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P-R-O-C-E-E-D-I-N-G-S

3:03 P.M.

1
2
3 JUDGE McDADE: Why don't we go on the
4 record. My name is Lawrence McDade, I'm the chairman
5 of the panel to which this matter has been assigned.
6 With me are Judge Paul B. Abramson and Judge Richard
7 B. Wardwell. Those are the other two Judges on the
8 panel. Also present here are Susan Stephenson Potts,
9 and Sheverne Cloyd who is our Administrative
10 Assistant.

11 We're here in the matter of USEC, ASLBP
12 No. 05-8-ML. At this point in the proceedings, we
13 need to make a determination as to whether or not to
14 admit contentions that have been filed by the
15 Portsmouth Pinketon Residents for Environmental Safety
16 and Security, PRESS; also by an individual, Geoffrey
17 Sea.

18 This matter is being transcribed. Would
19 the Court Reporter please identify themselves for the
20 record?

21 MR. MONGOVEN: Yes, sorry for the delay.
22 I'm John Mongoven, M-O-N-G-O-V-E-N, of Neal R. Gross
23 and Company. I would ask that members who are not the
24 Judges would identify themselves before speaking and
25 if you do need to address me, it will be a three to

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1 five second delay before I come on the line.

2 JUDGE McDADE: That's fine. And I do want
3 to emphasize that, given the fact that this is a
4 telephone call. It's difficult to identify the voice
5 with the person when you don't have visuals, so it is
6 important, even after you've spoken a few times to
7 preface your remarks by identifying yourself by name.

8 What we propose to do here today is to ask
9 some questions of you and to get answers that we
10 believe might be helpful for us in making our
11 decisions with regard to the admissability of
12 contentions.

13 Before we proceed further, what I'd like
14 to do is have the various persons on the line identify
15 themselves for the record. From the NRC, who is
16 present?

17 MS. ZOBLER: Yes, Marian Zabler and Sara
18 Brock from the NRC Staff. I also have some members of
19 the staff with me in the room. I have Matthew Levins,
20 the Senior Project Manager for the Environmental
21 Review. I have Stan Echolls, also a Senior Project
22 Manager for the Safety Review. I have Brian Smith who
23 is the Chief of the Gas Centrifuge Facility Licensing
24 Section. I have Tom Fredericks who is the Project
25 Manager for Financial Analysis. And I have Jim

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1 Cliffords who is the Chief of the Special Projects
2 Branch.

3 JUDGE McDADE: One thing I am going to ask
4 you to do, we're going to be on the record here for a
5 while. When we are finished, before you all ring off
6 the conference call, what I would like to do is to
7 give the Court Reporter an opportunity to go back, get
8 spellings of names. I don't want to take the time to
9 do it right now. I'd like to get into the discussion
10 questions that we have, but I would ask that
11 everybody, before we ring off to allow the Court
12 Reporter to ask for spellings of names so that they
13 can have it correctly identified in the record.

14 From USEC, who is present?

15 MR. SILVERMAN: Your Honor, Don Silverman
16 from Morgan, Lewis and Bockius representing USEC. In
17 addition, I have with me Dennis Scott who is Assistant
18 General Counsel; Pete Miner, who is the Director of
19 Regulatory and Quality Assurance; and Greg Fout, who
20 is the USEC, ES&H Manager.

21 JUDGE McDADE: Thank you. From Portsmouth
22 Pinketon Residents for Environmental Safety and
23 Security?

24 MS. COLLEY: I'm Vina Colley, President of
25 PRESS.

1 JUDGE McDADE: Okay, you don't have any
2 problem with me referring to your organization as
3 PRESS, rather than the full name?

4 MS. COLLEY: No, that will be fine.

5 JUDGE McDADE: Is there anyone else from
6 PRESS with you today?

7 MS. COLLEY: Yes.

8 MR. TODD: Ewan Todd, E-W-A-N T-O-D-D.

9 JUDGE McDADE: And Mr. Sea, are you on the
10 line?

11 MR. SEA: Yes, I am.

12 JUDGE McDADE: I think that is everybody.
13 What we would like to do is to get into the questions
14 that we have. What I propose to do initially is to go
15 through various questions relating to the PRESS
16 contentions, to ask those questions initially of the
17 PRESS representatives, and then solicit comments on
18 that from folks from USEC and the NRC Staff to go
19 through it a contention at a time and Judge Abramson
20 and Judge Wardwell may have questions as well.

21 The first question from PRESS is what do
22 you view as erroneous, deficient or flawed in USEC's
23 analysis of the potential uranium concentration in the
24 Scioto River?

25 MR. TODD: I have a number of points here.

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1 JUDGE McDADE: Could you state your name,
2 please?

3 MR. TODD: Yes, sorry. Ewan Todd for
4 PRESS. First of all, I'd like to start with the
5 notes, the reference 7 that we talk about in our
6 contention. It's referred to as USEC-2, certification
7 of the Portsmouth gaseous diffusion plants. It's used
8 53 times between 1-66, that's the page number, and 1-
9 88, that's between Sections 1.3.3 and 1.3.6.7 of the
10 license application. And through no fault of USEC,
11 that is not available. I called the ADAMS help desk
12 yesterday. There is a microfiche copy of that, but it
13 hasn't been cleared at this point.

14 So the deficiencies that I found: in
15 Section 1.3.4.1.3, and I quote "storm water ... is
16 drained to local Scioto River tributaries by storm
17 sewers and the flow of storm water is further
18 controlled by holding ponds ..." This point is very
19 general. In general, I would expect something more
20 like a very accurate time series modeling of storm
21 water flow showing all the different flow fields
22 around about 10 centimeter resolution which is similar
23 to the Titan 7.5 second quadrant map, digital
24 elevation model contours. That's public domain from
25 the State of Ohio. That's the first point.

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1 The second point refers to Figure 1.3-12.
2 And what we have there is a single cross section
3 through the geology of the sites. And so what I'd
4 expect there is more of a three dimensional map, again
5 at about 10 centimeter resolution, including -- and
6 that would provide a basis for modeling the flow of
7 water through the gallia and berea geological strata
8 and with also reference to the summary level which is
9 in between the gallia and the berea and also with the
10 surface of the underlying bedford. So that would be
11 a three dimensional map for the purposes of modeling.

12 Third point is about the flood history.
13 This is just a straight contradiction here. In
14 Section 1.3.4.2, the 1937 flood level is stated as
15 593.7 feet whereas at Table 3.4.3-1 it's stated as
16 556.7 feet, and that's a difference just short of 40
17 feet.

18 Let's see.

19 JUDGE McDADE: What do you view is the
20 significance of that difference?

21 MR. TODD: Well, there are two
22 significances. One is that the former level, the
23 flood waters rise up to Bigrun Creek, that's B-I-G-R-
24 U-N which is a creek that has the most significance as
25 far as off-sites and migration of pollutants are

1 concerned. If the flood level rises up to the bend in
2 Bigrun Creek, when Bigrun Creek leaves the
3 reservation, it's moving a southward direction and
4 then it turns towards the southwest direction shortly
5 south of the reservation and the water rises
6 remarkably far up there. Not only that, but the water
7 level also rises up some of the lower tributaries to
8 Bigrun Creek, the clean tributaries.

9 And also, there's a remark here that if
10 some of these grossest calculations are being
11 confused, what confidence do we have in some of the
12 more involved figures in the license application.
13 That was a third point.

