

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

DOCKETED
USNRC

December 15, 2004 (3:59pm)

BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of

Docket No. 70-3103

Louisiana Energy Services, L.P.
National Enrichment Facility

ASLBP No. 04-826-01-ML

**BRIEF ON BEHALF OF PETITIONERS
NUCLEAR INFORMATION AND RESOURCE SERVICE/
PUBLIC CITIZEN
IN RESPONSE TO USEC INC. BRIEF
ON THE PROPER CLASSIFICATION
OF DEPLETED URANIUM TAILS**

Preliminary statement

This memorandum is submitted on behalf of Petitioners Nuclear Information and Resource Service and Public Citizen ("NIRS/PC") pursuant to the Order of the Nuclear Regulatory Commission (the "Commission") dated December 1, 2004. That Order allows the parties to respond to the brief amicus curiae filed by USEC, Inc. ("USEC Br.") on the proper classification of depleted uranium tails.

Argument

NIRS/PC have previously filed an opening (Sept. 8, 2004) and reply (Sept. 17, 2004) brief on the issue certified to the Commission. In those briefs NIRS/PC pointed out that this certification occurs at the preliminary stage of determining admissibility of a contention and that it would be erroneous for the Commission now to decide, on the merits, that depleted uranium constitutes low-level radioactive waste under 10 CFR Part 61. NIRS/PC further pointed out that

the Commission could not make that determination without full environmental impact analysis, which has not been done. NIRS/PC asked that the Commission affirm the decision of the Atomic Safety and Licensing Board to admit the contention for further proceedings.

USEC, Inc. has now filed a brief in which it asks the Commission to declare that depleted uranium tails are low-level radioactive waste. (USEC Br. 7). For reasons previously stated on brief, NIRS/PC submits that it would be error for the Commission to make such a declaration.

In addition, NIRS/PC notes that the brief of USEC, Inc. calls attention to two important points:

a. USEC's brief emphasizes the necessity for a Commission determination that depleted uranium can be classified as low-level radioactive waste before the uranium may be tendered to DOE under Sec. 3113 of the USEC Privatization Act.

USEC Inc.'s brief emphasizes that in the USEC Privatization Act Congress adopted the definition of the term "low-level radioactive waste" contained in the Low Level Radioactive Waste Policy Act. (42 U.S.C. 2021b; USEC Br. 3-5). That definition expressly incorporates the necessity for a Commission determination before material may be deemed low-level radioactive waste, eligible for transfer to the Department of Energy under Sec. 3113 of the USEC Privatization Act. Thus, the USEC Privatization Act in Sec. 3102(6) defines "low-level radioactive waste," by applying the meaning "given such term in section 2(9) of the Low-Level Radioactive Waste Policy Act (42 USC 2021(b))." That statute states:

"(9) Low-level radioactive waste.—The term "low-level radioactive waste" means radioactive material that—

- (A) is not high-level radioactive waste, spent nuclear fuel, or byproduct material (as defined in section 11e.(2) of the Atomic Energy Act of 1954 (42 USC 2014(e)(2)); and
- (B) The Nuclear Regulatory Commission, consistent with existing law and in accordance with paragraph (A), classifies as low-level radioactive waste." 42 USC 2021b.

Last week, this Commission itself underscored the necessity for a Commission determination of the status of depleted uranium, referring to “the ‘plausible strategy’ for disposition of depleted uranium by transfer to DOE *if the NRC declares* the depleted uranium to be low-level waste,” *Louisiana Energy Services*, No. 70-3103 ML, ___ NRC ___, slip op. at 5 n.18 (December 8, 2004))(emphasis supplied). No such Commission declaration has been made. Neither has this Commission undertaken the analysis under the National Environmental Policy Act, 42 U.S.C. 4332, required as a foundation for such a determination. Therefore, such a Commission determination cannot be made at this time.

b. The Commission has classified low-level radioactive waste only pursuant to 10 CFR Part 61, which deliberately avoids the issue of depleted uranium from enrichment operations.

USEC, Inc.’s brief also emphasizes that the Commission’s hearing order in this case specifically points the parties to the definition of “waste” in 10 CFR 61.2—a definition that requires a Commission determination that the material would be “acceptable for disposal in a land disposal facility.” (10 CFR 61.2). USEC, Inc. improperly disputes the Commission’s order in this respect (USEC Br. 5-8; see *Duke Energy Co.* (McGuire Nuclear Station, Units 1 and 2), 55 NRC 278, 290, CLI-02-14 (April 12, 2002); see also 10 CFR 2.335), but the hearing order cannot be misread: Depleted uranium cannot be classified as low-level radioactive waste unless it is first found to be “acceptable for disposal in a land disposal facility.” In last week’s ruling the Commission described that pronouncement as a “rulemaking-associated generic determination” that could not permissibly be challenged. (*Louisiana Energy Services*, No. 70-3103 ML, ___ NRC ___, slip op. at 5 n.18 (December 8, 2004)). The history of 10 CFR Part 61 contains the only rulemakings in which this Commission has classified low-level radioactive waste for disposal by any method, and that series of final rules studiously avoids examining the

classification of depleted uranium from enrichment operations, as NIRS/PC have already shown. (NIRS/PC Br. 10-11, 14, Sept. 8, 2004).

