RAS 8687

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

DOCKETED
USNRC

October 18, 2004 (4:59PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of United States Enrichment Corporation (American Centrifuge Plant)	)	Docket No. 70-7004

USEC INC. MOTION FOR CORRECTIONS TO CLI-04-30 AND FOR LEAVE TO SUBMIT VIEWS ON MATTERS OF LAW POTENTIALLY DISPOSITIVE IN THIS PROCEEDING

I. INTRODUCTION

Pursuant to 10 CFR § 2.323, USEC Inc. (USEC) hereby respectfully requests that the Nuclear Regulatory Commission (Commission): (1) correct two administrative errors in its October 7, 2004 "Notice of Receipt of Application for License; Notice of Availability of Applicant's Environmental Report; Notice of Consideration of Issuance of License; and Notice of Hearing and Commission Order" (CLI-04-30), in the above-captioned proceeding; and (2) grant leave to USEC to submit its views on matters of law currently under Commission consideration that may be dispositive of issues arising in this

Template=SECY-041

SECY-02

proceeding. USEC's views on those matters of law are set forth in the accompanying "USEC Inc. Brief on the Proper Classification of Depleted Uranium Tails."[1]

II. PROPOSED CORRECTIONS TO CLI-04-30

In both the caption and the text of CLI-04-30, the Commission has incorrectly identified the applicant for the license to construct the American Centrifuge Plant (ACP) and to possess and use licensed material at the ACP as the "United States Enrichment Corporation," or "United States Enrichment Corporation, Inc." CLI-04-30, slip op. at 1. The license applicant for the ACP is actually "USEC Inc.," the parent corporation of its wholly-owned subsidiary, the "United States Enrichment Corporation."[2] Accordingly, USEC respectfully requests that the caption and text of CLI-04-30 be modified to indicate that "USEC Inc." is the license applicant for the ACP.

Secondly, CLI-04-30 states that the ACP license application requests authority to "enrich natural uranium to a maximum of 5 percent U^{235} by the gas centrifuge process." CLI-04-30, slip op. at 1. In fact, the ACP license application requests authority to enrich normal, depleted, reprocessed and enriched uranium to a maximum enrichment of 10%. *See* License Application for the American Centrifuge Plant, Table 1.2-1. Accordingly,

---

[1] 10 CFR § 2.323(a) requires that motions be filed no later than ten days after the occurrence or circumstance from which the motion arises. This Motion is being filed within ten days of the date of CLI-04-30 in accordance with the requirements governing "Computation of Time" set forth in 10 CFR § 2.306. 10 CFR § 2.323(b) provides that a motion must be rejected if it does not include a certification that the moving party has made a sincere (but unsuccessful) effort to contact other parties in the proceeding and resolve the issues raised in the motion. USEC believes that this provision is inapplicable under the circumstances here where the Motion is not responsive to any action or inaction by any party to the proceeding, where only the Applicant and NRC Staff are parties as of this time, and where the matters of law addressed herein are not susceptible to resolution by the parties, but instead are being decided by the Commission. USEC has, however, advised the NRC Staff of both its proposed corrections and its views on the legal matters that are the subject of this Motion.

[2] The subsidiary company, the United States Enrichment Corporation, is the holder of NRC Certificates of Compliance for the Paducah, Kentucky and Portsmouth, Ohio gaseous diffusion uranium enrichment plants.

USEC respectfully requests that CLI-04-30 be modified to reflect its request to enrich uranium to a 10% maximum level of enrichment.

III. REQUEST FOR LEAVE TO SUBMIT USEC VIEWS ON POTENTIALLY DISPOSITIVE MATTERS OF LAW

Section IV "Applicable Requirements" of CLI-04-30 sets forth a number of substantive requirements that will govern the conduct of this proceeding. Among other requirements, Section IV addresses the "[t]reatment of depleted uranium hexafluoride tails" in the Applicant's Environmental Report, and the NRC Staff's Environmental Impact Statement, and states that:

> The Commission is considering matters of law applicable to disposition of tails which may be dispositive of matters arising in a USEC proceeding. *See Louisiana Energy Services* (National Enrichment Facility), CLI-04-25, slip op. at 5 (August 18, 2004).