14 The next one is that -- oh, there's
15 something definitely wrong with the probable maximum
16 flood. It's 1.3.4.3. There, we find --

17 JUDGE McDADE: Could you repeat what you
18 just said? I didn't get that.

19 MR. TODD: The new section of the license
20 application, 1.3.4.3, the probable maximum flood.
21 There's a figure there for the 1937 flood that rises
22 up to 593.7 feet. And that's with a flow rate of the
23 Scioto of 177,000 cubic feet per second. For the
24 probable maximum floods, the flow rates of the Scioto
25 is estimated as one million which is about five times

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1 the flow rates of the 1937 floods, yet the flood level
2 is 571 feet which is 12 or 13 feet short of the 1937
3 floods. So that seems definitely awry.

4 JUDGE McDADE: Okay, but from the
5 standpoint of the application, what is the
6 significance of that of the impact that that would
7 have if the facility were there?

8 MR. TODD: Well, we know more or less how
9 high the 1937 flood rose to and USEC has made the --
10 had deduced that the site is safe for the historic
11 floods, but for the probable maximum floods, it's not
12 clear what its level really is. It certainly can't be
13 571, so there may be implications about that.

14 JUDGE McDADE: Excuse me, just to make
15 sure I understand what you're saying, what you're
16 saying is the flow rate for the probable maximum flood
17 is almost five times that which was listed for the
18 1937 flood and therefore you believe that it would
19 have a significantly higher water than the 597 feet of
20 the 1937 flood?

21 MR. TODD: Absolutely.

22 JUDGE McDADE: Okay, and if there were to
23 be a significantly higher level, water level, what
24 would that do in your view?

25 MR. TODD: Well, it has implications for

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1 -- the flooding has implications not just for the on-
2 site discussion, but also for the off-site discussion
3 and that's a point that is entirely missed. Also, the
4 implications of higher floods are going to be
5 different and I would be interested to hear what that
6 real figure is.

7 One point is though with very heavy
8 rainfall also, I'm wondering whether the minford and
9 gallia basin, that's the one that the site rests upon,
10 would it fill up. That's a question that I haven't
11 seen addressed, and what would happen if that basin
12 did fill up.

13 JUDGE McDADE: Going back here to focus
14 this a little bit, this particular contention has to
15 do with the potential uranium concentration in the
16 Scioto River and could you sort of bring this in as to
17 how in your view, this would impact on the potential
18 uranium concentration and why the application
19 submitted by USEC is deficient in this specific
20 regard.

21 MR. TODD: Okay, well the next few points
22 there were going to start discussing pollutants in the
23 water. So far we've only discussed water flow itself.

24 So the passage that we quoted in the
25 petition that the uranium discharged from the

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1 reservation from the GDP through the local drainage
2 system to the Scioto River was estimated to be 45
3 kilograms during 1990. I recognized that that 45
4 kilograms, amazing though it seems, 45 kilograms of
5 uranium was, in fact, the largest recorded release.
6 So I appreciated that that's a worst case scenario.

7 But then that's compared with 4,721 cubic
8 feet per second average discharge of the Scioto River
9 and I followed this calculations. I multiplied the
10 cubic feet per second by the number of seconds in a
11 year and converted that to a volume, divided the mass
12 of uranium by the volume and sure enough, it came out
13 to the average uranium concentration that the
14 application mentions, 1.1 times 10^{-5} .

15 However, and this is really the essence of
16 this, uranium is the heaviest naturally occurring
17 element. It's very heavy. So I would expect the path
18 of loose uranium hexafluoride to perhaps follow the
19 center of a river bed, something like that. There's
20 no -- it's not obvious to me. There are no studies
21 cited in the license application about the transport
22 of uranium hexafluoride in water. It's not clear to
23 me whether the uranium hexafluoride necessarily makes
24 it to the Scioto. That's one point. So a study would
25 have to include certainly Bigrun Creek and the unnamed

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1 creeks to the west of the sites.

2 But the other extreme, it's not clear to
3 me that the uranium doesn't go all the way down to the
4 confluence of the Scioto and the Ohio where the water
5 changes direction very quickly and maybe gets
6 deposited there. So it's a question of accumulation
7 and where do all these pollutants wind up?

8 JUDGE McDADE: Now going back to sort of
9 the beginning of this, you indicated that you believed
10 that the single cross section that is provided is
11 inadequate. What would the 3-D map provide in your
12 view?

13 MR. TODD: Okay, that first groundwater
14 analysis, I don't have the chapter and verse, but the
15 license application mentions that 25 percent of
16 rainfall goes in as groundwater and the rest leaves as
17 surface water. So the purpose of the geological
18 survey of the various strata basically there's a
19 conductive layer, that's the gallia. Then there's a
20 barrier layer, if I can find my map here. There it
21 is. The barrier layer is sunbury shale which is
22 intermittent across the reservation and then
23 underlying that there's berea sandstone which is also
24 permeable. And underneath that there's the bedford
25 shale which is impermeable.

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1 So the berea layer opens -- well, it
2 actually folds away from Scioto Valley as does the
3 gallia. So basically, it seems as though the
4 groundwater around the location of the ACP is likely
5 to migrate to the east to go to the south holding pond
6 eventually and then into Bigrun Creek.

7 So we're concerned about pathways for
8 pollutants, but regular ones and discharges due to
9 events and how strong they're going to be, where
10 they're going to go, are they going to accumulate in
11 targeted spots. And so the three dimensional model
12 would allow theoretical analysis of where the
13 pollutants actually do migrate to.

14 JUDGE McDADE: Judge Wardwell, you had a
15 question?

16 JUDGE WARDWELL: How would that relate to
17 the uranium concentrations in the river?

18 MR. TODD: I'm sorry, who is asking?

19 JUDGE WARDWELL: Judge Wardwell.

20 MR. TODD: Well, here, by Scioto I mean
21 Scioto and its tributaries and so concentrations in
22 the tributaries, all different points in the
23 tributaries and concentrations in the Scioto, it's not
24 clear to me that the uranium hexafluoride would be
25 homogeneously dispersed throughout the Scioto. For

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1 instance, just south of Bigrun Creek where I
2 anticipate that most of the pollutants are going to
3 enter the Scioto with the exception of the storm
4 drains that go straight in.

5 There's a little 90 degree crook in the
6 Scioto River is likely to throw the heavy uranium out
7 so it accumulates on a particular bank, probably on
8 the west side of the river.

9 JUDGE WARDWELL: Let me focus my question
10 so we get to the matter. I meant in regards to why do
11 you need a three-dimensional map or any really
12 groundwater map to evaluate your uranium
13 concentrations in the river during any flow events?

14 MR. TODD: I see. So the idea is that
15 basically in this passage, what USEC appears to be
16 claiming is that oh here's the average concentration.
17 It's 10^{-5} milligrams and that's assuming a full
18 dilution and I'm challenging the assumption that full
19 dilution is a reasonable assumption. And so I think
20 what's more likely is that you will get accumulations
21 of pollutants in the river. The purpose of the three-
22 dimensional map is to track the pathways down to the
23 Scioto River so that you can identify places where
24 those accumulations are likely to be and then you look
25 at the uranium concentrations at those locations.

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1 JUDGE ABRAMSON: This is Judge Abramson.
2 Let me ask a question on this. You suggested earlier
3 that your three-dimensional model would have four
4 centimeter resolution? Did I understand that?

5 MR. TODD: Well, I was thinking --

6 JUDGE ABRAMSON: Ten centimeter
7 resolution.

8 MR. TODD: It seems like the best
9 measurements the state has done around there is 10
10 centimeter resolution for the height data.

