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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO
NUCLEAR INFORMATION AND RESOURCE SERVICE AND
PUBLIC CITIZEN MOTION TO AMEND AND SUPPLEMENT CONTENTIONS

INTRODUCTION

Pursuant to the Board's Order of August 16, 2004¹, the Nuclear Regulatory Commission ("NRC" or "Commission") Staff ("Staff") hereby responds to the Motion filed by Nuclear Information and Resource Service and Public Citizen ("NIRS/PC") to Amend and Supplement Contentions.² As discussed below, the Staff submits that NIRS/PC has proposed one additional basis which should be admitted to support an admitted contention. The remaining modifications and amendments sought by NIRS/PC, however, should be denied.

BACKGROUND

Following notice of the receipt and availability of the LES application to build and operate the National Enrichment Facility ("NEF"),³ a petition to intervene was filed by three entities,

¹ Memorandum and Order (Memorializing and Ruling on Matters Raised in Conjunction with August 3, 2004 Conference Call and Setting General Schedule for Proceeding).

² "Motion on Behalf of Petitioners Nuclear Information and Resource Service and Public Citizen to Amend and Supplement Contentions," October 20, 2004 ("NIRS/PC Motion").

³ "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-04-03, 69 Fed. Reg. 5873 (February 6, 2004).

including NIRS/PC. NIRS/PC set forth numerous contentions it asked to be admitted for consideration in the hearing on the application. Necessarily, the NIRS/PC contentions were premised upon the information contained in the application submitted by LES, which included an Environmental Report ("ER"). The Board ruled on the NIRS/PC petition on July 19, 2004, admitting eight contentions advanced by NIRS/PC, as premised on certain specified bases. Since that time, the Staff has issued its Draft Environmental Impact Statement ("DEIS") for the proposed NEF.⁴ Thereafter, NIRS/PC filed its motion to amend and supplement those contentions which is the subject of this response.

DISCUSSION

I. Application of the Late-Filing Standards of 10 C.F.R. § 2.309.

A. Legal Standards for Late-Filed Contentions.

The criteria to be considered when determining the admissibility of late-filed contentions are set forth in 10 C.F.R. § 2.309(c)(1)(I-viii). The factors are:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of petitioner's right under the [Atomic Energy] Act to be made a party to the proceeding;
- (iii) The nature and extent of petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the petitioner's interest;
- (v) The availability of other means whereby petitioner's interest will be protected;
- (vi) The extent to which petitioner's interests will be represented by existing parties;
- (vii) The extent to which petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which petitioner's participation may reasonably be expected to assist in developing a sound record.

See 10 C.F.R. § 2.309(c)(1)(I-viii).

⁴ Environmental Impact Statement for the Proposed National Enrichment Facility in Lea County, New Mexico, NUREG-1790, September 2004.

The petitioner, as the proponent of the admission of its late-filed contentions, bears the burden of demonstrating that a balancing of these factors weighs in favor of their admission. The petitioner must affirmatively address the lateness factors in its petition, and must demonstrate that a balancing of the factors warrants overlooking the petition's lateness. *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 n.22 (1985).⁵

It has long been held that the first factor, good cause for lateness, carries the most weight in the balancing test. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 221 (2000); *aff'd*, CLI-04-04, ___ NRC ___ (Feb. 5, 2004). Absent a showing of good cause, a petitioner must make a compelling showing that the remaining factors outweigh the lack of good cause for the untimely filing. *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 295 (1993); *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986).

In making a judgment about good cause, emphasis is placed on when sufficient information was made available to the petitioner so as to make it possible for the petitioner to raise and frame the contention with reasonable specificity and basis. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-99-43, 50 NRC 306, 313 (1999); *interlocutory review denied*, CLI-00-02, 51 NRC 77 (2000). Good cause does not exist for nontimely filings when the late-filed contentions were not based on new information arising after the original deadline and therefore could have been included in a timely petition. *See, e.g. Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-00-14, 51 NRC 301, 306 (2000); CLI-04-04, ___ NRC ___ (Feb. 5, 2004); LBP-99-43, 50 NRC 306, 313; LBP-00-27, 52 NRC 216, 222-23; LBP-01-13, 53 NRC 319, 326-27.

⁵ This case, and those which are cited in the following discussion, precede the recent change in the Commission's procedural regulations which somewhat broadened the criteria for late filing by adding factors (ii) to (iv). *See*, 60 Fed. Reg. 2182 (January 14, 2004). However, there is no reason to believe that the case law established based on the previous regulation, 10 C.F.R. § 2.714(a)(1), would not apply to the current version of the regulation.

When a petitioner waits for a document to be issued before raising or amending its contentions, it does so at its own peril. See *Private Fuel Storage*, LBP-00-27, 52 NRC at 223; see also *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-94-11, 39 NRC 205, 212 (1994). The petitioner takes a risk that if the new contentions are not based on new information made available for the first time in a newly issued document, the petitioner will fail to meet the good cause requirement for the late filing.

When good cause is lacking, the petitioner must make a compelling showing on the remaining late-filing factors. See *Private Fuel Storage*, LBP-00-14, 51 NRC at 310; see also *Commonwealth Edison Co.*, CLI-86-8, 23 NRC at 244. In addition to showing that a balancing of the factors favors intervention, a petitioner must also meet the requirements for setting forth a valid and admissible contention under 10 C.F.R. § 2.309(f)(1).

B. Application of Late-Filing Criteria to NIRS/PC's Additional Bases for Contentions.

With respect to the first and most important factor, good cause, NIRS/PC attempts to make a showing that it has met this criteria by merely stating that the matters raised have recently come to its attention either through discovery or in the environmental impact statements issued by the Staff or by the Department of Energy ("DOE").⁶ However, this is not sufficient to demonstrate good cause for late filing. As discussed above, good cause is only established if the information on which the contention is premised was not available so that a timely filing was not possible. Thus, if the information upon which NIRS/PC predicates its filing was available in the NEF application, including the ER, good cause for filing now has not been established. As discussed below, some of the new bases NIRS/PC seeks to advance to support its contentions are clearly based on information contained in the application. For those contentions, this factor weighs against admission.

⁶ NIRS Motion at 2.