CLI-04-30, slip op. at 15 (emphasis added). In particular, in the Commission's August 18, 2004 Memorandum and Order in the *Louisiana Energy Services* (LES) proceeding, it accepted for review as a "novel legal or policy question" whether depleted uranium tails should be classified as "low-level radioactive waste" (LLW) in the absence of a demonstrated use for such tails. CLI-04-25, slip op. 4-5.

USEC, of course, is not, and has no wish to become, a party to the *LES* proceeding. However, USEC has a fundamental and unique interest in the Commission's resolution of the issue regarding the appropriate classification of depleted uranium tails, since substantial quantities of such materials will be generated at the ACP and will require appropriate disposition. Costs associated with such disposition are a major component of USEC's plans for providing adequate financial assurance for ACP decontamination and decommissioning pursuant to applicable NRC requirements.

Furthermore, USEC's basic funding plans involve transfer of the depleted uranium tails to the U.S. Department of Energy as LLW pursuant to Section 3113 of the USEC Privatization Act.[3] *See* License Application for the American Centrifuge Plant, Chapter 10 and Decommissioning Funding Plan.

The Commission has made clear that its decision on the depleted uranium tails disposition issue, which is now before it in the *LES* proceeding, "may be dispositive of" the issue in the USEC proceeding. None of the parties in the *LES* proceeding represents USEC's interests on this issue. Indeed, USEC's review of CLI-04-30 and of the responsive pleadings of the parties in the *LES* proceeding indicates that they do not adequately address an important element in the Commission's discussion of the criteria for determining whether depleted uranium tails are LLW that could create unnecessary legal barriers to the classification of such tails as LLW.

Given USEC's clear interest in the appropriate classification of depleted uranium tails as LLW, and the potentially dispositive impact of any Commission decision on this issue in the *LES* proceeding on USEC, USEC should be given the opportunity to be heard on this narrow issue before the Commission issues any definitive ruling.

[3] USEC's subsidiary, the operator of the two gaseous diffusion uranium enrichment plants, has a similar interest.

Accordingly, for the reasons set forth above, USEC respectfully requests that the Commission accept for consideration the attached pleading which expresses USEC's views on this important issue.

Respectfully submitted,

Donald J. Silverman, Esq.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20005
Phone: (202) 739-5502
Fax: (202) 739-3001
E-mail: dsilverman@morganlewis.com

Dennis J. Scott, Esq.
Assistant General Counsel
USEC Inc.
6903 Rockledge Drive
Bethesda, MD 20817
Phone: (301) 564-3352
Fax: (301) 564-3206
E-mail: scottd@usec.com

Counsel for USEC Inc.

Dated October 18, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of United States Enrichment Corporation (American Centrifuge Plant)	)	Docket No. 70-7004

USEC INC. BRIEF ON THE PROPER CLASSIFICATION OF DEPLETED URANIUM TAILS

I. INTRODUCTION

On August 23, 2004, USEC Inc. (USEC) submitted an application to construct and operate its American Centrifuge Plant (ACP) in Piketon Ohio. On October 7, 2004, the Nuclear Regulatory Commission (Commission) issued its "Notice of Receipt of Application for License; Notice of Availability of Applicant's Environmental Report; Notice of Consideration of Issuance of License; and Notice of Hearing and Commission Order," CLI-04-30 (CLI-04-30). In CLI-04-30 the Commission stated that it was "considering matters of law applicable to disposition of tails which may be dispositive of matters arising in a USEC proceeding," and referenced in particular its August 18, 2004 Memorandum and Order in the *Louisiana Energy Services, L.P.* (National Enrichment Facility) proceeding (CLI-04-25). CLI-04-30, slip op. at 15.

In the Commission's August 18, 2004 Memorandum and Order, the Commission stated, among other things, that the intervenors in the *Louisiana Energy Services* (*LES*) proceeding contended that LES "does not have a 'plausible strategy' to dispose of" depleted uranium tails. CLI-04-25, slip op. at 4. Citing its hearing notice in the *LES*

proceeding, the Commission set forth what it believed was "one [such] possible 'plausible strategy'" as follows:

> [U]nless LES demonstrates a use for the uranium in the depleted tails as a potential resource, the depleted tails may be considered "waste".... [I]f additionally, "such waste meets the definition of 'waste' in 10 C.F.R. 61.2 , the depleted tails are to be considered low-level radioactive waste within the meaning of 10 C.F.R. 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."

