contention on this issue below. In sum, the Attorney General believes the tails constitute low-level radioactive waste but that the proper classification (A, B or C) should depend on the calculated radiological hazards to an intruder on the site after the end of institutional controls.

Contention: Although also mixed waste, the enrichment tails that LES proposes to produce are low-level waste but there is inadequate material in the application upon which to base a classification under Part 61. Unless the Nuclear Regulatory Commission properly classifies the tails, there will be no disposal options for them.

Basis: Section 3113 of the USEC Privatization Act requires that the DOE take possession and dispose of depleted uranium hexaflouride from private uranium enrichment facilities should the Nuclear Regulatory Commissions determine that the depleted uranium hexaflouride may be classified as low-level radioactive waste. In Section 4.13.3.1.3 of its

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SECY-02

Environmental Report, LES states that "[t]he disposition of UBCs by DOE conversion and disposal . . . is also a 'plausible strategy,' but is not considered the preferred option." Under the definition of waste (or low-level radioactive waste) in 10 C.F.R. Part 61 the tails must be low level radioactive waste because they do not fit in any other category that would exclude them from the definition. LES, however, fails to provide sufficient material in its application upon which to base a classification of such waste under Part 61. Nor has the Nuclear Regulatory Commission made a formal determination regarding the classification of depleted uranium hexafluoride. Additionally, there has not been a classification made by the DOE in this regard. Under Part 61, and the requirement in the Atomic Energy Act that Agreement State programs be compatible with the Commission's program, neither the Commission nor an Agreement State will allow the licensed disposal of the tails as low level waste unless the Commission classifies them under Part 61. (An Agreement State will defer to the Commission's classification.) Thus there is no private tails disposal strategy unless there is a Commission classification. Also, certain classifications will eliminate private disposal options either as a practical matter, given the terms of disposal licenses, or (in the case of GTCC waste) under the Low-level Radioactive Waste Policy Amendments Act (LLRWPAA) which provides for DOE disposal of GTCC waste generated by a Commission licensee. Moreover, while DOE will be obligated in specified circumstances to accept the tails from the applicant, such acceptance will be delayed for an indefinite period if the tails are GTCC because such GTCC waste must be disposed of in a Commission-licensed facility under the LLRWPAA and DOE has announced no plans for such a facility. Thus a proper classification is critical and a discussion and justification for the classification must be included in the application. Since the application does not address this

issue, it is inadequate. It is not possible to be any more specific by taking issue with a particular classification decision.

This issue is within the scope of this proceeding, as the Nuclear Regulatory Commission has recently requested briefing on the classification of the depleted uranium hexaflouride. Additionally, this issue is material to the findings the Nuclear Regulatory Commission must make in determining whether the disposition of UBCs by DOE conversion is a plausible strategy.

The Tails Are Low-Level Radioactive Waste

The tails (depleted UF-6) are low-level radioactive waste by default. Under the Low Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021 note, and 10 C.F.R. § 61.2, low-level radioactive waste is waste containing Atomic Energy Act materials that is not high-level radioactive waste, transuranic waste, spent nuclear fuel, or section 11 (e)(2) byproduct material (uranium or thorium mill tailings and waste). Since the tails are none of these, it follows that they must be low-level radioactive waste. However, 10 C.F.R. § 61.56 is clear that the depleted UF-6 will have characteristics that make it generally unsuitable for ordinary land disposal. For purposes of this brief, the Attorney General assumes that the Commission's classification question presumes treatment of the tails to remove the hazardous chemical constituent (the fluoride component).

The Tails Cannot Be Classified Properly Without Development of a Record on Hazards to Intruders

10 C.F.R Part 61 has two conflicting sets of provisions on classification. 10 C.F.R § 61.55 (a) first appears to suggest the tails are Class A waste. This is because uranium is not included in Tables I or 2 and, under 10 C.F.R. § 61.55 (a)(6), waste with nuclides not listed in these tables is Class A by default. On the other hand, 10 C.F.R. § 61.7 (a) (3) states that "it is possible but unlikely that persons might occupy the site in the future and engage in normal

pursuits without knowing they were receiving radiation exposure" (intruders), and 10 C.F.R. § 61.7 (a) (4) presumes that all Class A wastes may be disposed without special provision for protection of intruders because "they will decay during the 100-year period [of institutional control] and will present an acceptable hazard to an intruder."

