

September 17, 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

September 17, 2004 (3:58PM)

BEFORE THE COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of:	)	
	)	Docket No. 70-3103-ML
Louisiana Energy Services, L.P.	)	
	)	ASLBP No. 04-826-01-ML
(National Enrichment Facility)	)	

REPLY BRIEF OF LOUISIANA ENERGY SERVICES, L.P. ON CERTIFIED QUESTION  
REGARDING THE PROPER WASTE CLASSIFICATION OF DEPLETED URANIUM

I. INTRODUCTION

On September 8, 2004, Joint Intervenors Nuclear Information and Resource Service and Public Citizen ("NIRS/PC" or "Intervenors") submitted a brief<sup>1</sup> in response to the Commission's Memorandum and Order of August 18, 2004, CLI-04-25.<sup>2</sup> In accordance with the schedule set forth in CLI-04-25, Louisiana Energy Services, L.P. ("LES"), herein submits its reply to the NIRS/PC brief. This reply focuses on the NIRS/PC argument that contention NIRS/PC EC-3/TC-1 should be "admitted for further proceedings." NIRS/PC Brief at 23. Specifically, NIRS/PC maintain that "since there has been no determination by the Commission that DU [depleted uranium] constitutes low-level waste, [] NIRS/PC should therefore be allowed to show that, under the standards of 10 C.F.R. Part 61, DU would not and should not be classified as low-level waste." *Id.* at 23.

<sup>1</sup> "Brief on Behalf of Petitioners Nuclear Information and Resource Service/Public Citizen in Support of NIRS/PC Contention EC-3/TC-1" (Sept. 8, 2004) ("NIRS/PC Brief").

<sup>2</sup> *Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC \_\_ (Aug. 18, 2004) (slip op.).

As set forth below, depleted uranium meets the definition of “waste” in 10 C.F.R. § 61.2 and is therefore properly considered “Class A” waste under the clear language of 10 C.F.R. § 61.55(a)(6). Accordingly, “Basis D” [redesignated Basis C] of contention NIRS/PC EC-3/TC-1 should be dismissed as challenge to those regulations,<sup>3</sup> and the transfer of depleted uranium from the National Enrichment Facility (“NEF”) to the Department of Energy (“DOE”) for disposal by DOE pursuant to Section 3113 of the USEC Privatization Act should be deemed a “plausible strategy” for the disposition of that depleted uranium.

## II. ARGUMENT

### A. It is Within the Commission’s Purview to Affirm, As a Matter of Law, That Depleted Uranium is Low-Level Radioactive Waste For Purposes of Part 61 and Section 3113

NIRS/PC contend that “[i]t would be serious error for the Commission to attempt to decide, on this referral, whether certain DU in fact constitutes ‘low-level radioactive waste’ for purposes of Sec. 3113 or Part 61.”<sup>4</sup> NIRS/PC Brief at 5. However, as LES and the NRC Staff demonstrated in their briefs of September 8, 2004,<sup>5</sup> the language and structure of 10 C.F.R. §§ 61.2 and 61.55(a) are unambiguous. When these regulations are construed and applied in

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<sup>3</sup> To the extent they challenge the classification of depleted uranium as low-level waste, Bases A, H, and I of contention NIRS/PC EC-6/TC-3 (originally NIRS/PC 4.1) also should be dismissed. See LES Brief at 3 n.6. Similarly, if the Commission finds that depleted uranium meets the definition of Class A waste under Part 61, then the New Mexico Attorney’s late-filed contention of September 3, 2004 should be dismissed as moot (even assuming that it were properly filed with the Commission).

<sup>4</sup> Intervenors present inconsistent views on when and how the Commission should address the waste classification issue. On the one hand, NIRS/PC suggest that the issues of depleted uranium waste classification and disposal are appropriate for rulemaking. On the other hand, they seek the opportunity to “present evidence” on these issues in this adjudicatory proceeding. See NIRS/PC Brief at 17, 21-23.