Id. at 4 (citations omitted). (Emphasis added.) The Commission accepted for review, as a "novel legal or policy question" whether depleted uranium tails are properly classified as low-level radioactive waste (LLW). *Id.* at 4-5.

As discussed below, USEC strongly believes that, with respect to any depleted uranium tails generated during the operation of USEC's ACP that are not used as a resource and are to be disposed of, such depleted uranium tails clearly are LLW, and that the transfer of such depleted uranium to the U.S. Department of Energy (DOE) pursuant to Section 3113 of the USEC Privatization Act is clearly a "plausible strategy" for the disposition of this material.

Furthermore, in order to conclude that depleted uranium tails are LLW, the Commission need not either: (1) reference 10 CFR Part 61 in general; or (2) find that the tails meet the definition of "Waste" set forth in 10 CFR § 61.2. The materials defined as "Waste" in 10 CFR Part 61 are clearly a subset of the materials defined as LLW by statute. Since depleted uranium tails clearly meet the statutory definition of LLW in the USEC Privatization Act as well as the definition in NRC regulations, no further

determination under 10 CFR Part 61 is necessary. The bases for USEC's views are set forth below.

II. ARGUMENT

The fundamental purpose of the Commission's inquiry into the appropriate classification of depleted uranium tails is to determine if USEC has a "plausible strategy" for the disposition of this material upon which it can rely in evaluating USEC's Application. Passage of the USEC Privatization Act established such a plausible strategy by virtue of its direction to DOE to accept for disposal depleted uranium tails, so long as they are ultimately determined to be LLW. In particular, Section 3113(a) of the USEC Privatization Act states:

> The Secretary, at the request of the generator, shall accept for disposal ... depleted uranium if it were ultimately determined to be low-level radioactive waste....

42 U.S.C. § 2297h-11(2000).

Thus, the issue presently before the Commission is a straightforward one – do depleted uranium tails satisfy the statutory definition of LLW in the USEC Privatization Act? If so, USEC's reliance on DOE disposal of such tails pursuant to DOE's responsibilities under Section 3113 represents a plausible disposition strategy. In short, the matter before the Commission is one of statutory interpretation of the USEC Privatization Act.

A. In The Absence Of A Beneficial Use, Depleted Uranium Tails That Are To Be Disposed Of Meet The Statutory Definition Of Low-Level Radioactive Waste

Section 3102(6) of the USEC Privatization Act defines LLW as having "the meaning given such term in section 2(9) of the Low-Level Radioactive Waste Policy

Act" (LLRWPA). 42 U.S.C. § 2297h(6) (2000). Section 2(9) of the LLRWPA defines LLW as follows:

> radioactive material that –
>
> (A) is not high-level radioactive waste, spent nuclear fuel, or [11e.(2)] byproduct material... and
>
> (B) the Nuclear Regulatory Commission, consistent with existing law and in accordance with paragraph (A), classifies as low-level radioactive waste.

42 U.S.C. § 2021b(9) (2000). It is manifestly clear that depleted uranium tails do not constitute high-level waste,[1] spent nuclear fuel,[2] or 11e.(2) byproduct material.[3] Thus, so long as the NRC classifies depleted uranium tails as LLW consistent with existing law and in accordance with these definitions, then such tails are LLW under the USEC Privatization Act and transfer to DOE under Section 3113 represents a plausible disposition strategy.[4]

---

[1] The term "high-level radioactive waste" means – (A) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentrations; and (B) other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation. 42 U.S.C. § 10101(12) (2000).

[2] The term "spent nuclear fuel" means fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing. 42 U.S.C. § 10101(23) (2000).

[3] The term 11e.(2) "byproduct material" means ... (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content. 42 U.S.C. § 2014e. (2) (2000).