With regard to the remaining factors, NIRS/PC is already a party to the proceeding, having established standing based on a demonstrated interest in the proceeding. Thus, the second and third factors, which concern the nature of a petitioner's interest in the proceeding, generally weigh in favor of admission. In regard to the impact of a decision on the admissibility of the new bases advanced by NIRS/PC, it is significant that all of them relate to contentions already admitted. Thus, NIRS/PC will have the opportunity to participate as a party on the primary subject of each contention regardless of whether additional bases are admitted. Accordingly, the interests of NIRS/PC will be protected through other means in this proceeding, and factors (iv), (v) and (vi) generally weigh against admission.

There is no question that permitting the admission of additional bases at this stage in the proceeding will broaden the issues and could potentially delay the proceeding, although the extent of this impact is somewhat limited given the fact that they relate to contentions already admitted in this proceeding. Finally, with respect to the last criterion - the extent to which a petitioner's participation will assist in the development of a sound record - the Board looks to whether the petitioner has set out with specificity the issues it plans to cover, identified its prospective witnesses and summarized their proposed testimony. *Private Fuel Storage*, LBP-00-27, 52 NRC at 224. As discussed below, in response to the specific bases which have been proposed, NIRS/PC has in most instances failed to provide the necessary specificity to meet this criteria, relying instead on generalized allegations of inadequacy of Staff and applicant documents. The Staff's conclusions with regard to the application of the late-filing criteria as to the specific bases advanced by NIRS/PC are set forth below:

1. Contention on Ground and Surface Water (Bases A through I).

The additional bases proposed by NIRS/PC are premised on specific deficiencies alleged to be present in the DEIS. Because they are specific to the DEIS, the Staff believes that NIRS/PC has good cause for its late filing even though much of the information cited was also set forth in

the application. Because this factor weighs in favor of admission, and no other party to this proceeding is pursuing issues with regard to ground or surface water, an overall balancing of late-filing criteria weighs in favor of admission.

2. Contention on Impact Upon Water Supplies.

With regard to this contention as well, NIRS/PC alleges a specific deficiency in the DEIS. For the reasons stated above, therefore, the late-filing criteria weigh in favor of admission.

3. Contention on Depleted Uranium Hexafluoride Storage and Disposal.

NIRS/PC advances two new bases for this contention. One relates to the question of whether LES has set forth a plausible strategy in sufficient detail so that cost of pursuing that strategy can be determined. NIRS/PC cites to deposition testimony relating to the manner in which LES developed estimates for the cost of converting and disposing of depleted uranium hexafluoride (“DU”) in attempt to justify the late filing of this basis. However, it is apparent that NIRS/PC had access to sufficient information to frame this basis from the LES application. Indeed, this is obvious from the statements of NIRS/PC which include claims that “LES has failed to set forth the strategy of private conversion and disposal with sufficient specificity” and “there is no ‘reasonable or credible plan to dispose of the DUF₆ tails’ that the Commission could examine and find valid.” NIRS/PC Motion at 8, 11. The strategy set forth by LES was, of course, set forth in its application. Indeed, these same claims were the subject of a NIRS/PC contention already proposed and admitted into the proceeding (NIRS/PC/PC EC-3/TC-1). The deposition testimony does not present another basis for this contention. Thus, the good cause factor weighs against admission of this basis.

Because this basis concerns an issue already admitted into this proceeding, the interests of NIRS/PC will be protected even if this basis is not admitted. Further, the additional evidence cited by NIRS/PC, even if examined more fully, would likely add little to the development of a sound record on the issue of whether LES has developed a plausible strategy for disposing of DU.

Overall, therefore, the late-filing criteria weigh against admission of this additional basis.

The other basis NIRS/PC seeks to admit challenges the Commission's determination that transfer of DU to DOE for disposition is a plausible strategy on the grounds that conversion by DOE could not occur for several decade. Aside from the fact that such a challenge is impermissible, this basis is not premised upon information which has only become available since the time NIRS/PC submitted its original contentions. Information regarding the plans for DOE disposal has long been available.⁷ This absence of good cause for filing late, considered with the fact that there is no need to develop a record on an issue already determined by the Commission, weighs against admission of this basis as well.

4. Contention on Impacts of Waste Storage and Disposal.

First, NIRS/PC offers a new basis for its contention which relies on the approach taken in the DEIS to rely on environmental analyses performed by DOE for conversion of DU. Thus, good cause exists for filing this contention now, after issuance of the DEIS. Further, NIRS/PC details specific issues with the DEIS. Accordingly, an overall weighing of the late-filing criteria support admission of this basis.

However, the second proposed basis again raises the issue of whether the DEIS was correct in determining that DU may be disposed of as low-level waste. This issue is clearly not one which is premised upon new information. Indeed, this issue has already been admitted and is currently before the Commission for consideration. Clearly, there is no reason for this Board to develop a record on an issue which is under consideration by the Commission. Further, NIRS/PC has already had the opportunity to present its position on this issue in briefs submitted to the Commission. The late-filing criteria therefore weigh against admission of this basis.

⁷ For example, the Draft Environmental Impact Statements for evaluating the construction and operation of DU conversion facilities at the Portsmouth, Ohio, site and the Paducah, Kentucky, site were noticed for comment on November 28, 2003. See, 68 Fed. Reg. 66824.

5. Contention on Decommissioning Costs.

The new basis proposed by NIRS/PC again raises the issue of whether DU should be classified as low-level waste. For the reasons stated above, the late-filing criteria weigh against admission.

6. Contention on Costs of Management and Disposal of Depleted UF6.

NIRS/PC again cites deposition testimony regarding the manner in which LES relied upon other cost estimates in developing an estimate of the cost of disposing of DU. While all of the cost information relied upon by LES is contained in the application, this testimony presents a new explanation of the manner in which the information was utilized. To that extent, NIRS/PC has good cause for untimely filing this basis. Further, development of this issue would serve to establish a sound record without unduly expanding the issues in the proceeding. Accordingly, the late-filing criteria weigh in favor of admission of this new basis.

7. Need for the Facility.

The new basis advanced by NIRS/PC relates to the treatment in the DEIS of the need for the NEF. Specifically, NIRS/PC takes issue with the failure of the DEIS to account for the impact on the market for enrichment services by considering the impact on existing suppliers, the nature of competition and impacts on the market. This issue, however, is not premised on new information in the DEIS. Indeed, NIRS/PC raised these same issues in its original contentions based on the information contained in the NEF application.⁸ Thus, the good cause factor for this untimely filing must weigh heavily against its admission. NIRS/PC should not be permitted to raise issues it has already attempted to admit into the proceeding because of the issuance of a staff document such as the DEIS.