11 JUDGE ABRAMSON: How big is this region
12 that you're trying to do this -- give it to me in
13 miles.

14 MR. TODD: Let's see, well, it should be
15 greater than the extent of the DOE boundary for sure.
16 It looks as though the principal pathways off-site
17 from the ACP, since it's in quadrant 1, quadrant 1 is
18 towards the south and groundwater migrates to the east
19 in quadrant 1, so that's going to go in Bigrun Creek.
20 So certainly Bigrun Creek, probably down to the
21 testing location, RW1. That's the one down by
22 Wakefield and then up as far as perhaps the Big Beaver
23 Creek.

24 JUDGE ABRAMSON: How many miles is that?

25 MR. TODD: Is that five miles?

1 JUDGE ABRAMSON: Let's assume it's five
2 miles. You're suggesting that this be analyzed at 10
3 centimeter increments? How many increments would that
4 be in that five miles?

5 MR. TODD: That's a pretty big model.

6 JUDGE ABRAMSON: I'd say it's a pretty big
7 model. Do you have a computer code that can
8 accommodate it?

9 MR. TODD: We certainly don't have access
10 to computers, but there are facilities around I'm
11 sure. But the resolution was just suggested. I'm
12 sure you can get a good appreciation for the flows
13 involved.

14 JUDGE McDADE: But your argument is that
15 you need a three-dimensional model that the single
16 cross section is inadequate in the USEC's application.

17 MR. TODD: Right.

18 JUDGE McDADE: You believe that it doesn't
19 tell you enough with regard to how the uranium is
20 going to be transported and deposited?

21 MR. TODD: Right. You can't see where the
22 groundwater is breaking through the sunbury shale and
23 berea, the accumulation of water in the berea
24 sandstone. It breaks in the sunbury shale and you
25 don't from this map where they are.

1 JUDGE McDADE: Okay, but you've also
2 indicated that the average discharge in determining
3 uranium concentration is inappropriate and that you
4 need a full survey.

5 MR. TODD: Right.

6 JUDGE McDADE: Just very briefly could you
7 explain to me why you believe the average discharge is
8 inadequate and what a full survey would consist of and
9 what it would tell us?

10 MR. TODD: Okay, well, I touched on this
11 earlier but basically the calculation here is very
12 crude. It's 45 kilograms divided by the average
13 discharge at the Scioto, scaled up to one year. That
14 gives us a dilution which, of course, is under
15 regulations and so the question is are there
16 accumulations that are more concentrated than that.

17 JUDGE McDADE: And what would your full
18 survey consist of?

19 MR. TODD: Well, I would suggest that it
20 would be based on this geological model for the
21 groundwater, combined with a surface model for the
22 surface water, combined with various combinations of
23 regular running discharges at the locations at which
24 they're discharged and perhaps some models of
25 extraordinary events.

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1 JUDGE McDADE: Okay, before we move on to
2 something else, Judge Wardwell, do you have any
3 questions further about this area?

4 JUDGE WARDWELL: No.

5 JUDGE McDADE: Judge Abramson?

6 JUDGE ABRAMSON: No.

7 JUDGE McDADE: Before we move on, USEC, do
8 you wish to respond to anything that was just said by
9 the PRESS representative?

10 MR. SILVERMAN: I do, Your Honor. This is
11 Don Silverman. I have a number of general points I'd
12 like to make.

13 The first one is that the Board's order
14 scheduling this conference indicated that it was for
15 the purpose of elaborating on statements in the
16 existing petition, but not to raise information that
17 was not present in existing filings. And most of
18 these sections that PRESS has cited and most of the
19 concerns that they now raise are not at all present in
20 the contention or in its bases.

21 This contention is at least on its
22 surface, very straight forward. It says "our use of
23 an average figure for uranium concentration in the
24 Scioto River is misleading." And the only basis that
25 is provided for that is an excerpt from our license

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1 application that discusses how we came up with a
2 calculation. So a number of the sections and figures
3 that relate to flood levels, water flow through
4 geology, etcetera, as far as we're concerned are
5 unrelated to the contention and new information.

6 JUDGE McDADE: Within the specific
7 contention that was made, I mean as I understand what
8 PRESS is saying is that there is a significant
9 variance in the flow in the river that your model does
10 not take into consideration and that the use of the
11 average discharge therefore does not give an accurate
12 picture of how uranium would be transported and also
13 deposited.

14 MR. SILVERMAN: Yes, I can respond to
15 that. A few points. First of all, as a contention,
16 as we understand it, and we think the plain language
17 is there, goes to the average -- the question of the
18 average concentration of uranium in the river, not the
19 average discharge of the river, although that is a
20 relevant factor, as I understand it, in determining
21 average concentration.

22 We need to be -- all remember that the
23 portion of the application that's being cited by PRESS
24 is no more than a general information and site
25 description section, providing historical information

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1 about the gaseous diffusion plant. It does not at all
2 address any impacts from -- or discharges from the
3 American Centrifuge.

4 Furthermore, we do not believe an average
5 concentration figure is misleading. The NRC itself,
6 in its release standards under 10 CFR part 20 that are
7 applicable to this facility, in 10 CFR 20.1302, uses
8 average annual concentrations as the measurement.

9 With respect to the flow and the use of an
10 average flow value, the value that's used in the
11 license application is 4,721 cubic feet per second.
12 That's an Army Corps of Engineers data point which we
13 apply and I would call the Board's attention to other
14 portions of the application where we explain not just
15 the average flow, but the minimum and the maximum
16 stream flows over a period of 70 years. In fact, on
17 the question of whether the application is misleading,
18 if you look at the section just prior to the section
19 that PRESS has cited, and that's license application
20 section 1.3.4.6, that provides the information on
21 minimum stream flow.

22 So we don't believe that the application
23 is deficient in any way. We don't believe the
24 intervenors have identified any noncompliance with NRC
25 regulations and again, we want to underscore that this

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1 particular section of the application is limited to a
2 historic description and background of the site and
3 the GDPs in general.

4 JUDGE ABRAMSON: Judge Abramson. Let me
5 follow it up for a second, Mr. Silverman.

6 Is it my understanding then that you're
7 suggesting or stating perhaps that Chris has
8 referenced the wrong section and that, in fact, they
9 haven't cited any flaw in the sections that would
10 provide or do provide what USEC thinks are the
11 detailed analyses?

12 MR. SILVERMAN: Well, they've cited a
13 section that does address uranium concentrations in
14 the Scioto River and I think it is probably the
15 primary section that does that. But I also believe
16 they have not identified any deficiencies in the
17 application, either in that section or anywhere else
18 that indicate there's a noncompliance with applicable
19 requirements.

20 JUDGE ABRAMSON: I'm sorry, let me make
21 sure I understand then.

22 MR. SILVERMAN: Sure.

23 JUDGE ABRAMSON: It seems to me that PRESS
24 is suggesting that the application is deficient
25 because it doesn't do, if you will, time-dependent and

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1 spatially-dependent analysis of the uranium
2 concentrations as a function of locations and what
3 gets put in, discharged into the river, along with
4 variations in river flows. Is there any such analysis
5 in the application?

6 MR. SILVERMAN: I don't believe there is
7 and I don't believe it's required or that it was ever
8 reflected in the original contention. So the notion
9 of having time and spatial analyses is completely new
10 information.