[4] It is worth noting that DOE has already acknowledged that if depleted uranium tails are not beneficially used, they may require "disposition[ing] as low-level radioactive waste" and that studies performed for DOE have concluded that depleted uranium tails to be transferred from DOE's planned tails conversion facilities either to the Nevada Test Site or Envirocare "would likely meet each site's waste acceptance criteria." *See* Final Environmental Impact Statement for Construction and Operation of a Depleted Uranium Hexafluoride Conversion Facility at the Portsmouth, Ohio, Site (DOE/EIS-0360, June 2004) at Section 1.6.2.4; *See also Id.* at Section S.2.3.4, and Table 2.2-2. Further, DOE's EIS acknowledges and considers that additional depleted ura nium may be transferred to DOE under Section 161(v) of the Atomic Energy Act or Section 3113 of the Privatization Act (*See Id.* at Section 2.2.7).

There is no existing law that would preclude the Commission from classifying depleted uranium tails as LLW. Thus, the Commission may do so explicitly in the course of its consideration of this issue and thereby fully satisfy the statutory standard. Alternatively, since depleted uranium tails already clearly meet the definition of LLW set forth in the Commission's existing regulations (*see* Section II. B. below), the Commission may simply rely on that definition to meet the statutory standard.

Thus, depleted uranium tails clearly meet the statutory definition of LLW in the USEC Privatization Act. As a result, the NRC need not even consider 10 CFR Part 61 (its regulations governing "Licensing Requirements for Land Disposal of Radioactive Waste"), in making its determination with respect to depleted uranium tails. The matter can be resolved simply and directly on the basis of a straightforward statutory interpretation of the USEC Privatization Act and the related statutory provisions discussed above.

B. In the Absence of a Beneficial Use, Depleted Uranium Tails That Are To Be Disposed Of Meet the 10 CFR Part 61 Definition Of Low-Level Radioactive Waste

Nevertheless, even if the Commission chose to apply the definitional provisions of 10 CFR Part 61 in making its determination, it remains clear that depleted uranium tails, if not used as a resource, would be LLW. It is on this particular issue where USEC believes there is an aspect of both the Commission's Hearing Notice in the LES proceeding and CLI-04-25 which requires additional attention.

As stated earlier, CLI-04-25 cites the LES Hearing Notice and states, in part,

> [I]f ... "such waste meets the definition of 'waste' in 10 C.F.R. 61.2, the depleted tails are ... low-level radioactive waste within the meaning of 10 C.F.R. part 61"....

CLI-04-25, slip op. at 4. As discussed below, such tails do not need to meet the 10 CFR 61.2 definition of "Waste" to be considered LLW. Indeed, the inclusion of the reference to the definition of "Waste" adds an inappropriate requirement that the depleted uranium be acceptable for disposal in a land disposal facility.

10 CFR § 61.2 defines "Waste" as:

> those low-level radioactive wastes ... that are acceptable for disposal in a land disposal facility.

It is clear from this definition alone that the term "Waste" as used in CFR Part 61 is, in fact, a subset of the larger category of LLW. Thus, materials may not meet the definition of "Waste" – because they are not acceptable for disposal in a land disposal facility – but nevertheless may properly be classified as LLW. [5]

The reason for the distinction between "Waste" and LLW is clear from a reading of Part 61. Those regulations were written to prescribe licensing requirements for "Land Disposal of Radioactive Waste," primarily in "near-surface disposal facilities." 10 CFR §§ 61.1 and 61.7. A "land disposal facility" is defined in Section 61.2 to exclude a geologic repository. A "near-surface disposal facility" is defined in Section 61.2 as a land disposal facility involving disposal in the upper 30 meters of the earth's surface. The definition of "Waste" was established in order to define the types of materials suitable for land disposal. It was not promulgated to represent a comprehensive definition of LLW. [6]

---

[5] While depleted uranium tails generated at USEC's ACP will undoubtedly meet the definition of "Waste" contained in 10 CFR Part 61, and in fact would be classified as Class A Waste, it is not necessary to make such a determination to decide that depleted uranium tails would be LLW.

[6] For example, although "greater than class C waste" is not suitable for land disposal under Part 61, it nevertheless meets the definition of LLW. Under the LLRWPA, which defines LLW for purposes of Section 3113 of the Privatization Act, the federal government is legally responsible for the disposal of any waste classified as greater than class C waste. 42 USC § 2021c(b)(1)(D)(2000).