The difficulty, as the Attorney General sees it, is that it is reasonably possible that this premise of 10 C.F.R. § 61.55 (b) (4) may not be correct for depleted uranium that has a very long half-life. If an intruder would receive an unacceptable dose (more than the limits in 10 C.F.R. § 61.41), then the premise for classification as Class A would appear to fail, for the result would be that simple disposal as Class A waste would violate 10 C.F.R. § 61.42, which demands that inadvertent intruders be protected after institutional controls are removed. However, the record of this proceeding may need further development on the question of intruder dose after the end of institutional controls, which 10 C.F.R. Part 61 pegs at 100 years.

If the intruder dose is at or below acceptable limits after 100 years, then the tails are Class A. However, if the intruder dose exceeds acceptable limits, then the Commission has several options. It could establish a special classification for the tails under 10 C.F.R. § 61.58. Alternatively, it could use 10 C.F.R. § 61.54 to add special requirements for intruder protection for the tails but maintain the A classification. These special requirements could be developed with a particular disposal option in mind.

As the Attorney General has made clear, she is concerned about the possibility of indefinite storage of the tails on the LES site pending full development and implementation of a disposal option. Thus, in deciding the classification question, she would not want the Commission to prejudice the option in the USEC Privatization Act for DOE to accept the tails for processing (treatment) and disposal. While the applicant has not set forth its plans with

sufficient specificity to rule out the probability of indefinite on-site storage, and DOE's current plans do not appear to embrace any acceptance of privately generated tails at DOE facilities, keeping this DOE option open seems desirable until applicant develops and implements an alternative disposal option.

Nor would the Attorney General want to prejudice the possible use of safe and environmentally sound private disposal options for the tails. In this respect, the Attorney General submits that the failure of the applicant to specify its disposal option for the tails not only establishes the basis for the Attorney General's concern about indefinite on-site storage, but also vastly complicates the Commission's task in deciding the classification question, for without more specific information from applicant about its disposal plans, the Commission cannot be sure that its classification decision would not prejudice an otherwise desirable specific disposal option.

Respectfully submitted,

PATRICIA A. MADRID
Attorney General

Glenn R. Smith
Deputy Attorney General
Christopher D. Coppin
Special Counsel
Stephen R. Farris
David M. Pato
Assistant Attorneys General
P. O. Drawer 1508
Santa Fe, NM 87504
Telephone: (505) 827-6021
Facsimile: (505) 827-4440

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	
LOUISIANA ENERGY SERVICES, L.P.	Docket No. 70-3103-ML
(National Enrichment Facility)	ASLBP No. 04-826-01-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the NEW MEXICO ATTORNEY GENERAL'S BRIEF IN RESPONSE TO COMMISSION'S ORDER ON NIRS/PC CONTENTION D AND ATTORNEY GENERAL'S LATE-FILED CONTENTION have been served upon the following persons by electronic mail, facsimile, and/or first class U.S. mail this 3rd day of September, 2004:

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Paul B. Abramson
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: pba@nrc.gov

Dennis C. Dambly, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: dcd@nrc.gov

Administrative Judge
G. Paul Bollwerk, III, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: gpb@nrc.gov

Administrative Judge
Charles N. Kelber
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: cnk@nrc.gov

James R. Curtiss, Esq.
Winston & Strawn LLP
1400 L Street
Washington, DC 20005-3502
E-mail: jcurtiss@winston.com

Tannis Fox, Esq.
Clay Clarke, Esq.
Assistant General Counsel
State of New Mexico Environment Dep't

1190 St. Francis Drive
Santa Fe, NM 87502-6110
E-mail: clay_clarke@nmenv.state.nm.us

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Attn: Rulemaking & Adjudications Staff
Washington, DC 20555-0001
Facsimile: (301) 415-1101
E-mail: hearingdocket@nrc.gov

Office of General Counsel
U.S. Nuclear Regulatory Commission
Attn: Assoc. Gen. Counsel for Hearings, Enforcement & Administration
Washington, DC 20555-0001
Facsimile: (301) 415-3725

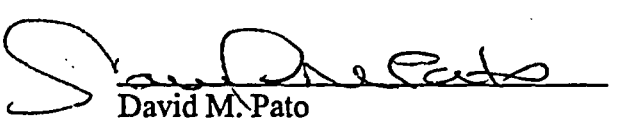
Lisa Cook, Esq.
Angela Coggins, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mails: lbc@nrc.gov
ABC1@nrc.gov

Lindsay A. Lovejoy, Jr., Esq.
618 Paseo de Peralta, Unit B
Santa Fe, NM 87501
E-mail: lindsay@lindsaylovejoy.com

Chairman Nils J. Diaz, Ph.D.
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Commissioner Edward McGaffigan, Jr.
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Commissioner Jeffrey S. Merrifield
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001



David M. Pato
Assistant Attorney General

UNITED STATES OF AMERICA
U.S. NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
LOUISIANA ENERGY SERVICES, L.P.	)	Docket No. 70-3103-ML
(National Enrichment Facility)	)	

AFFIDAVIT OF ALLEN L. MESSENGER, P.E.