<sup>5</sup> See “Response of [LES] to the Question Certified to the Commission By Memorandum and Order (Rulings Regarding Standing, Contentions, and Procedural Administrative Matters)” (Sept. 8, 2004) (“LES Brief”); “NRC Staff Brief on Classification of Depleted Uranium as Waste” (Sept. 8, 2004) (“NRC Staff Brief”).

accordance with their clear terms, there can be only one conclusion: depleted uranium is Class A waste under Part 61. See LES Brief at 8-10; NRC Staff Brief at 5-7. Thus, there is no genuine dispute on a material issue of law or fact. Contrast 10 C.F.R. § 2.309(f)(1)(vi). Contrary to the assertion of NIRS/PC, the Commission should therefore simply abide by the terms of its own rules, and affirm that depleted uranium is Class A waste under Part 61. See, e.g., *Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120 (D.C. Cir. 1979), cert. denied, 449 U.S. 889 (1980) (citations omitted) (stating that “it has become axiomatic that an agency is bound by its own regulations”). Further, insofar as Basis D improperly challenges the terms and basic structure of 10 C.F.R. Part 61, it should be rejected.<sup>6</sup>

B. Commission Affirmation that Depleted Uranium is Class A Low-Level Waste Under the Clear Terms of 10 C.F.R. Part 61 Would Provide the Requisite “Determination” for Purposes of Section 3113 of the USEC Privatization Act

NIRS/PC submit that, before transfer to DOE under [Section] 3113 may be regarded as a ‘plausible strategy,’ the Commission itself must make a determination, which it has not yet made, that DU constitutes low-level radioactive waste.” NIRS/PC Brief at 5. The apparent implication is that this “essential Commission determination” must be made through a formal rulemaking, or after a full-fledged evidentiary hearing before the Licensing Board.<sup>7</sup> In its Hearing Order for this proceeding, however, the Commission made clear that:

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<sup>6</sup> Contrary to the suggestion by NIRS/PC that the Commission is “not now called upon to determine the merits of the contention” (NIRS/PC Brief at 5), the Commission frequently decides issues of law at the contentions-admissibility stage. See, e.g., *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278 (2002), reversing a Licensing Board decision, LBP-02-04, 55 NRC 49, to admit a contention based at least in part on the Board’s erroneous view that it could not reject the issue at the admissibility stage.

<sup>7</sup> In their brief, NIRS/PC cite the language of Section 3113, portions of the legislative history associated with that provision, the Low-Level Waste Policy Act, and statements made by DOE and NRC officials. None of these references, however, establishes that the Commission lacks the authority to decide – “on this referral” – that depleted uranium

[U]nless LES demonstrates a use for the uranium in the depleted tails as a potential resource, the depleted tails may be considered waste. In addition, if such waste meets the definition of "waste" in 10 CFR 61.2, the depleted tails are to be considered low-level radioactive waste within the meaning of 10 CFR Part 61, in which case an approach by LES to transfer to DOE for disposal by DOE of LES'[s] depleted tails pursuant to Section 3113 of the USEC Privatization Act constitutes a "plausible strategy" for dispositioning the LES depleted tails.

69 Fed. Reg. at 5,877 col. 3. Under this approach, the only cognizable issue is whether the depleted uranium meets the definition of "waste" in 10 C.F.R. § 61.2. LES has provided the requisite information to make such a determination as a matter of law. Based on that information, the NRC Staff has determined that the depleted uranium to be generated by the NEF is Class A waste, a subset of low-level waste as defined in Section 61.2. See LES Environmental Report ("ER") at 4.13-6 to 4.13-7; DEIS at 2-27, 2-29. The "determination" at issue thus involves the straightforward application of an unambiguous regulatory definition, and does *not* require a rulemaking or evidentiary hearing. In particular, no genuine dispute requiring a hearing has been identified.<sup>8</sup> Insofar as NIRS/PC believe that the Commission's "safety regulations [Part 61 in this case] are in any way inadequate and need revision, the appropriate vehicle to ask the Commission to set a new standard is a petition for rulemaking under 10 C.F.R. § 2.802." *Connecticut Yankee Atomic Power Co. (Haddam Neck Plant)*, CLI-03-7, 58 NRC 1, 7 (2003).