In addition, this basis attempts to require analysis of the overall market for enrichment

⁸ "See "Petition to Intervene by Nuclear Information and Resource Service and Public Citizen," April 6, 2004 ("Intervention Petition") at 40-43.

services, to include the nature of competition in the context of existing and future suppliers and consumers. This would clearly broaden the issues in this proceeding. At the same time, it is questionable at best whether a sound record on such speculative matters could be developed. Accordingly, consideration of the late-filing criteria weighs against admission of this contention.

II. Applicable Legal Standards for Admission of Contentions.

A. General Legal Standards for Admission of Contentions.

Even in cases where petitioners have met the criteria for late-filed contentions under 10 C.F.R. § 2.309(c)(1)(i-viii), strict admissibility standards must also be satisfied. In order for a contention to be admitted to a proceeding, the requirements of 10 C.F.R. § 2.309(f)(1) must be met. NRC regulations require that admissible contentions set forth with particularity: (1) a specific statement of the issue of law; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue is within the scope of the proceeding; (4) a demonstration that the issue is material to the findings the NRC must make regarding the action subject to the proceeding; (5) a concise statement of the alleged facts or expert opinions which support the contention and on which the petitioner intends to rely at hearing, including references to the specific sources and documents; and (6) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(i-vi).

Furthermore, contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, or environmental report filed by an applicant or licensee. 10 C.F.R. § 2.309(f)(2). On issues involving NEPA, the contentions shall be based on the applicant's environmental report, and may be amended (or new contentions may be filed) if there are data or conclusions in the NRC draft or final EIS that differ significantly from the data or conclusions in the applicant's documents. *Id.*

B. Legal Standards for Evaluating the Adequacy of an EIS.

The Commission has established standards, in addition to those described above,

applicable to the admission and treatment of environmental contentions. In this regard, it is well established that NEPA is to be interpreted as a “rule of reason.” See *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 44 (1989), citing *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 739 (3d Cir. 1989) and *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1300 (D.C. Cir. 1984), *aff’d en banc*, 789 F.2d 26, *cert denied* 479 U.S. 923 (1986).

Under this “rule of reason,” not all alleged environmental or economic impacts need to be considered in an EIS under NEPA. An EIS is required to consider only those environmental impacts which are “reasonably foreseeable.” “Remote and speculative” environmental impacts, in contrast, need not be considered. See, e.g., *Scientists’ Institute for Public Information, Inc. v. AEC*, 481 F.2d 1079, 1092 (D.C. Cir. 1973); *Public Service Electric and Gas Co.* (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 38-39 (1979); *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), LBP-78-26, 8 NRC 102, 141 (1978).

The “rule of reason” applied by courts when reviewing the adequacy of an EIS is also used to determine whether the agency has given a “hard look” at the environmental impacts and, as a minimum, requires the EIS to be a “full disclosure” document that discloses the environmental impacts of the proposed action. When evaluating the adequacy of an EIS, it is always possible to explore a subject more deeply and to discuss it more thoroughly. However, the discretion to determine how thoroughly to examine a subject is vested in the agencies. *Coalition on Sensible Transportation, Inc. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987). The role of the courts “...is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions...” *Id.*, quoting *Baltimore Gas and Electric Co. v. NRDC*, 462 U.S. 87, 97-98 (1983).

Courts have further recognized that the scope of an agency’s inquiries in an EIS must remain manageable if NEPA’s goal of ensuring a fully informed and well considered decision is to be accomplished. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776

(1983), citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978). Agencies are given broad discretion to contain their inquiries within appropriate and manageable boundaries. *Louisiana Energy Services, LP* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 103 (1998), citing *South Louisiana Environmental Council, Inc. v. Sand*, 629 F.2d 1005, 1011 (5th Cir. 1980). An agency need not consider remote and speculative risks, or “events whose probabilities they believe to be inconsequentially small.” *Vermont Yankee*, ALAB-919, 30 NRC at 44. In addition, neither NEPA nor the case law based thereon requires a “worst case analysis.” See *Vermont Yankee*, ALAB-919, 30 NRC at 44, citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333-34 (1989).

Courts have also stated in a related context that “there must be an end to the process somewhere.” *Providence Road Community Association v. EPA*, 683 F.2d 80, 83 (4th Cir. 1982). Otherwise, so long as there are “unexplored and undiscussed alternatives that inventive minds can suggest,” there would never be a federal project. *Id.*, citing *Fayetteville Area Chamber of Commerce v. Volpe*, 515 F.2d 1021 (4th Cir. 1975). If NEPA were construed broadly to require a full examination of every conceivable aspect of federally licensed projects, “available resources may be spread so thin that agencies are unable adequately to pursue protection of the physical environment and natural resources.” *Louisiana Energy Services, LP*, CLI-98-3, 47 NRC at 102-03, citing *Metropolitan Edison Co.*, 460 U.S. at 776.

III. Application of Admissibility Standards to NIRS/PC’s Additional Bases for Contentions.

As discussed above, some of the new bases for admitted contentions must be rejected for failing to meet the required late-filing criteria. Notwithstanding this, we will discuss the admissibility standards as applied to each of the proposed new bases in the following section.

1. Contention on Ground and Surface Water (NIRS/PC/EC-1).

NIRS/PC advances several new bases to support its admitted contention (NIRS/PC/EC-1) concerning the impact of the NEF on ground and surface water. NIRS/PC accordingly asks to add the following statement to its admitted contention which is supported by specific bases, designated as A through I:

The Draft Environmental Impact Statement, NUREG-1790 (September 2004) ("DEIS") does not contain a complete or adequate assessment of the potential environmental impacts of the proposed project on ground and surface water, contrary to the requirements of 10 CFR Part 51.

NIRS/PC Motion at 3-4. Each of the supporting bases advanced by NIRS/PC are addressed below.

- A. There is a geologic fault about one mile east of the proposed NEF site (DEIS at 3-26). Information about this fault emerged at the September 17, 2004, deposition of George Harper, witness for LES. One LES contractor, GL Environmental, stated that the fault passes beneath the site. (Harper-Peery dep. ex. 10). NRC has not examined the potential effect of this fault on groundwater flow and contaminant transport. LES's expert witness, Roger Peery, stated that a fault can constitute a fast flow path. (Id. Tr. 100).