11 JUDGE McDADE: Isn't that what they
12 implied by insisting that a full survey would be
13 necessary?

14 MR. SILVERMAN: They provided no
15 information at all as to what such a survey would
16 entail and what they say is a survey, I believe they
17 say, a full survey -- well, it says just a full survey
18 should be undertaken. That's all the information we
19 have.

20 JUDGE ABRAMSON: This is Judge Abramson
21 again. What would your experts advise you is the
22 meaning of a full survey? I'm sure there are
23 different meanings in different technical areas?

24 MR. SILVERMAN: Right. Well, I think our
25 view, Your Honor, is that the answer to that question

1 is in part 20. What we're talking about is
2 radioactive discharges from the historical gaseous
3 diffusion plant and they are governed by 10 CFR
4 20.2001 and various other provisions and in 20.1302,
5 the NRC provides a licensee must make such surveys as
6 are necessary to demonstrate compliance with the NRC
7 dose standards. And they go on to say that that
8 demonstration can be provided by surveying,
9 essentially monitoring effluent releases from the
10 plant and ensuring that those releases are below
11 certain table limits in part 20. That's what we do.
12 That's what we think the right survey is. That's
13 what's been done for the GDPs since USEC took over
14 their operation.

15 JUDGE McDADE: This is Judge McDade. I
16 just want to make sure that I understand your position
17 and correct me if there's more to it or if I've got it
18 wrong. It's with regard to this particular contention
19 that PRESS did not adequately support it, even if
20 there were some theoretical bases for what they are
21 suggesting, that they had an obligation to come
22 forward to offer expert opinion as to what a full
23 survey consists of, what it would show that what has
24 been done has not shown and why that would be
25 significant to the application. Is that correct?

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1 MR. SILVERMAN: Well, I would agree with
2 that statement.

3 JUDGE McDADE: Is that your position?

4 MR. SILVERMAN: That's certainly part of
5 our position, yes sir.

6 JUDGE McDADE: And the other part of it?

7 MR. SILVERMAN: Well, as I articulated,
8 we're talking about information that's historical in
9 nature, that's not relevant to the impact of the
10 American Centrifuge, the use of the average annual
11 concentration value is a legitimate approach that's
12 consistent with NRC regulation and we don't think
13 there's anything misleading in the application.
14 There's a number of points. But I agree with your
15 statement.

16 JUDGE McDADE: Is the NRC staff in a
17 position to comment on this?

18 MS. ZOBLER: Your Honor, this is Marian
19 Zabler. The comments I'd like to make -- excuse me.

20 JUDGE McDADE: Hello?

21 MS. ZOBLER: I'm sorry, Your Honor, we're
22 having -- we had a little technical problem.

23 I would first like to point out, as Mr.
24 Silverman has, that a lot of this new information that
25 was just provided is nowhere found in the original

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1 PRESS contention and as such, doesn't, couldn't be
2 used to support the admission of the contention 8. We
3 do agree with the part 20 analysis which does provide
4 that one way to show compliance was 20.1301 is to
5 demonstrate that the average annual concentration of
6 radioactive material releases in liquid effluents at
7 the boundary of the unrestricted area does not exceed
8 certain levels in Table 2.

9 I'd also like to reiterate that the
10 section that PRESS does refer to in its initial
11 petition does relate to a description of the general
12 condition of the site as found, be it as a result from
13 the GDP operations or other operations and is not
14 related to potential effect from the ACP.

15 JUDGE McDADE: Okay. Judge Wardwell, did
16 you have a question?

17 JUDGE WARDWELL: Yes, you mentioned that
18 in regards to part 20 it does state that the average
19 annual concentrations will be used, but also, if I
20 understand USEC correctly that there is a requirement
21 to monitor the effluent. Is that correct?

22 MR. SILVERMAN: This is Don Silverman.
23 There are at least two ways in the regulation to
24 demonstrate compliance. One is to do a dose analysis,
25 another is to monitor the effluents at the release

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1 point, not in the river and to determine that those
2 effluents do not exceed the part 20, table 2 limit.
3 That is the method that has been used and is
4 appropriate under the regulation.

5 JUDGE WARDWELL: And back to the NRC
6 staff, is there any requirement in a license
7 application to look at how those effluents might
8 impact river concentration, flow regimes or is it
9 strictly limited to the concentrations?

10 MS. ZOBLER: Could you repeat that, Your
11 Honor, sir, I didn't hear the last part of your
12 question.

13 JUDGE WARDWELL: I'll give it a try. Are
14 there any requirements under part 20 or for any
15 historical license applications where you've asked
16 applicants to look at the discharge of that effluent
17 into various flow regimes within a receiving body in
18 order to determine the concentration in that receiving
19 body rather than just use average annual
20 concentrations?

21 MS. ZOBLER: Your Honor, I can't speak to
22 whether we've ever required anything in a specific
23 license for unique circumstances, but as a general
24 rule, there are a number of ways that the compliance
25 of part 20 could be demonstrated. And one of them is

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1 related to whether there are off-site doses to
2 individual members of public and that could be either
3 looking at the effluents from the source or evaluation
4 of the dose which could include the pathway flowing
5 from a river.

6 JUDGE ABRAMSON: Would those evaluations
7 -- this is Judge Abramson -- would those evaluations
8 look at peaks over the course of a year, or would they
9 look at annual averages?

10 JUDGE McDADE: Or a low flow?

11 MS. ZOBLER: If you can give me a minute,
12 Your Honor.

13 I'm sorry, Your Honor, usually our
14 regulations are provided in terms of dose as an amount
15 per year. It would be based on a very technical dose
16 model.

17 JUDGE ABRAMSON: It might be a dose per
18 year and you might get it all in a millisecond or you
19 might get it over a year and the NRC -- our regs are
20 indifferent to that?

21 MS. ZOBLER: Well, we do have some
22 requirements about not to exceed a certain dose in an
23 hour, if an individual were in a place in an hour,
24 they could exceed a dose of say .02 rem.

25 JUDGE ABRAMSON: And how could you

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1 evaluate that number if you don't know what the peak
2 dose is being carried down the river?

3 MS. ZOBLER: Well, with respect to this
4 particular license application, Your Honor, the
5 applicant has indicated that they don't anticipate any
6 discharge from the source and we would then do our
7 evaluation based on what the applicant has provided us
8 in their application.

9 JUDGE ABRAMSON: So then let's back up to
10 the real meat of this which is we've been talking
11 about evaluation of historic discharges. Is that
12 correct?

13 MS. ZOBLER: Yes, Your Honor.

14 JUDGE ABRAMSON: And what's the relevance
15 of that, help me out. What's the relevance of that in
16 the context of the application to build a new base
17 line or what's it got to do with a new application?

18 MS. ZOBLER: Your Honor, I think you said
19 it correctly. It's a baseline, so that the staff
20 knows the current condition of the site.

21 JUDGE ABRAMSON: Okay.

22 JUDGE McDADE: Does PRESS which to respond
23 to anything that was just said by Mr. Silverman or Ms.
24 Zabler?

25 MR. TODD: Just one point and that was

1 that simply to say that we were answering the question
2 "What, if anything, is erroneous, deficient or
3 otherwise flawed in USEC's analysis of the potential
4 uranium concentrations in the Scioto River?"