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meets the definition of "waste" in Section 61.2. In short, the Commission would be ruling, as a matter of law, on the proper application of a clear-cut regulatory definition.

<sup>8</sup> NIRS/PC claim that their contention "does not constitute an attack on that regulation [*i.e.*, the applicable provisions of Part 61] but, to the contrary, constitutes the application of that regulation." NIRS/PC Brief at 8. NIRS/PC, however, have contended that depleted uranium "cannot *logically* be classified" as anything other than "transuranic" or GTCC waste, and that "[t]he conclusion that [depleted uranium] is GTCC fits squarely within the NRC definition for that category, *if we ignore the nomenclatural difference between uranium and transuranium radionuclides and focus on the substance.*" See LES Brief at 17 (emphasis added). These statements confirm that, in reality, the contention improperly takes issue with the plain language and basic structure of Part 61.

C. The “Origins” of 10 C.F.R. Part 61 Do Not Alter the Fact that Under Final Part 61, Depleted Uranium from the Proposed NEF is “Class A Waste” That Can Be Properly Disposed of in a Part 61 “Land Disposal Facility”

NIRS/PC assert that “an examination of the origins of Part 61 demonstrates that the rule was never intended to address DU and if Part 61 were applied to DU, that DU would fall outside the category of low-level waste.” NIRS/PC Brief at 10. In making this assertion, however, NIRS/PC ignore a fundamental tenet of regulatory interpretation:

As is the case with statutory construction, interpretation of any regulation must begin with the language and structure of the provision itself. 1A Sutherland, *Statutory Construction* § 31.06 (4th ed. 1984); *Lewis v. United States*, 445 U.S. 55, 60 (1980). Further, the entirety of the provision must be given effect. 2A Sutherland, *Statutory Construction* § 46.06 (4th ed. 1984). Although administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation’s language, *its interpretation may not conflict with the plain meaning of the wording used in that regulation.* *Abourezk v. Reagan*, 785 F.2d 1043, 1053 (D.C. Cir. 1986, *aff’d*, 108 S.Ct. 252 (1987); *GUARD v. NRC*, 753 F.2d 1144, 1146 (D.C. Cir. 1985).

*Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988). The plain meaning of 10 C.F.R. §§ 61.2 and 61.55(a)(6) is crystal clear. Because depleted uranium is *not* high-level radioactive waste, transuranic waste, spent nuclear fuel, or Section 11e.(2) byproduct material, it is low-level waste under the plain language of 10 C.F.R. § 61.2. Further, because neither depleted uranium nor any of its associated uranium isotopes is listed in Table 1 or Table 2 of Section 61.55(a)(3), depleted uranium is Class A waste under the terms of Section 61.55(a)(6). As such, disposal as “GTCC” waste in a deep geologic repository is not required per the terms of Part 61. Indeed, as LES has demonstrated, these conclusions are consistent with prior NRC determinations regarding the proper waste classification of depleted uranium. *See* LES Brief at 11-13. In short, Intervenors’ foray into the “origins” of Part 61 is not dispositive given the plain meaning of the Part 61 provisions at issue.

D. NIRS/PC Attach Too Much Weight to the “Prescriptive” Waste Classification Provisions and Effectively Ignore the Overriding Performance Objectives of 10 C.F.R. Part 61