In this basis, NIRS/PC implies that the DEIS is incomplete because it fails to examine the impact of a fault beneath the site on groundwater flow. However, this implication is premised upon a misreading of the facts regarding the location of the fault referenced by NIRS/PC. As explicitly stated in the DEIS, and noted by NIRS/PC in the first sentence of the basis, the fault was observed in Texas, approximately one mile east of the proposed NEF. As stated in the DEIS, the fault is a small reverse fault in the Triassic beds, which is believed to be inactive, with about 3 to 6 meters of offset. DEIS at 3-26, citing Waste Control Specialists, LLC. Application for License to Authorize Near-Surface Land Disposal of Low-Level Radioactive Waste, Andrews County, Texas, August 2, 2004. Because the fault is not located beneath the site, there is no reason to believe it would have any impact on ground water flow beneath the site. In order to satisfy its NEPA requirements, an agency must make a "good faith effort...to describe the *reasonably foreseeable*

environmental impact of the program.” *Scientists’ Institute for Public Information*, 481 F.2d at 1092, (emphasis added). In this basis asserted by NIRS/PC, there is no reasonably foreseeable impact on the ground water flow beneath the site from a fault which is located elsewhere.

The location of the fault is not put into serious question by the exhibit NIRS/PC cites to advance this contention. The deposition exhibit cited (Harper-Peery Dep. Ex. 10) is simply a collection of comments by a group identified as GL Environmental, Inc. to George Harper concerning a New Mexico ground water permit. The comment on “Ground Water Conditions” states only, “will information on the fault under the NEF be provided?” As Mr. Harper further explained in his deposition, the fault was improperly characterized in the document, because it referred to the fault which was in fact located on the WCS property. Harper-Peery dep. at 88-95. As Mr. Harper explained, the fault was first brought to their attention by the NRC, and was subsequently investigated and reported on in response to a request by the NRC. *Id.*

Thus, it is clear that the NRC was well aware of the location and nature of the fault. Because it is not located beneath the site, there was no need to determine any impact of the fault on groundwater flow beneath the site in the DEIS. This basis for the contention therefore raises no genuine issue of fact to be litigated in this proceeding.

- B. Earthquakes sometimes occur in the vicinity of the proposed NEF site. (DEIS at 3-27). In 1992 a magnitude 5.0 earthquake occurred, centered 11.0 miles from the site (ER Rev. 2, Table 3.3-3). NRC has not investigated the potential effect of such earthquakes on flow and transport, for example, formation of faults or fractures that may act as fast flow paths.

NIRS/PC is correct that earthquakes occur in the vicinity of the NEF, as noted in the DEIS. Specifically, the DEIS points out that earthquakes in the area include isolated, small clusters of low to moderate size events. DEIS at 3-27. In light of this information, NIRS/PC alleges that the DEIS is inadequate because it does not project the potential impact of any future earthquakes on the soil underlying the NEF and the consequences on groundwater transport. Such an exercise, however,

goes beyond the scope of analysis which is necessary to assess the environmental impact of the proposed facility. Indeed, any such analysis would necessarily be speculative at best. There is no basis to project where future earthquakes will occur, much less their exact location and magnitude. This information would be necessary, however, in order to project the location of any faults or fractures which could impact the flow of ground water.

To expect the NRC to project the potential consequences of every conceivable earthquake on the soil underlying the site and then the potential consequences on groundwater transport would be a nearly impossible and unnecessary exercise. Under NEPA, an agency may proceed with an action despite environmental uncertainties which are remote and speculative. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117A, 16 NRC 1964, 1992 (1982), *citing, State of Alaska v. Andrus*, 580 F.2d 465, 473, (D.C. Cir. 1978), *vacated in part sub nom. Western Oil and Gas Ass'n v. Alaska*, 439 U.S. 922 (1982); *NRDC v. Morton*, 458 F.2d 827, 835; 837-38 (D.C. Cir. 1972). NEPA does not demand that every uncertainty be eliminated before agency action is taken. *Pacific Gas and Electric Co.*, (Diablo Canyon Nuclear Power Plant, Unit No. 2), ALAB-254, 8 AEC 1184, 1191 (1975). Thus, NIRS/PC has not identified genuine basis for finding that the DEIS is inadequate.

- C. The DEIS correctly notes that leakage from the stormwater detention basin and the septic leach fields will probably cause formation of perched bodies of groundwater at the alluvium /Chinle interface. (DEIS, 4-13, 4-14). The DEIS contains estimates of the dimensions of such water bodies, flow rates, and discharge areas. However, NRC provides no explanation of such calculations, and it is not possible to determine whether they are reasonable.

In this basis, NIRS/PC does not allege any deficiency in the DEIS analysis, but instead alleges that it has been unable to evaluate whether the DEIS analysis is correct. NIRS/PC has, therefore, requested this information through discovery. Specifically, NIRS/PC has propounded interrogatories to the Staff which request that the Staff provide the model used to estimate the impact of leakage from the stormwater detention basin and the septic leach field, including a

description and source of all parameters used.⁹ Because NIRS/PC is obtaining the information which is the subject of this basis for their contention through discovery, the alleged omission will be cured through the Staff's response. This basis does not, therefore, provide any issue of fact or law to be litigated in the hearing.

- D. The DEIS does not contain an estimate of the probability and frequency of leakage through the liners of the treated effluent basin or the stormwater detention basin. The basins are to be lined with geosynthetic materials (DEIS at 4-11, 4-12), such liners are known to leak (EPA, Hydrologic Evaluation of Landfill Performance (HELP) Model, User's Guide for Version 3, EPA/600/R-94/168a, Sept. 1994), and such information is necessary to demonstrate the impact of such leakage. The DEIS should contain an estimate of the leakage rate and should show the fate of water and contaminants that leak from the basins.

The DEIS explains that the proposed NEF site liquid effluent discharge rates would be relatively small. DEIS at 4-11. Discharges are treated differently depending on the source of the discharge. Approximately 2,540 cubic meters of liquid will be generated annually from the liquid effluent treatment system. *Id.* This effluent, which consists of shower/hand and wash/laundry effluents, is discharged into a double lined basin and disposed of by evaporation of the water and impoundment of the remaining dry solids. DEIS at 4-11 to 4-12. The double lined basin is designed to include a leak detection system between the liners in order to minimize the possibility that effluent will enter the ground. The proposed monitoring system for determining whether the primary liner has been breached will be an active liquid-sensor leak detection system. This system is a drain/sump system consisting of collection pipes that will be routed to a monitored sump. If the sump is collecting liquid, a level monitor will alert site staff.¹⁰

Additional measures will also be implemented upon failure of the primary liner to mitigate

⁹ "Interrogatories and Document Request by Petitioners Nuclear Information and Resource Service and Public Citizen to Commission Staff," October 21, 2004, at 6.