5 JUDGE McDADE: Now in number 11 you talked
6 about the environmental report being inadequate in its
7 assessment of the potential environmental impact of
8 the APC found in surface water in a piped-in area.
9 What specifically is deficient? Do you have anything
10 further or is that covered in what you --

11 MR. TODD: No, I have -- we will address
12 this historic question later. Is that correct?

13 JUDGE McDADE: I mean if the historic
14 question was with regard to the gaseous diffusion
15 plant, I think that was part of the same contention,
16 so --

17 MR. TODD: Okay, so first of all, I -- in
18 the NRC staff and the USEC responses to this petition,
19 there was a good deal made of our comments about
20 security concerns and all this. I spoke to the author
21 of this contention yesterday and it turned out that
22 one of the points that she was making was that it's a
23 very frustrating passage, the passage between -- this
24 is the environmental report now, not the main body of
25 the license application -- between pages 318 and 323,

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1 very frustrating for us with only public access,
2 because there are nine inaccessible references there
3 in six pages.

4 There are three figures, figure 3.4.1-1;
5 3.4.2-1; 3.4.2-2 that are referred to in this passage
6 that we can't read. Plus, there are four references
7 to USEC-02 which I explained about earlier and two
8 other figures that we can't read.

9 And the types of things those figures have
10 are pictures of the DOE environmental restoration
11 quadrants, the GDP license application safety analysis
12 report, ponds and lagoons on the USDOE reservation,
13 USDOE reservation drainage map and elevation of
14 roadways. So really we haven't had a very good
15 opportunity to respond to the substance of this
16 because it's very difficult to follow the argument
17 with such big gaps.

18 JUDGE McDADE: Let me ask this of the NRC
19 staff, why has that not been available for them?

20 MS. ZOBLER: Well, initially, some of the
21 parts of the environmental report were withheld for
22 proprietary, as well as security-type information.
23 Then we subsequently made some of that information
24 available, but that information was withheld for
25 security and proprietary reasons.

1 JUDGE McDADE: Okay, the figures that were
2 just specifically referenced doesn't appear to impact
3 security issues. Would they?

4 MR. TODD: Are you asking me, Your Honor?

5 JUDGE McDADE: No, I was asking the USEC
6 and the NRC staff. I assume you want access to it.
7 I'm just simply asking does there remain a reason to
8 withhold that from PRESS?

9 MR. SILVERMAN: Your Honor, this is Don
10 Silverman, we're checking now. It would be helpful --

11 MR. TODD: They are on page 324 et al.

12 MR. SILVERMAN: It would be useful to have
13 the figure numbers again if Mr. Todd wouldn't mind.

14 MR. TODD: Okay, they start at 3-24. The
15 figure numbers -- that was the page number -- figure
16 numbers. They are 3.4, they're all 3.4. 1-1, 2-1, 2-
17 2 and also 3-1 which is the elevation of roadway.

18 MR. SILVERMAN: This is Don Silverman.
19 While we are looking at that, I do not recollect any
20 reference to the absence. I could be wrong, to the
21 absence of those figures.

22 JUDGE McDADE: I mean again, one of the
23 issues here is sort of the breadth with which the
24 contention is written which has to do with a general
25 statement that the ER is inadequate in its assessment

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1 of the environmental impact on the surface and
2 groundwater.

3 MR. TODD: I have some comments.

4 JUDGE McDADE: What we were looking to do
5 is sort of get from PRESS here some specifics of
6 exactly what they believe is inadequate about it. And
7 if I understand what PRESS has just said and please,
8 Mr. Todd, correct me if I'm wrong is that so far you
9 haven't been in a position to make an appropriate
10 assessment of the adequacy of the ER being -- withheld
11 information or is there more to it?

12 MR. TODD: That's partially true, but
13 that's actually covered in a separate contention. I
14 think we did make this point about unnecessary
15 redactions in a separate contention.

16 JUDGE McDADE: Is there anything further
17 that you can point to in your submission with regard
18 to why you believe the ER is inadequate in this and
19 what I would like to do is rather delaying here, to
20 ask Mr. Silverman to look into this particular issue
21 and just advise us in writing within the next week
22 whether or not in your view, those sections could be
23 made available, in the event they were made available,
24 the issue would then be whether or not PRESS under
25 2.309(c) or 2.309(f) would be able to appropriately

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1 end their contention, specifically, that the
2 information was not previously available, it's
3 material and they submit it in a timely fashion after
4 getting it.

5 If USEC could, within the next week, just
6 let us know about whether or not those materials can
7 be turned over. If so, to turn them over; if not, to
8 just briefly describe --

9 MS. ZOBLER: Your Honor, excuse me, this
10 is Marian Zabler from the staff. The staff would like
11 an opportunity to address the question as well.

12 MR. SILVERMAN: Ms. Zabler, I'd be happy
13 to do it. Would you like us to go first, because I
14 don't feel that we've finished making our points on
15 this issue. However you'd like to proceed.

16 MS. ZOBLER: I meant with respect to the
17 written filing that the Judge had asked for.

18 JUDGE McDADE: What is the NRC Staff's
19 position.

20 MS. ZOBLER: With respect to the figures
21 that Mr. Todd referenced, upon getting a chance to
22 look at them, they do appear to contain detailed site
23 information which under our security criteria we
24 determined should be withheld from the public.

25 JUDGE McDADE: Could you just simply say

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1 that in a submission?

2 MS. ZOBLER: We could memorialize that,
3 yes sir.

4 JUDGE McDADE: Okay. Judge Abramson?

5 JUDGE ABRAMSON: Mr. Todd, this is Judge
6 Abramson again. Can you hear me all right?

7 MR. TODD: Yes, I can, sir.

8 JUDGE ABRAMSON: I understand there are
9 some figures that describe the site are not supplied,
10 not available to you. Can you tell from reading the
11 application or this portion of the application what
12 analysis they did, even though you can't access the
13 details of the local site conditions?

14 MR. TODD: Well, fortunately, I think our
15 -- the bases that follow that contention are
16 references to some reports and I think maybe the first
17 two of those provide some of the details that are
18 redacted in the application.

19 So we can still get a fairly good idea.
20 I have some points --

21 JUDGE ABRAMSON: Please, we'd like to
22 understand what you think is missing. We understand
23 you don't have access to certain details of the site
24 conditions, physical conditions, but you still should
25 be able to tell what the analysis looks like and tell

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1 us where you think it's deficient.

2 MR. TODD: Sure. In Section 3.4.1,
3 groundwater, the first paragraph there has a sentence,
4 "the hydraulic properties of these units and
5 groundwater flow at the sites have been well defined."
6 In other words, the properties of the different
7 geological layers, we know how fast water goes through
8 those, but unfortunately, the surfaces and the
9 dimensions of the gallia and various strata haven't
10 been described very well.

11 JUDGE ABRAMSON: I'm sorry, this is Judge
12 Abramson again, when you say "haven't been described
13 very well" is that because they're in figures and
14 reports you can't access?

15 MR. TODD: I believe they're not in the
16 application.

17 There's a lot of discussion in the pages
18 3-18 through 3-26. That's where I'm focusing my
19 attention here, about Little Beaver Creek. Now Little
20 Beaver Creek is at the north of the reservation and I
21 believe that not much effluent from the ACP is
22 necessarily going to go there. So there's some
23 superfluous material. That's not a deficiency, of
24 course.

25 Now underneath where -- and we're on page

1 318 here, still in 3.4.1 groundwater, underneath the
2 description of the quadrant, last paragraph on the
3 page, it says "in the southern portion of the ACP,
4 groundwater discharges to Bigrun Creek" -- that's
5 B-I-G-R-U-N -- and the unnamed southwest drainage
6 ditch, along the western boundary of the site, the
7 west drainage ditch, so to the local discharge area
8 for the geological unit. And there again, it's --
9 there's not enough information there to discover
10 whether the regular discharges that are described in
11 the application, whether they're going to build up to
12 levels that are not permitted by the regulations.