The cornerstone of Intervenor’s argument that Basis D is admissible is that a review of the administrative history of Part 61 “demonstrates that the rule was never intended to address DU.” NIRS/PC Brief at 10. NIRS/PC point out that the waste classification or radionuclide tables published as part of the *proposed* rule listed depleted uranium “as one of the possible contaminant radionuclides.” *Id.* at 12. According to NIRS/PC, “[t]he effect of the proposal was to classify DU in excess of 0.05 microcuries per cubic centimeter into the [GTCC] category.” *Id.* As NIRS/PC further note, the Commission, in promulgating the final Part 61 rule, opted to *remove* uranium, along with several other radionuclides, “as a limiting element for waste classification.” *Id.* at 14 (quoting NUREG-0945, *Final Environmental Impact Statement on 10 C.F.R. Part 61, Licensing Requirements for Land Disposal of Radioactive Waste*, NRC/NMSS (Nov. 1982), at 5-38). In doing so, the Commission explained that the changes “came about principally in response to commenters on the proposed Part 61 regarding the costs and impacts of compliance with the waste classification requirements.” NUREG-0945 at 5-37 to 5-38. The Commission added:

To further *ease the burden of compliance*, the number of isotopes treated generically in the waste classification tables was reduced to those judged to be needed on a generic basis for waste characterization purposes. . . . Other isotopes may be added later either generically or in specific waste streams.

*Id.* (emphasis added). Indeed, LES recognizes that, in removing uranium as a “limiting element for waste classification,” the Commission also stated that “[a]nalysis of the data base for the Part 61 EIS indicates that the types of uranium-bearing wastes typically disposed of by NRC licensees do not present a sufficient hazard to warrant limitation on the concentration of this naturally occurring material.” NUREG-0945 at 5-38.

However, NIRS/PC reach an unsupportable conclusion; namely, that in “omit[ting] uranium from the table of concentration limits,” the Commission intended to “abstain from regulating DU disposal.” NIRS/PC Brief at 21. This conclusion is premised on a clear misunderstanding of the purpose of the waste classification provisions of Section 61.55 and their relationship – particularly their secondary importance – to the performance objectives of Part 61. Indeed, subsequent to the 1982 issuance of Part 61, the Commission emphasized that “[t]he Part 61 regulation is intended to be performance-oriented rather than prescriptive, with the result that the Part 61 technical criteria are written in relatively general terms, allowing applicants to demonstrate how their proposals meet these criteria for various near-surface disposal methods.” Advanced Notice of Proposed Rulemaking, *Definition of High-Level Radioactive Waste*, 52 Fed. Reg. 5992, 5999 col. 2 (Feb. 27, 1987). Significantly, the Commission, in the same passage, acknowledged that Part 61 also encompasses a “broader range of land disposal methods,” which may include, *inter alia*, “mined cavities, engineered bunkers, or shallow land burial.” *Id.*

That Part 61 “is intended to be performance-oriented rather than prescriptive” is manifest in the administrative history of Part 61. *Id.* NIRS/PC give short shrift to this important fact, though they include a passage from the Final Part 61 EIS which states that “[o]verall performance objectives were developed to define the level of safety that should be achieved in the land disposal of [low-level waste].” NIRS/PC Brief at 13 quoting NUREG-0945 at S-3 to S-4). The same passage provides that “prescriptive requirements were established where they were deemed necessary and where sufficient technical information and rationale were available to support them.” *Id.* At bottom, the performance objectives are the principal means for ensuring the safety of land disposal of radioactive wastes (including depleted uranium) – not the waste classification or other prescriptive provisions of Part 61.

Notably, in responding to comments on the proposed Part 61 rule, the NRC Staff spoke to this very issue, underscoring the performance-oriented nature of Part 61:

The concentration limitations and other requirements in Subpart D are intended to help ensure that the performance objectives established in Subpart C are met. *That is, the concentration limits and other requirements are not the end in themselves, but are a means of achieving the end.*

. . . NRC still believes that the best overall approach to the rule is the existing framework in which requirements are established which apply to the majority of waste, *but some flexibility is allowed in meeting the performance objectives.*

NUREG-0945, Vol. 2, App. B at B-91 (emphasis added).<sup>9</sup> In discussing the “principal reasons” for this position, the NRC Staff stated, among other things, that it “will be looking next at setting regulatory requirements in the form of amendments to 10 C.F.R. Part 61 for licensing disposal by methods offering greater isolation than near-surface disposal,” such as “intermediate depth disposal or use of mined cavities.” *Id.* at B-91 to B-92. The Staff further noted its expectation that “the regulatory requirements developed will include setting limiting concentrations for isotopes of significant concern.” *Id.* at B-92. Importantly, the Staff added:

In the meantime, it is possible that license applications will be received for disposal by such improved methods. *NRC Staff wish to retain the flexibility to be able to address these license applications in the existing framework of the rule.* It is not desirable to arbitrarily prohibit the NRC from considering such applications, especially since there is a current shortage of disposal capacity.<sup>10</sup>

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<sup>9</sup> Cf. NUREG-0945, Vol. 2, App. B at B-88 (stating that “[i]n approving any exceptions or alternatives to the technical requirements in Part 61, meeting the performance objectives rather than the numerical concentration limits will be the bottom line”).

<sup>10</sup> In the event that a “specific proposal” to construct and operate a new Part 61 land disposal facility (or a proposal to modify an existing facility’s license) were submitted to the NRC or an Agreement State, any additional environmental evaluation under NEPA would be appropriately performed at the time of the licensing submittal. Contrary to Intervenor’s suggestion, an “actual licensing proposal” is not necessary for the Commission to affirm here, as a matter of law, that depleted uranium is properly classified as Class A waste under Part 61.

*Id.* (emphasis added). Finally, the Staff specifically noted that it would expect to “incorporate flexibility into future requirements to allow alternative ways to meet the performance objectives as well as potential improvements in technology.” *Id.*

Although the NRC has not pursued further rulemaking in this regard, it is clear that Part 61 is intended to be a broad and flexible regulatory scheme. Thus, the *Claiborne* Licensing Board was correct in its assessment that “as long as the disposal of uranium enrichment tails meets the performance objectives of Subpart C, Part 61 is intended to accommodate such disposal, and the Commission, ‘by necessary implication,’ considered the disposal of this waste in the rulemaking proceeding.”<sup>11</sup> Certainly, the Commission’s decision to remove depleted uranium from a waste classification table in Section 61.55 cannot be construed as “abstain[ing] from regulating DU disposal,” as NIRS/PC suggest. Intervenors’ reading of the regulatory history of Part 61 conflicts with both the plain meaning and structure of Part 61 and the NRC’s clear intent to employ a predominantly performance-oriented approach.

Finally, to the extent that NIRS/PC challenge the sufficiency of proposed disposal strategies for depleted uranium to meet the performance objectives of Part 61 (from an environmental perspective or otherwise), that challenge would exceed the scope of Basis D that is here at issue.<sup>12</sup> Basis D raised a straightforward issue: that depleted uranium *must be* disposed

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<sup>11</sup> See *Louisiana Energy Servs., L.P.* (Claiborne Enrichment Center), Memorandum and Order (Ruling on Intervenor’s Petition to Waive Certain Regulations), 1995 WL 110611 at \*5 (N.R.C. Mar. 2, 1995), *petition for interlocutory review denied*, CLI-95-7, 41 NRC 383 (1995), *vacated*, CLI-98-5, 47 NRC 113 (1998).

<sup>12</sup> In SECY-91-019, “Disposition of Depleted Uranium Tails from Enrichment Plants” (January 25, 1991), relied upon by Intervenors, the NRC Staff specifically recognized that depleted uranium is Class A waste and that further evaluation of the specific characteristics of the waste, disposal site, and method of disposal would be necessary to find reasonable assurance of compliance with the performance objective of Subpart C of

of in a deep geological repository. Basis D, as submitted, cannot be valid if the regulations are simply applied. Basis D can be rejected as a matter of law.

### III. CONCLUSION

For the foregoing reasons, the Commission should find, as a matter of law, that the depleted uranium waste to be generated by the NEF meets the definition of "waste" set forth in 10 C.F.R. § 61.2, and that such waste is appropriately classified as Class A waste under 10 C.F.R. § 61.55(a)(6). Any contention or basis thereof challenging the clear terms and proper application of those regulations should be dismissed.