¹⁰ LES Response to NRC Request for Additional Information, dated May 20, 2004 (ADAMS Accession no. ML04180411).

the possibility that effluent will enter the ground. Any cell with a failed liner will be isolated, drained, and repaired. During this time period, discharges will be to the cell with the intact liner. Furthermore, the secondary liner will preclude discharge to the subsurface in the case of a breach in the primary liner.¹¹ Therefore, while the possibility of leakage cannot be precluded, NIRS/PC provides no basis to conclude that there is any reasonable possibility that effluent will leak through one liner, bypass the leak detection system, and then leak through a second liner. As discussed above, NEPA does not require an agency to assess every possibility, however remote or speculative. *Arizona Public Service Co.*, LBP-82-117A, 16 NRC at 1992; *see also Scientists' Institute for Public Information*, 481 F.2d at 1092 (forecasting and speculation is implicit under NEPA, but agencies are held to a reasonableness standard in this regard).

With regard to the uranium byproduct cylinder ("UBC") Storage Pad Stormwater Retention Basin, the DEIS explains that this will receive cooling water blowdown and UBC storage pad stormwater runoff. DEIS at 4-11 to 4-12. This basin will have a single liner. *Id.* The effluents will be disposed of by evaporation of the water and impoundment of the remaining solids. *Id.* at 4-13. In order to prevent contamination of the water, the UBC's will be surveyed for external contamination which is to be removed before being placed on the storage pad. DEIS at 4-13. Thereafter, the UBC's will be monitored while stored on the pad. *Id.* In addition, liquid effluents are also monitored. DEIS at 6-2, 6-3. Based on these measures, the DEIS concluded that rainfall runoff would be clean and would not result in an exposure pathway. *Id.* Furthermore, it was determined that all of the water discharged to this basin would evaporate, and in fact the basin would be dry for 11 to 12 months of the year. *Id.*

Given these conclusions, it is apparent that any leakage that might occur from the liner would have virtually no impact on ground water. Under these circumstances, determining the

¹¹ *Id.*

probability and frequency of leakage would not serve to better inform the public of the environmental impacts of the facility. It is not necessary for the NRC to examine each and every possible discharge or effluent that may be produced from the facility in extensive detail, but rather to provide a reasonably thorough discussion of the significant impacts of the probable environmental consequences. *Oregon Natural Resources Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997), *citing Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992). Under NEPA, agencies are required to give a “hard look” at environmental impacts, which the NRC’s DEIS has done with respect to this basis. An agency always has the option of exploring more possibilities and examining existing issues in greater depth, but lines must be drawn in light of utilizing agency resources to meet actual NEPA requirements. *Coalition on Sensible Transportation, Inc.*, 826 F.2d at 66. Agencies have the discretion to make these line-drawing decisions, and as such, the NRC has decided that it need not analyze each and every possible discharge or effluent that may be produced from the facility. *Id.*

- E. According to NRC, there is a 100 foot-thick water-bearing sandstone layer at a depth of about 600 feet. (DEIS at 3-36). However, NRC has not answered basic questions about this water-bearing layer, including:
- Does it exist below the proposed site?
 - What are the hydraulic properties?
 - What is the quality of the water?
 - Where does the water discharge?

NIRS/PC is correct in pointing out that the DEIS notes the presence of a water-bearing sandstone layer at a depth of about 600 feet. DEIS at 3-36. However, this is only one of the occurrences of ground water within the 1,076 feet of red-bed clay that forms the Chinle Formation. *Id.* at 3-35. As the DEIS points out, the clay has low permeability and isolates these hydrologic systems. *Id.* The first occurrence of a well-defined aquifer is at a depth of 1,115 feet below ground surface. *Id.* In this context, it is apparent that the ground water at this location is isolated within a formation of relatively impermeable red bed clay and will therefore not be impacted in any way

by operations at the NEF. Indeed, when discussing discharges from the facility, the DEIS notes that water would be expected to form a perched layer on top of the highly impermeable clay. *Id.* at 4-13. Similarly, this water is not available for use by any inhabitants of the site and will not enter the underlying aquifer. Under these circumstances, there is no reason that qualities of the water must be assessed in the context of the NRC's NEPA review. This basis should therefore be rejected.

- F. According to the DEIS, “. . . no precipitation recharge (i.e., rainfall seeping deeply into the ground) occurs in thick, desert vadose zones with desert vegetation (Walvoord et al., 2002)” (DEIS at 3-35). However, cuttings from one of the borings drilled in September 2003 were “slightly moist” (ER Rev. 2 at 3.4-2). In addition, the clay at the bottom of boring B-2 was “moist” (SAR at Fig. 3.2-11). The DEIS should explain the presence of this moisture, which conflicts with its statements about lack of recharge.

The conclusion reached in the DEIS regarding precipitation discharge is based on field investigations and computer modeling which have shown that no precipitation recharge occurs in these types of desert zones. DEIS at 3-35. This is because precipitation that infiltrates the subsurface is transpired by native vegetation. *Id.* A natural thermal gradient is present in the deeper part of the vadose zone that induces water vapor to diffuse upward toward the vegetation root zone. *Id.* As the DEIS explains, the water vapor creates negative pressure potential at the base of the root zone that acts like a sink where water is taken up by plants and transpired. *Id.* The presence of this phenomenon is confirmed by measurements taken in the high plains of Texas. *Id.*

NIRS/PC does not challenge the computer modeling or the actual measurements confirming the conclusion that no precipitation recharge occurs. Rather, NIRS/PC notes that cuttings from one boring drilled during 2003 at the site were “slightly moist” and that clay at the bottom of another boring was “moist.” NIRS/PC then concludes that the DEIS is inadequate because it fails to explain those findings. It is not incumbent upon the NRC to explain every finding

which NIRS/PC states may conflict with this conclusion. NIRS/PC has not provided any basis for concluding that these two findings alone indicate that the DEIS fails to accurately described the hydrology of the site.