NIRS/PC fully agree with USEC, Inc. that 10 CFR Part 61 contains rules for near surface disposal only. (USEC Br. 6). Thus, in proposing Part 61, the Commission expressly reserved for later rulemakings any determination of the proper methods of dealing with waste that requires greater isolation. (See NIRS/PC Br. 13, 16, Sept. 8, 2004). If this Commission had instead undertaken to investigate the degree of isolation required for depleted uranium—something it has never done—NIRS/PC contend, in the contention in issue, that the radioactivity and the long half-life of depleted uranium would clearly have disqualified it for land disposal. (See NIRS/PC Br. 9, Sept. 8, 2004).

But, of course, that investigation has not been carried out and the results published in accordance with the National Environmental Policy Act, and without such analysis no pronouncement by this Commission can lawfully be made. A Commission declaration establishing the authorized disposal methods for depleted uranium, and classifying such material for disposal purposes, must await another formal proceeding, most appropriately a rulemaking, with necessary NEPA predicate, or a licensing proceeding, with its own proper NEPA predicate, before it can lawfully become effective.

Conclusion

The Commission should return the certified issue to the Atomic Safety and Licensing Board with directions to admit the contention to the licensing proceeding, so that the Board, for the Commission, may undertake the investigation directed by the hearing order into the “subtle and complex,” *Louisiana Energy Services (Claiborne Enrichment Center)*, CLI-95-7, No. 70-

3070-ML (June 22, 1995), question of the classification of, and disposal methods appropriate to, depleted uranium from enrichment operations.

In remanding, the Commission should give serious consideration to addressing these questions by rulemaking to afford the broadest possible participation by affected entities and communities.

Respectfully submitted,



Lindsay A. Lovejoy, Jr.
618 Paseo de Peralta, Unit B
Santa Fe, NM 87501
(505) 983-1800
(505) 983-0036 (facsimile)
E-mail: lindsay@lindsaylovejoy.com

Counsel for Petitioners
Nuclear Information and Resource Service
1424 16th St., N.W. Suite 404
Washington, D.C. 20036
(202) 328-0002

and

Public Citizen
1600 20th St., N.W.
Washington, D.C. 20009
(202) 588-1000

December 15, 2004

CERTIFICATE OF SERVICE

Pursuant to 10 CFR § 2.305 the undersigned attorney of record certifies that on December 15, 2004, the foregoing Brief on Behalf of Petitioners Nuclear Information and Resource Service /Public Citizen in Response to USEC, Inc. Brief on the Proper Classification of Depleted Uranium Tails was served by electronic mail and by first class mail upon the following:

G. Paul Bollwerk, III
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: gpb@nrc.gov

Dr. Paul B. Abramson
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: pba@nrc.gov

Dr. Charles N. Kelber
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: cnk@nrc.gov

James Curtiss, Esq.
David A. Repka, Esq.
Winston & Strawn
1400 L St.
Washington, D.C. 20005-3502
e-mail: jcurtiss@winston.com
drepka@winston.com
moneill@winston.com

John W. Lawrence, Esq.
Louisiana Energy Services, L.P.
2600 Virginia Ave., N.W.
Suite 610
Washington, D.C. 20037
e-mail: jlawrence@nefnm.com

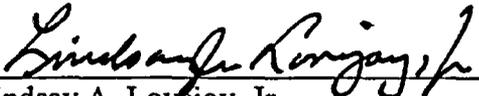
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Associate General Counsel for Hearings, Enforcement, and Administration
e-mail: OGCMailCenter@nrc.gov
lbc@nrc.gov
abc1@nrc.gov
jth@nrc.gov
dmr1@nrc.gov

Office of Commission Appellate Adjudication
Mail Stop O-16C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Tannis L. Fox, Esq.
New Mexico Environment Department
1190 St. Francis Drive
Santa Fe, NM 87502-1031
e-mail: tannis_fox@nmenv.state.nm.us

Glenn R. Smith, Esq.
Christopher D. Coppin, Esq.
Stephen R. Farris, Esq.
David M. Pato, Esq.
Assistant Attorneys General
P.O. Drawer 1508
Santa Fe, NM 87504-1508
e-mail: ccoppin@ago.state.nm.us
dpato@ago.state.nm.us
gsmith@ago.state.nm.us
sfarris@ago.state.nm.us

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications Staff (original and two copies)
e-mail: hearingdocket@nrc.gov


Lindsay A. Lovejoy, Jr.
618 Paseo de Peralta, Unit B
Santa Fe, NM 87501
(505) 983-1800
(505) 983-0036 (facsimile)
e-mail: lindsay@lindsaylovejoy.com