13 On the next page, 319, top paragraph,
14 groundwater recharge and discharge areas of the sites
15 are also affected by manmade features including the
16 storm sewer system. There's no presentation of the
17 dimensions of any storm sewer system, so if you were
18 to model the hydrology around here, it would be
19 impossible to determine how much of it went into the
20 storm sewer system because --

21 JUDGE ABRAMSON: Mr. Todd, let me
22 interrupt you for a second. I have a sort of
23 underlying fundamental question here again.

24 MR. TODD: Sure.

25 JUDGE ABRAMSON: You're focusing on what

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1 the groundwater discharge would be and how it will be
2 altered by the implementation of the ACP, is that
3 correct?

4 MR. TODD: It's more to do with how the
5 local water system works and what's the distribution
6 of pollutants in the effluents, where all that stuff
7 is going to go.

8 JUDGE ABRAMSON: Now let me understand
9 what I heard correctly. I think I heard this question
10 from the staff, did I hear from the staff that the
11 Applicant has advised the staff in the application
12 that there will be no radioactive products, no uranium
13 released to the groundwater and surface water?

14 MS. ZOBLER: That is correct, Your Honor.
15 That's our understanding of the license application.

16 JUDGE ABRAMSON: If that is the case then,
17 Mr. Todd, what is it you're concerned about? If the
18 application says there will be uranium discharge, what
19 concern are you raising? What is it about this
20 application?

21 MR. TODD: I'd like to challenge the NRC
22 staff's interpretation there. I believe I saw a table
23 today describing regular discharges of uranium,
24 perhaps USEC could confirm that.

25 JUDGE McDADE: Well, discharged from the

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1 gaseous diffusion plant or discharged from the
2 proposed --

3 MR. TODD: ACP.

4 JUDGE McDADE: Let's ask the applicant.
5 Mr. Silverman, which way is it? Is ACP certifying
6 there will be no discharges of uranium or has the ACP
7 application indicated there will be some discharges?
8 Let's deal with the ACP, not associated with the
9 historic.

10 MR. SILVERMAN: Understand. Bear with me
11 one second, Your Honor. I'll have the answer for you,
12 I hope.

13 (Pause.)

14 MR. SILVERMAN: This is Don Silverman
15 again. My understanding is there will be from the ACP
16 no uranium discharged to the groundwater. There are
17 other discharge points.

18 JUDGE ABRAMSON: What does that mean?

19 JUDGE ABRAMSON: I'm going to ask Greg
20 Fout to just elaborate on that.

21 MR. FOUT: The facility is designed --
22 this is Greg Fout -- the facility is designed with
23 liquid effluent tanks and if there's an excursion
24 within the process buildings, that water drains to
25 those tanks. That is checked by operator rounds. If

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1 it's discovered that there is water in that, it will
2 be analyzed. It will be pumped into containers. If
3 it meets the release criteria, it will be sent through
4 the 6619 sewage treatment plant. If it's higher than
5 the acceptable limits to go through this facility, it
6 will be containerized and shipped to a commercial
7 facility for disposal.

8 JUDGE WARDWELL: This is Judge Wardwell.
9 So if that's correct, if there happens to be any
10 unanticipated leakage from any of these facilities
11 that you're talking about that's controlling this,
12 that would be a violation then regardless of the
13 results of concentrations in any of the receiving
14 bodies, for instance, the groundwater.

15 MR. SILVERMAN: No, Your Honor. This is
16 Don Silverman. I don't think it's necessarily a
17 violation if you have a leak or an event.

18 JUDGE WARDWELL: Well, you're contending
19 here that there are no -- you're using the phrase
20 discharged to mean in regards to a licensed known
21 discharge then when you state that there are no
22 uranium discharges to groundwater that you're not as
23 a routine operation applying any uranium to the
24 groundwater. Is that correct?

25 MR. SILVERMAN: That is correct.

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1 JUDGE WARDWELL: I interpreted PRESS
2 meaning something different from that.

3 JUDGE McDADE: Does USEC have anything
4 further on this point?

5 MR. SILVERMAN: We do, Your Honor. Don
6 Silverman again. I'd like to begin pretty much the
7 way I began with the last contention and that is we're
8 hearing references to language and sentences and
9 references in the license application that do not
10 exist in the petition or the bases. This is new
11 information which we did not think was contemplated by
12 the Board's order. It's not contained in existing
13 filings and we haven't had an opportunity to respond
14 to these in the past.

15 The contention itself, I'd like to just
16 remind the Board is one that raises the issue of the
17 adequacy of our assessment of the impact of the
18 American Centrifuge Plant, yet the sections of the
19 environmental report that are cited by PRESS and in
20 fact that have been discussed here today, all relate
21 once again to historical background information on the
22 GDP facility. Chapter 3 is description of the
23 affected environment. That is background bases
24 information, baseline information for the
25 environmental report.

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1 The bases that are cited by PRESS here are
2 several reports that they did not provide and some
3 correspondence which they did not provide and little
4 or none of what they have addressed today has been
5 raised in their petition.

6 JUDGE McDADE: Anything further?

7 MR. SILVERMAN: No, Your Honor.

8 JUDGE McDADE: From the NRC staff, Ms.
9 Zabler?

10 MS. ZOBLER: Yes, Your Honor. Just a
11 couple of points of clarification. First, when I was
12 discussing what USEC said in their application, I
13 didn't want it to be confused that this is in any way
14 the staff agreeing or disagreeing with the license
15 application. Simply I am noting what it is that the
16 licensee or the applicant, I should say, has proposed
17 in its application. Our review is of the application
18 as presented to us.

19 The other point I'd like to make with
20 respect to the figures that Mr. Todd claims were
21 missing or withheld from the public, nowhere in the
22 initial PRESS contention did he claim that any of
23 these figures, the withholding of these figures were
24 either inappropriate or somehow prevented him from
25 articulating his contention 11. He simply referenced

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1 the fact that these figures had been withheld, but
2 given the questions presented today by the Judges,
3 we'd be happy to discuss the withholding of those
4 figures in a future, written filing.

5 JUDGE McDADE: Okay, if you could within
6 the next week, we'd appreciate it.

7 MS. ZOBLER: Within the next week, Your
8 Honors.

9 JUDGE McDADE: Is that adequate or would
10 you need longer?

11 MS. ZOBLER: Do you mean by this Friday or
12 say a week from Friday?

13 JUDGE McDADE: Mr. Todd, did you have
14 anything further?

15 MR. TODD: Yes, Your Honor. Our basis 11-
16 4, references what's in your report, really a letter
17 from the Ohio EPA. And there was -- it seemed as
18 though none of the parties could find that, so I'd
19 like to explain what that is. It's a letter from
20 Rachel Blumenfield from -- sorry, it's addressed to
21 Rachel Blumenfield, Department of Energy at
22 Portsmouth, Duke Project Office in Lexington. And
23 it's from Maria Gilante, Site Organization, Division
24 of Emergency and Remedial Response Ohio EPA. And it's
25 cc'd to a bunch of people, DOE at Portsmouth, BJC at

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1 Portsmouth, a couple of people and so forth and it's
2 a response to the draft's RBES. That's the risk-based
3 end states report of the DOE which USEC makes liberal
4 reference to in the passage cited in the contentions
5 from 3-18 to 3-26. Those are page numbers. For
6 instance, on page 3-20, sorry, page 3-19, every single
7 paragraph there almost references the risk-based end
8 state.