In fact, the hydrogeologic investigation performed by the LES contractor Cook-Joyce, Inc., which included borings to obtain hydrogeologic information, and placed into evidence by NIRS/PC during recent depositions, supports the conclusions reached in DEIS. Harper-Peery Dep. Ex. 6. According to that report, nine borings, B-1 through B-9, were installed at depths from 35 feet to 60 feet. *Id.* at 4. The borings were allowed to remain open for a minimum of 24 hours to determine if shallow groundwater was present. *Id.* Groundwater was not identified in any of the nine borings. *Id.* Furthermore, the report concerning the boring that was “slightly moist” (Harper-Peery Dep. Ex. 6, App A. Log of Boring No. B-9) shows that the moisture is located within fourteen feet of the surface, and therefore cannot reasonably be considered a source of recharge of the aquifer, which is over 1000 feet below ground surface. DEIS at 3-36. Given the totality of evidence cited by and relied upon in the DEIS, the bare assertion by NIRS/PC that additional information should be explained is not sufficient to raise a genuine issue as to the sufficiency of the environmental review conducted by the NRC, and the contention should be rejected.

- G. The DEIS states: “Although the presence of fracture zones that can significantly increase vertical water transport through the Chinle Formation has not been precluded, the low measured permeabilities indicate the absence of such zones.” (DEIS at 3-35). Two permeability measurements have been made on the Chinle Formation at or near the site: laboratory measurement of core samples (ER Rev. 2 Table 3.3-2) and a slug test performed in MW-2 (Cook-Joyce, Hydrogeologic Investigation, Sec 32, T. 21 R. 38, Nov 19, 2003). Such extremely limited measurements, where faults are present, cannot describe the permeability of the entire site, and NRC should explain its reliance on such restricted data.

NIRS/PC essentially argues that the DEIS is incorrect in concluding that fracture zones are unlikely to occur. However, once again, NIRS/PC fails to provide any basis for finding that the DEIS is incorrect. As stated in the DEIS, this conclusion is based, in part, on the low permeability

which was determined through direct measurement. The conclusion was supported by visual inspection of the clay. DEIS at 3-35. NIRS/PC takes issue with the number of measurements but provides no reason to believe that they are unreliable, particularly in light of the fact that the conclusions drawn have been confirmed by visual inspection. NIRS/PC's conclusion that more investigation is necessary because faults are present is simply unsupported. For these reasons, this basis must also be rejected as a contention in this proceeding.

- H. The DEIS does not state whether the perched zones at the alluvium/Chinle interface will be monitored, if at all.

This assertion also should be rejected as a basis for a contention alleging a deficiency in the DEIS. The DEIS sets forth with specificity the locations at which effluent monitoring will be performed at the site. These include monitoring at numerous location at the surface of the site and in monitoring wells. DEIS at 6-1 to 6-3. NIRS/PC has not alleged, much less made any showing, that this information is incorrect or inadequate. The simple fact that a specific location will not be monitored does not provide a basis for concluding that the DEIS is inadequate.

- I. The stormwater basin will discharge runoff containing numerous contaminants, which are not adequately identified in the DEIS, nor is their monitoring explained. LES has stated that the runoff will contain small amounts of oil and grease typically found in runoff from paved roadways and parking areas (RAI Response, May 20, 2004, at 33). However, other contaminants may be present, such as PAHs (USGS, Concentrations of PAHs and Major and Trace Elements in Simulated Rainfall Runoff from parking lots, 2003, Open File Report 2004-1208), other organics such as aliphatic hydrocarbons and alcohols (Barrett, M.E. et al., Review and Evaluation of Literature Pertaining to the Quality and Control of Pollution from Highway Runoff and Construction, Tech Report CRWR 239, April 1993), and other contaminants from spills and accidents. Their presence should be disclosed. Further, stormwater should be monitored for such contaminants.

As explained in the DEIS, the stormwater detention basin will collect effluent from building roofs and paved areas which are typical of any industrial facility. DEIS at 4-13. These are expected to include small amounts of oil and grease from onsite traffic, which would readily absorb

into the soil, but no other contaminants. *Id.* NIRS/PC claims that other contaminants may be present and should be disclosed. In support of this claim NIRS/PC identifies specific contaminants associated with typical highway and parking lot runoff. However, NIRS/PC does not make any showing that these contaminants would be present and that, if present, would be in a quantity or form that could have any impact on ground water by entering stormwater runoff. The mere allegation that additional contaminants could be present is not sufficient to raise a genuine question regarding the adequacy of the DEIS. Further, NIRS/PC's claim that stormwater should be monitored for contaminants does not raise an issue which is in dispute. As the DEIS shows, the stormwater retention basin will be subject to water and sediment sampling. DEIS at 6-3.

2. Contention on Impact on Water Supplies.

NIRS/PC seeks to amend its contention regarding the impact of the NEF on water supplies by adding the following basis:

The water used at the proposed facility would be pumped from the Hobbs well field (Lea County Underground Water Basin, Ogallala Aquifer) (ER Rev. 2 at 4.4-5). Groundwater in the Basin is being pumped at a rate faster than it is being recharged (Lea County Regional Water Plan, prepared for Lea County Water Users Association, Summary at 1; at 5-4). The DEIS compares the water use of the proposed facility to the amount of water stored in the Ogallala Aquifer in the entire State of New Mexico (DEIS at 4-15). However, NRC has not shown in the DEIS how this pumpage would affect water levels and the long-term productivity of the Hobbs well field or the Lea County Underground Water Basin.

NIRS/PC explains this basis as follows:

In simple terms, the DEIS fails to account for the impact of the NEF on the water supply in the area. The DEIS states only the ratios, such as the ratio between the projected water needs of the NEF and the current quantity of water reserves in the part of the aquifer located within New Mexico and the ratio between NEF requirements and system capacities. (DEIS at 4-14, 4-15; Fig. 4-3). Such ratios are irrelevant, since they do not relate to the hydrology of the area. In addition, the DEIS fails to project the impact of the NEF on water supply over the entire operating life of the NEF and to state the actual effect of operation upon aquifer level and other water users.

In this basis, NIRS/PC again alleges that the DEIS does not go into sufficient detail in analyzing the environmental impacts of the proposed facility. This is not, however sufficient to raise

an issue to be litigated in this proceeding. The scope of the NRC's analysis necessary to assess the impacts of the facility on the environment must remain manageable to ensure that NEPA's goal of a fully informed and well considered decision will be met. *Metropolitan Edison Co.*, 460 U.S. at 776, citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. at 558. Mere allegations that more could be done are not sufficient to raise an issue as to the adequacy of the NRC's environmental review. Moreover, a close examination of NIRS/PC's claims reveals that they are based on a misreading of the DEIS. In fact, the DEIS clearly states that water use over the entire life of the facility was considered, concluding that the total water use from construction and operation would constitute 0.004 percent of the Ogallala reserves in the State of New Mexico. DEIS at 4-14 to 4-15. Further, the DEIS notes that "[b]ecause the Ogallala Aquifer is a nonrenewable water source and future demand for water in the region would exceed the recharge rate, the present local water supplies could be affected. The Lea County Water Plan includes mitigation actions to be taken to increase water supplies in the future and actions to deal with drought conditions should supplies be insufficient." *Id.* at 4-15. For these reasons, this basis should be rejected.