Respectfully submitted,



James R. Curtiss, Esq.  
David A. Repka, Esq.  
Martin J. O'Neill, Esq.  
WINSTON & STRAWN LLP  
1400 L Street, N.W.  
Washington, DC 20005-3502  
(202) 371-5700

John W. Lawrence, Esq.  
LOUISIANA ENERGY SERVICES, L.P.  
One Sun Plaza  
100 Sun Lane NE, Suite 204  
Albuquerque, NM 87109  
(505) 944-0194

Dated at Washington, District of Columbia  
this 17th day of September 2004

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Part 61. SECY-91-019, Attachment at 2. That evaluation is beyond the ambit of Basis D.

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BEFORE THE COMMISSION

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Docket No. 70-3103-ML  
ASLBP No. 04-826-01-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the "REPLY BRIEF OF LOUISIANA ENERGY SERVICES, L.P. ON CERTIFIED QUESTION REGARDING THE PROPER WASTE CLASSIFICATION OF DEPLETED URANIUM" in the captioned proceeding have been served on the following by e-mail service, designated by \*\*, on September 17, 2004 as shown below. Additional service has been made by deposit in the United States mail, first class, this 17th day of September 2004.

Chairman Nils J. Diaz  
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

Office of the Secretary\*\*  
Attn: Rulemakings and Adjudications Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop O-16C1  
Washington, DC 20555-0001  
(original + two copies)  
e-mail: HEARINGDOCKET@nrc.gov

Office of Commission Appellate  
Adjudication  
Mail Stop O-16C1  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Office of the General Counsel\*\*  
Attn: Associate General Counsel for  
Hearings, Enforcement and  
Administration  
Lisa B. Clark, Esq.\*\*  
Angela B. Coggins, Esq.\*\*  
Mail Stop O-15D21  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
e-mail: OGCMailCenter@nrc.gov  
e-mail: lbc@nrc.gov  
e-mail: abcl@nrc.gov

Ron Curry, Esq.  
Clay Clarke, Esq.\*\*  
Tannis L. Fox, Esq.  
New Mexico Environment Department  
1190 St. Francis Drive  
Santa Fe, NM 87502-6110  
e-mail: clay\_clarke@nmenv.state.nm.us

Administrative Judge  
G. Paul Bollwerk, III, Chair\*\*  
Atomic Safety and Licensing Board Panel  
Mail Stop T-3F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
e-mail: gpb@nrc.gov

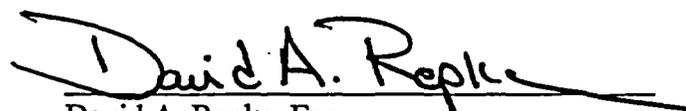
David M. Pato, Esq.\*\*  
Stephen R. Farris, Esq.\*\*  
Glenn R. Smith, Esq.\*\*  
Office of the New Mexico Attorney General  
P.O. Box Drawer 1508  
Santa Fe, NM 87504-1508  
e-mail: dpato@ago.state.nm.us  
e-mail: sfarris@ago.state.nm.us  
e-mail: gsmith@ago.state.nm.us

Lisa A. Campagna\*\*  
Assistant General Counsel  
Westinghouse Electric Co., LLC  
P.O. Box 355  
Pittsburgh, PA 15230-0355  
e-mail: campagla@westinghouse.com

Administrative Judge  
Paul B. Abramson\*\*  
Atomic Safety and Licensing Board Panel  
Mail Stop T-3F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
e-mail: pba@nrc.gov

Administrative Judge  
Charles N. Kelber\*\*  
Atomic Safety and Licensing Board Panel  
Mail Stop T-3F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
e-mail: cnk@nrc.gov

Lindsay A. Lovejoy, Jr.\*\*  
618 Pasco de Peralta, Unit B  
Santa Fe, NM 87501  
e-mail: lindsay@lindsaylovejoy.com

  
David A. Repka, Esq.  
Counsel for Louisiana Energy Services, L.P.