9 And then let's see, a lot of the standards
10 that USEC is appealing to, for instance, on page 3-22,
11 samples collected at surface water monitoring points
12 in 2002 were analyzed. Oh, by the way, the Ohio EPA's
13 letter was very critical of the risk-based end states.
14 There's a few quotes in here that Ohio -- let's see --
15 we consider the RBES report as an internal exercise by
16 USDOE for stakeholder inputs. Draft RBES report does
17 not provide specific risk-based information on
18 conclusions were reached, specifically concerning
19 groundwater clean up levels. It also makes points
20 about the -- oh, clean up goals being at the unit
21 boundary. Should be at the unit boundary, the point
22 of compliance, rather than the site boundary, so
23 they're concerned about off-site locations being
24 neglected.

25 JUDGE McDADE: So is the gist of what

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1 you're saying, you're using this as a basis for why
2 the ER is inadequate?

3 MR. TODD: Yes.

4 JUDGE McDADE: Since it's noted by the
5 Ohio --

6 MR. TODD: EPA. I'd note that in the
7 entire environmental report, the Ohio EPA, only two of
8 its documents are reference, whereas -- oh, there's
9 one United States EPA report referenced, whereas there
10 are 11 USEC reports referenced and 18 DOE reports
11 referenced. So there's a remarkable thing.

12 JUDGE McDADE: What's the significance of
13 that?

14 MR. TODD: Well, it's -- perhaps I can
15 draw your attention to one part of the environmental
16 report and then answer that question. So here we have
17 on 3-22, there's reference to samples collected at
18 surface water monitoring points in 2002 which it
19 doesn't say which time in 2002, whether it's before or
20 after the gaseous diffusion plant was decommissioned.
21 But it's talking about DOE-derived concentration
22 guides of 100,000 microcuries per liter for 1990
23 technetium and U238 uranium was detected at maximum
24 concentration of 0.51 microcuries per liter which, of
25 course, aside from the fact that that's not really

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1 concentration, it's actually an activity because it's
2 in curies. Also, could be 510 picocuries per liter
3 which is the normal units. And actually, these
4 numbers are incredibly high.

5 If I can turn my attention --

6 JUDGE ABRAMSON: Mr. Todd, excuse me.
7 Judge Abramson again.

8 MR. TODD: Yes.

9 JUDGE ABRAMSON: It sounds to me like all
10 the information you're referring to relates to the
11 current state of the facility. Does any of it have
12 anything to do with the proposed construction and
13 operation of the ADP or is all of this just going to
14 the base state?

15 MR. TODD: I have why the historic issues
16 matter here. I have four points. One is that the
17 historic concerns, especially I wanted to discuss
18 basis 11-3, but maybe I can do that afterwards.

19 JUDGE ABRAMSON: Before you get on to
20 telling me why the historic concerns are important,
21 I'd like to get an answer to the question I just
22 posed, which is does any of the information you're
23 referring to including the letter from the Ohio EPA,
24 have anything to do with the proposed constructed ACP
25 or does it all have to do with assessing the current

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1 state of things at the site? Or is it something else?

2 MR. TODD: These are current state issues.

3 JUDGE ABRAMSON: Thank you.

4 JUDGE McDADE: And you said you had four
5 points on why that's significant in this license
6 application?

7 MR. TODD: Yes. Yes. Maybe I can discuss
8 this other point afterwards, but the point that I want
9 to discuss shows that pollutant do escape the site, so
10 if historically they've escaped the site, then we can
11 expect pollutants also to escape the site under the
12 ACP.

13 Second point is that an accurate, high
14 resolution survey is required, based on the current
15 state, in order to determine what impacts the ACP does
16 have on the land.

17 Third point is about cumulative effects.
18 Will the ACP elevate pollution concentrations above
19 regulation levels? So even if the ACP contribution to
20 pollutants is small, it's going to land on top of a
21 whole bunch of legacy material. And we don't know
22 what that legacy material is.

23 And then part 4 is that the historic
24 patterns show where the pathways are that leads
25 contamination off-site.

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1 The point that I wanted to make, if I
2 could return to the November 2000 report of Sergei
3 Pashenko, USEC, in its reply to our petition, produced
4 a letter by William Murphy of the local DOE, stating
5 that some samples that Dr. Pashenko had taken had --
6 well, what happened was in 2003, PRESS held a press
7 release and announced that we'd found some hot foam
8 that was hundreds of --

9 JUDGE McDADE: Found what?

10 MR. TODD: Some radioactive foam, gross
11 beta radiation at the foot of Bigrun Creek where it
12 meets the Scioto plain. That's near the location of
13 RW2 if you look on page 9-58, figure 9.2-4, it shows
14 the location of surface water sampling points and this
15 water was sampled by WR2. So Dr. Pashenko claims that
16 the sample in question had beta radiation at levels
17 100 times backgrounds.

18 Subsequently, USEC dispatched somebody to
19 go and sample this foam. They were overseen by the
20 Ohio EPA and later, in fact, in February of this year,
21 Mr. Murphy wrote to Vina Colley, President of PRESS,
22 saying they had found levels of 1.1 picocuries per
23 milliliter and 0.3 picocuries per milliliter in their
24 samples which we accept, but then they erroneously
25 concluded that this was normal background level.

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1 Now with assistance from Norm Buske who is
2 a contractor for -- a consultant for ISAR, Norm Buske
3 looked at this letter and spotted that the numbers
4 actually, if you expressed them in normal units of
5 picocuries per liter, are actually 1,100s picocuries
6 per liter and 300 picocuries per liter, respectively,
7 where the -- let's see -- for example, Clinch River
8 water, Oak Ridge site, Tennessee is 2 picocuries per
9 liter; Columbia River water, Hanford site in
10 Washington, 1 picocurie per liter, so we're citing
11 that as backgrounds for water of this kind and that
12 the ambient water quality standard screening level,
13 that's in CFR for the EPA. That's 50 picocuries per
14 liter. So this material was exhibiting high beta
15 radiation. That's at the foot of Bigrun Creek.

16 So this is now documented in a pamphlet
17 called "A Citizen's Guide to Monitor Radioactivity
18 Around the Energy Department's Nuclear Facilities"
19 which explains the methods that Dr. Pashenko used, but
20 it also on page 32 has the explanation for this foam
21 that was referenced in USEC's attachments in their
22 answer to our petition.

23 JUDGE McDADE: Okay, but just very
24 briefly, how does that then relate tot he license
25 application for the ACP?

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1 MR. TODD: Okay, so it is about historic
2 matters. It shows pollutants do escape the sites. It
3 shows a survey is required to determine the base state
4 not only on site, but off site too, so that in future
5 when we're doing our environmental monitoring and we
6 find some hot spot, then USEC can say hey, that wasn't
7 us, that was there at the beginning. So I think it's
8 in everybody's interest to do a good survey around
9 here.

10 I should point out that Dr. Pashenko's
11 visit was a fly-in visit. He was just using field
12 techniques. It's no substitute for a full survey.

13 JUDGE McDADE: Anything else on this
14 contention, Mr. Todd?

15 MR. TODD: I have a small catalog, because
16 of the question that you asked me was to cite specific
17 flaws or omissions, why the environmental report is
18 inadequate in its assessments, potential environmental
19 impacts of proposed ACP on the ground and surface
20 water.