3. Contention on Depleted Uranium Hexafluoride Storage and Disposal (NIRS/PC/EC-3/TC-1).

NIRS/PC proposes the following additional bases to support its contention regarding the storage and disposal of depleted uranium hexafluoride:

- D. To show that it has a plausible strategy for disposal of depleted uranium, LES must set forth its strategy in sufficient detail so that the cost of pursuing the strategy can be estimated. LES has failed to set forth the strategy of private conversion and disposal with sufficient specificity. LES relies exclusively upon a cost estimate confirmed by Urenco, which estimate fails to describe any deconversion and disposal process relevant to the NEF, because it involves conversion by a process not planned for use in any United States facility, and it does not involve disposal at all, but only storage of the converted DU_3O_8 .

In this basis, NIRS/PC argues that LES has not demonstrated a plausible strategy for storing and disposing of DU on the grounds that LES has not provided an adequate basis to support its cost estimate for disposition. NIRS/PC fails, however, to explain how the alleged failure to provide adequate information to support the cost estimate would render any particular strategy for disposition implausible. While the two matters are related, failure to substantiate one - the cost estimate - does not amount to a failure to demonstrate a plausible strategy for disposition. As the only support for this contention, NIRS/PC cites deposition testimony during which an expert for LES stated that cost estimates from other sources were not relied upon, but rather used to inform, the cost of disposition. NIRS/PC Motion at 9-11, citing Krich 10/4/04 Transcript at 104-05, 125-27, 96-97. This testimony however, does not provide a foundation for challenging the plausibility of the strategy outlined by LES for disposing of DU. The matter of whether LES has provided a sufficient basis for estimating the cost of disposing of DU has already been admitted for litigation in this proceeding (NIRS/PC/EC-6/TC-3), and is the only matter to which the deposition testimony cited by NIRS/PC relates.

- E. It is not a plausible strategy for LES to propose to transfer DU to DOE under Sec. 3113 of the USEC Privatization Act, since it appears that the DU from the NEF would not be able to be converted in the DOE plants for several decades, and the cost of such conversion cannot be determined.

This contention must be rejected because it attempts to raise an issue which has already been settled by the Commission. As the Commission explicitly stated in the Order noticing this hearing,¹²

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' depleted tails pursuant to Section 3113 of the USEC Privatization Act constitutes a "plausible strategy" for dispositioning the LES depleted tails.

¹² See, CLI-04-03, 69 Fed. Reg. 5873.

Thus, the Commission has determined that this strategy is plausible and it is not for this Board to reconsider that determination.

4. Contention on Impacts of Waste Storage and Disposal (NIRS/PC/EC-4).

NIRS/PC seeks to add two additional bases for its contention relating to the impacts of waste storage and disposal. The first basis states:

The DEIS fails to discuss the environmental impacts of the construction and operation of a conversion plant for the depleted uranium hexafluoride waste. The DEIS entirely relies upon final EISs issued in connection with the construction of two conversion plants at Paducah, Kentucky, and Portsmouth, Ohio, that will convert the Department of Energy's inventory of depleted uranium (DEIS at 2-28, 2-30, 4-53, 4-54). Such reliance is erroneous, because the DOE plants are unlike the private conversion plant contemplated by LES.

NIRS/PC provides two grounds for support for this contention. First, the basis is premised upon the fact that conversion of DU6 to U308 can occur through various stages and processes. This is explained in graphic form in the DEIS in Figure 2-12 on page 2-28. As that figure demonstrates, conversion produces U308 and HF. At that point, HF is in aqueous form. HF, in turn, may be sold commercially or converted to CaF₂. Once converted to CaF₂, that product may either be sold commercially or disposed of in a licensed facility. Alternatively, HF may be distilled to produce as anhydrous HF ("AHF") which may be disposed of or sold commercially to be used as a resource.

The DEIS assumes that the conversion facility used by LES will utilize the same technology as that used in the DOE facilities, in which the aqueous HF is either sold commercially or converted to CaF₂. DEIS at 2-28 to 2-29. Obviously, if LES chooses to dispose of DU by transferring it to DOE, this reliance on the DOE analysis is appropriate. While NIRS/PC is correct that if a private conversion plant is used by LES to convert DU, it is possible that the plant could choose the option of distilling the HF to produce AHF. However, the specific process which would be employed is uncertain at this time since no private conversion facility currently exists. Further, the

environmental impacts of that process are unlikely to be significantly different from those which were analyzed by DOE. Operation of the conversion plant would not be expected to result in different environmental impacts depending on whether AHF or CaF₂ is produced and the end uses of the product would be the same in either case - commercial sale or disposal. Accordingly, it was the Staff's judgement that reliance on the DOE analysis was sufficient for the purpose of assessing the environmental impacts of a private deconversion facility which may be built in the future and used to convert DU from the LES facility. In the event that such a facility is constructed, it would be necessary to perform a full NEPA evaluation and, at that time, the particular process to be used would be analyzed in detail. Again, while NIRS/PC argues for more analysis, it has not shown that the Staff did not adequately consider the environmental impacts within the discretion afforded to agencies under NEPA.

As the second premise for this basis, NIRS/PC states that plant used for converting the DU from NEF will be much smaller in scale than the DOE conversion plants, creating different economics of operation. This, NIRS/PC speculates, will raise "the question what cost reductions will be attempted, and at what price to safety and the environment." NIRS/PC Motion at 14. This speculation is completely unfounded and does not raise a genuine issue for supporting a new basis for the contention before this Board.

NIRS/PC proposes a second, new supporting basis for its contention as follows:

The DEIS contains an incorrect analysis of the environmental impacts of the disposal of depleted uranium hexafluoride waste. The DEIS assumes that depleted uranium may be disposed of as low-level waste, which is incorrect. The DEIS fails to recognize the Commission's stated position that depleted uranium is not appropriate for near-surface disposal. The DEIS fails to support or explain the modeling of disposal of depleted uranium.