STATE OF TEXAS)
)ss.
COUNTY OF TRAVIS)

Allen L. Messenger, being first duly sworn, deposes and states:

1. I am over the age of eighteen years and I make this affidavit based upon my personal knowledge.
2. I have an M.S. in Civil Engineering from Texas A & M University and I have worked as a professional engineer for over eighteen years.
3. I have 24 years of experience in permitting and licensing hazardous and radioactive waste management facilities. I have directed the licensing and permit applications for the Waste Control Specialists, LLC (WCS) Class C radioactive materials storage and processing facility in Andrews County, Texas, a Class A, B & C radioactive waste disposal application, TSCA storage facilities, commercial hazardous waste landfills, and a hazardous waste and TSCA processing and incinerator complex including the cost estimates that established financial assurance for closure and post closure of these commercial waste management facilities. I directed the preparation of the decommissioning plan and financial assurance cost estimates for WCS for its low-level radioactive waste storage and processing license and negotiated the applicable license conditions.
4. From 1981-1985, I was the head of the Disposal Facilities Unit of the Texas Department of Water Resources (TDWR), where I was responsible for developing regulations for the design, siting, approval and groundwater monitoring of hazardous and non-hazardous waste landfills throughout the State of Texas. In addition, I was responsible for technical approval of closure plans for industrial hazardous waste disposal units and the design of groundwater monitoring systems throughout the State of Texas. During my tenure at TDWR, I served on the EPA/ASTSWMO Task Force to develop siting standards for hazardous waste landfills. I also provided comments on

behalf of the State of Texas on EPA regulations and guidance pertaining to hazardous waste management and implementation of HSWA requirements including Continuing Releases and Minimum Technological Requirements.

5. I have reviewed the application submitted by Louisiana Energy Services, L.P. ("LES") to construct and operate a centrifuge enrichment facility in Eunice, New Mexico.
6. Having reviewed the materials listed above, and 10 C.F.R. Part 61, I have reached the opinion, formulated to a reasonable scientific probability, that LES's application contains insufficient material upon which to base a classification of the enrichment tails under Part 61.
7. Moreover, based on my knowledge of low-level waste disposal facilities, it is my opinion that certain waste classifications under 10 C.F.R. Part 61, especially classification as Class C, will limit the availability of facilities for disposal of the tails because of restrictive waste acceptance criteria. Finally, I am not aware of any DOE plans for development of any NRC-licensed DOE disposal facility for low-level waste.

Further affiant sayeth naught.

Date: September 3, 2004

By: _____
ALLEN L. MESSENGER

ACKNOWLEDGEMENT FOR NATURAL PERSONS

STATE OF TEXAS)
)ss.
COUNTY OF TRAVIS)

The foregoing instrument was subscribed and sworn to me this 3 day of September, 2004, by Allen L. Messenger.

_____
Notary Public

My commission expires:

01-29-2008

JARRETT REECE
MY COMMISSION EXPIRES
January 29, 2008

Attorney General of New Mexico

PATRICIA A. MADRID
Attorney General

STUART M. BLUESTONE
Chief Deputy Attorney General

GLENN R. SMITH
Deputy Attorney General

September 3, 2004

Secretary of the Commission
United States Nuclear Regulatory Commission
Attn: Rulemaking and Adjudications Staff
Washington, D.C. 20555-0001
Facsimile: (301) 415-1101

Re: **In the Matter of Louisiana Energy Services, L.P. (National Enrichment Facility)**
Docket No. 70-3103

Dear Rulemaking and Adjudications Staff:

Enclosed is the original and three copies of the New Mexico Attorney General's Brief in Response to Commission's Order on NIRS/PC Contention D and Attorney General's Late-Filed Contention for filing in the above matter. The New Mexico Attorney General would appreciate it if you would kindly file, endorse and return a copy in the enclosed self-addressed, stamped envelope provided herewith.

Thank you for your assistance.

Sincerely,

David M. Pato
Assistant Attorney General
New Mexico Attorney General's Office

Enclosures

111 Lomas Blvd. NW, Suite 300 Albuquerque, New Mexico 87102 (505) 222-9000 Fax: (505) 222-9006