Furthermore, acceptability for disposal in a land disposal facility is a criterion for acceptance of waste at a facility licensed under Part 61, but it is not a criterion for determining if a waste is LLW or if, more importantly, DOE is responsible for its disposition under Section 3113 of the USEC Privatization Act.[7] The Section 61.2 definition of "Waste" goes on to state:

> For the purposes of this definition, low-level waste has the same meaning as in the Low-Level Waste Policy Act, that is, radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or byproduct material as defined in Section 11e.(2) of the Atomic Energy Act (uranium or thorium tailings and waste).

10 CFR § 61.2.[8] This portion of the definition makes even clearer both that "Waste" is only a subset of LLW, and that depleted uranium tails are properly classified as LLW in the absence of a beneficial use.

Based on the above, the Section 61.2 definition of "Waste" is not relevant in determining whether depleted uranium tails are LLW, and under the applicable statutory definitions, such tails clearly constitute LLW so long as no beneficial use has been identified.

III. CONCLUSION

The Commission should conclude that, in the absence of a beneficial use, depleted uranium tails that are to be disposed of are LLW and consequently, transfer of such depleted uranium to DOE pursuant to Section 3113 of the USEC Privatization Act is

---

[7] Part 61 applies to "all persons" in the United States but the DOE is explicitly excluded from the definition of a "person." 10 CFR §§ 61.1 and 61.2.

[8] The Section 61.2 definition of LLW, unlike the definition in the LLRWPA, refers to "transuranic waste." This is most likely as a result of the fact that the original Low-Level Radioactive Waste Policy Act of 1980, prior to its amendment in 1985, included this term in the definition of materials that are not LLW. *See* 42 U.S.C. § 2021b(2) (1980). Depleted uranium tails do not constitute transuranic waste. *See* 42 U.S.C. § 2014ee. (2000).

clearly a "plausible strategy" for the disposition of this material. Furthermore, the Commission should reach that conclusion by reference to the relevant statutory definitions in the USEC Privatization Act and the LLRWPA. There is no need to draw on 10 CFR Part 61 to reach this conclusion, because Part 61 was promulgated to establish NRC licensing requirements for commercial land disposal of radioactive waste, and not to establish requirements governing DOE disposal of LLW pursuant to Section 3113 of the USEC Privatization Act.

Even if the Commission does refer to Part 61, it is clear that depleted uranium tails satisfy the regulatory definition of LLW, and that there is no need to demonstrate that such tails meet the definition of "Waste" in 10 CFR § 61.2.

Respectfully submitted,

Donald J. Silverman, Esq.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20005
Phone: (202) 739-5502
E-mail: dsilverman@morganlewis.com

Dennis J. Scott, Esq.
Assistant General Counsel
USEC Inc.
6903 Rockledge Drive
Bethesda, MD 20817
Phone: (301) 564-3352
E-mail: scottd@usec.com

Counsel for USEC Inc.

Dated October 18, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of United States Enrichment Corporation	)	Docket No. 70-7004
(American Centrifuge Plant)	)	

NOTICE OF APPEARANCE

The undersigned, being an attorney at law in good standing admitted to practice before the courts of the District of Columbia, hereby enters his appearance as counsel on behalf of Applicant, USEC Inc., in any proceeding related to the above-captioned matter.

Respectfully submitted,

Donald J. Silverman, Esq.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20005
Phone: (202) 739-5502
Fax: (202) 739-3001
E-mail: dsilverman@morganlewis.com

Dated October 18, 2004

Counsel for USEC Inc.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of United States Enrichment Corporation (American Centrifuge Plant)	)	Docket No. 70-7004

CERTIFICATE OF SERVICE

I hereby certify that copies of: (1) the "USEC Inc. Motion for Corrections to CLI-04-30 and for Leave to Submit Views on Matters of Law Potentially Dispositive in this Proceeding;" (2) the "USEC Inc. Brief on the Proper Classification of Depleted Uranium Tails;" and (3) the Notice of Appearance of Donald J. Silverman, were served this day upon the persons listed below, by electronic mail and deposit in the U.S. mail.

Secretary of the Commission*
Attention: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
HEARINGDOCKET@nrc.gov

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
OGCMailCenter@nrc.gov

* Original and 2 copies

Donald J. Silverman

Dated: October 18, 2004