This basis is primarily a resurrection of the argument NIRS/PC has already made in earlier contentions - that DU should not be considered low-level waste. This issue is now before the Commission and is no longer within the purview of this Board. Should the Commission adopt NIRS/PC's argument that DU should not be classified as low-level waste, the DEIS will be revised accordingly.

NIRS/PC additionally argues that the DEIS fails to recognize the fact that DU may not be appropriate for near-surface disposal and argues that a change in agency position must be explained. This argument is, however, predicated upon a misreading of the DEIS. In fact, the DEIS is not premised upon the assumption that DU will necessarily be disposed of in near-surface land disposal, or, indeed, by any specific means. Instead, the DEIS notes that disposal may be through a number of options which include Hanford, which accepts Class A, B and C wastes; Envirocare, which accepts Class A waste; and the Nevada Test Site if DOE accepts the DU for disposal. DEIS at 2-31 to 2-32. Further, it is important to note that regardless of the classification of a particular waste, it can only be disposed of in near-surface land disposal sites if specific performance criteria are met. 10 C.F.R. § 61.7(a). Thus, the finding in the DEIS that DU is low-level Class A waste does not necessarily mean that near surface land disposal is appropriate.

Finally, NIRS/PC suggests that the DEIS uses inadequate modeling for assessing dose from disposal because it uses two hypothetical disposal sites instead of a site-specific model. Again, this basis is grounded on a misinterpretation of the DEIS. The DEIS does not assume any specific site for disposal but is based on the fact that a number of options could be used. Because this basis is premised upon matters which are before the Commission or demonstrably incorrect, it must be rejected.

5. Contentions on Decommissioning Costs (NIRS/PC/EC-5/TC-2; AGNM TC-1).

With respect to decommissioning costs, NIRS/PC proposes the following additional basis for its contention:

The DEIS similarly states that depleted uranium will be low-level radioactive waste, which is incorrect, and results in an incorrect and low estimate of disposal costs. (DEIS at 2-27, 2-31).

Once again, NIRS/PC is attempting to raise the issue of waste classification which was previously brought before this Board and accepted for consideration by the Commission. This basis for its contention must therefore be rejected.

6. Contentions on Costs of Management and Disposal of Depleted UF6 (NIRS/PC/EC-6/TC-3).

With regard to the cost of managing and disposing of DU, NIRS/PC seeks admission of the following additional basis to its contention:

- J. In fact, LES does not have any relevant estimate for the cost of converting and disposing of depleted uranium, because it does not rely upon the three examples cited in the application, i.e, the CEC estimate from 1993, the LLNL Report, or the UDS contract. LES would not supply any estimate for dispositioning costs based on commercial contracts. LES refers only to the Urenco data from 2003 for its decommissioning and disposal cost estimate, and Urenco data are not relevant to establishment of costs in the United States.

NIRS/PC cites testimony elicited at a deposition of a LES expert on the admitted contention on this issue which raises a new issue as to the basis for the cost estimate for the cost of converting and disposing of DU. The Board should include this as another basis for the existing contention on this issue - NIRS/PC/EC-5/TC-2.

7. Contention on Need for Facility (NIRS/PC/EC-7).

With regard the need for the facility, NIRS/PC seeks to amend the contention to add the following basis:

The DEIS likewise omits to discuss the impact of the proposed NEF, in particular upon the market for enrichment services, by failing to consider the effect of the addition of the NEF to the existing range of suppliers and other forthcoming suppliers, the nature of competition that will occur, and impacts upon market participants and consumers.

Through admission of this basis, NIRS/PC alleges that the DEIS must include an analysis of the costs and benefits of introducing the NEF into the market for enrichment services and those affected by it, including competitors, utilities and consumers. This is, however far beyond what is necessary to constitute an adequate analysis of need for the purposes of NEPA. Indeed, the determination of the need of a facility is determined first by the applicant and reviewed by the agency tasked with a NEPA review. The decision on where to draw the line in terms of exploring a subject more deeply during its NEPA review is one within agency discretion. *Coalition on Sensible Transportation, Inc.*, 826 F.2d at 66. Further, in order to accomplish NEPA's goals of making fully informed and well considered decisions, the scope of the reviewing agency's evaluation must be manageable. *Metropolitan Edison Co.*, 460 U.S. at 776, *citing Vermont Yankee Nuclear Power Corp. v. NRDC.*, 435 U.S. at 558. NIRS/PC has not made any allegation that the NRC abused this discretion in determining not to conduct an analysis of the costs of introducing another provider of enrichment services into the market. The mere allegation that NIRS/PC would like such an analysis is not sufficient to support an issue admissible in this proceeding.

Indeed, NIRS/PC attempted to raise this same issue with regard to the NEF application when it filed its Petition to Intervene.¹³ Specifically, NIRS/PC advanced bases for its contention relating to the need for the facility which alleged, among other things, that (1) LES assumed that current and current and future market participants would willingly surrender market share to a new participant (Basis D), and (2) LES had not provided a business plan showing how LES would effectively enter the market given the existing and anticipated competitors and contribute some public benefit (Basis G). Petition at 40, 41-43. This Board, in ruling on those contentions, rejected Basis D and Basis G as insufficient to support admission of the contention in that they fail to establish with specificity any genuine material dispute; and/or all outside the scope of the

¹³ "Petition to Intervene by Nuclear Information and Resource Service and Public Citizen," April 6, 2004 ("Petition").

proceeding in that the applicant is under no obligation to present either a business case or demonstrate the profitability of the proposed facility.¹⁴ This proposed basis should be rejected for the same reasons.

CONCLUSION

For the foregoing reasons, the Staff believes that NIRS/PC has proposed one additional basis which should be admitted by the Board to support an already admitted contention. However, remaining modifications and amendments to previously admitted contentions that NIRS/PC seeks to admit in this proceeding should be denied.

Respectfully Submitted,

/RA/

Lisa Clark
Counsel for NRC Staff

Dated at Rockville, Maryland
this 5th day of November, 2004

¹⁴ Memorandum and Order (Rulings Regarding Standing, Contentions, and Procedural/Administrative Matters), LBP-04-14, July 19, 2004, slip op. at 29-30.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(a), the following information is provided:

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Respectfully Submitted,

/RA/

Darani M. Reddick
Counsel for NRC Staff

Dated at Rockville, Maryland
this 5th day of November, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN MOTION TO AMEND AND SUPPLEMENT CONTENTIONS" and "NOTICE OF APPEARANCE" for Darani M. Reddick in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 5th day of November, 2004.

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