21 JUDGE ABRAMSON: This is Judge Abramson.
22 Before you go down into your laundry list any deeper,
23 let me just make sure I understand what you're concern
24 is. Your concern is we don't have a good measurement
25 of the current state. Is that correct?

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1 MR. TODD: That is a large part of the
2 concern.

3 JUDGE ABRAMSON: And that would be met by
4 them performing a detailed survey, is that correct?

5 MR. TODD: We think that an independent
6 survey is in order.

7 JUDGE ABRAMSON: Let's not get into
8 independent. Let's just say that what you're
9 suggesting is needed is ground survey of the current
10 condition. Is that correct?

11 MR. TODD: That's correct.

12 JUDGE ABRAMSON: Technically sound.

13 MR. TODD: Yes.

14 JUDGE ABRAMSON: Let's not throw rocks
15 whether so and so will do it independently or not.

16 JUDGE McDADE: But the ER is sufficient
17 because it lacks that currently is what you're saying?

18 MR. TODD: Yes.

19 JUDGE McDADE: I'd like to move on because
20 Mr. C has been very patient here with us and would
21 like to hear from him and we need to be wrapping this
22 thing up by about 5 eastern time.

23 Are there any specific regulations in this
24 regard or you wish to point us to, Mr. Todd?

25 MR. TODD: Regulations? I've been

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1 focusing on the petition and the supplemental
2 materials that we referenced. We should supply you
3 with a copy of this "Citizen's Guide" though because
4 it only came out last week. So we should distribute
5 that.

6 JUDGE McDADE: Anything further on
7 contention 11?

8 MR. TODD: Is this the last time I get to
9 address it?

10 JUDGE McDADE: Yes.

11 MR. TODD: Okay, I would like to just
12 point out that on page 3-22, the numbers referenced in
13 the second paragraph there are huge, huge numbers
14 compared with an ambient water quality standard
15 screening level of 50 picocuries per liter.

16 I don't know anything about this DOE-
17 derived concentration guide of 100,000 microcuries per
18 liter. That's a 100 million picocuries per liter for
19 technetium or how 510 picocuries per liter for maximum
20 concentration of uranium 238, how that could be well
21 below DOE-derived concentration guides. Certainly
22 off-sites, I'd suggest that EPA rules would be more
23 appropriate for permitted concentration levels.

24 JUDGE McDADE: Mr. Silverman, anything
25 further?

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1 MR. SILVERMAN: Yes, I will try to be
2 brief, Your Honor, so we can move on. And I think
3 there were two parts of the contention that Mr. Todd
4 referenced, basis 11.4 which is the Ohio EPA letter
5 referring to this risk-based end state report.

6 That letter as we read it, related to Ohio
7 EPA concerns about RCRA compliance, historical
8 compliance, once again, with respect to RCRA
9 materials. RCRA excludes Atomic Energy Act materials.
10 I don't think it's relevant at all. Any concern that
11 Ohio EPA had are relevant at all to this particular
12 project.

13 Reference the risk-based end state report
14 for historical factual information only. The
15 assertions here have nothing to do with the American
16 Centrifuge Plant. I don't even think the Ohio EPA has
17 authority over the radiological discharges associated
18 with this plant.

19 We're continuing, I must repeat, to hear
20 new information that was not presented in the
21 petition.

22 With respect to basis 11.3, Dr. Pashenko's
23 report, I'd like to just -- the report was not
24 provided, was "not available at the time" of the
25 filling of PRESS's petition. It is therefore -- you

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1 know, any references to it at this point are new
2 information. "The Citizen's Guide" in particular,
3 just came out last week, apparently. That's new
4 information and none of this raises any issue or
5 deficiency with respect to the impacts of the American
6 Centrifuge Plant.

7 MS. COLLEY: Could I mention one thing?
8 This is Vina Colley, about the report from Dr.
9 Pashenko? We did release a press release in 2003 that
10 this problem was there.

11 JUDGE McDADE: Thank you. Ms. Zobler,
12 anything from the NRC staff on this?

13 MS. ZOBLER: Yes, Your Honor. Just to be
14 brief and not to repeat, other than to say Mr. Todd
15 has made certain assertions and statements of a
16 technical nature with respect to the environmental
17 report in the license application, none of which can
18 be fully assessed and evaluated, upon hearing these
19 for the first time and therefore would lack any kind
20 of basis to support the admission of contention 11.

21 JUDGE McDADE: Okay. One of the things
22 we're looking for is the corroboration on what is
23 already in the contention, that is already before us
24 so that we can start to understand what is before us
25 in ruling on the contention.

1 Now with regard to contention 13 --

2 MR. TODD: Ewan Todd here, we don't have
3 much to say on this one. The contention is more about
4 decommissioning funding than it is about tails.
5 You'll recall that the calculation we showed showed
6 that tails is going to be much smaller in volume than
7 even the feed or the product for this process, for the
8 ACP process.

9 Also, this is not the LES proceeding with
10 the NEF, we're not so much interested in tails.

11 Plus, we believe that Geoffrey Sea's
12 petition covers financial issues much better than ours
13 does. I would, however, like to just register that we
14 object to the idea of modular funding.

15 JUDGE McDADE: Okay. And with regard to
16 the last contention, we want to move on here. There
17 is an allegation here with regard to past enforcement
18 actions taken against USEC.

19 MR. TODD: Right.

20 JUDGE McDADE: At least what I was about
21 to discern, there was nothing in there indicating that
22 any of the people who were the basis for the
23 enforcement actions in the past are going to be in any
24 way connected with the ACP, if it gets approved, or
25 that any of the procedures that were the basis of

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1 enforcement actions in the past are going to be
2 incorporated into the procedures of the ACP.

3 Do you have any evidence in the record
4 that indicates that any of those people or features
5 will be involved in the proposed ACP?

6 MR. TODD: Yes sir, the license
7 application, page 1 shows us that the existing
8 facilities will be refurbished to accommodate the ACP,
9 so the same facilities. I'd suggest, although I
10 wasn't able to find an organizational structure for
11 the gaseous diffusion plant, but I'd suggest that the
12 organizational structure is remarkably similar. This
13 is talk you're going to process.

14 In page of the environmental report,
15 there's a quote here. It says "No sites other than
16 the DOE reservation in Piketon, Ohio or PGDP" meaning
17 Paducah, I presume "offered the unique combination of
18 existing skilled work force and existing environmental
19 data, regulatory programs and infrastructure relevant
20 to uranium enrichment." That suggests that USEC
21 intends to draw from the same population of people and
22 to apply the same techniques as they did at the GDP.

23 Regarding corporate identity, the license
24 application 147, Section 1.2.1, called corporate
25 identity says "the NRC has issued certificates of

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1 compliance to the United States Enrichment
2 Corporation, a wholly-owned subsidiary of USEC to
3 operate Paducah and portions of GDPs." This is to
4 persuade the NRC of their experience, but it also
5 shows there isn't so much difference between the GDP
6 operators and the ACP operators.

7 Let's see, the license application has
8 examples of extrapolation, for example, in Section
9 1.3.4 they use flood history which uses historical
10 data and a third party model by the U.S. Army Corps of
11 Engineers. Historical data from 1930 to 2001 to
12 predict that the ACP site will not be flooded.

13 Here, we've presented some historical
14 data. The staff again, made an error in saying that
15 the latest was in 1999, I believe they said. Here's
16 how it goes. There's two in 1997; five in 1998; four
17 in 1999; two in 2000, one in 2001; then the Piketon
18 Plant went on standby, cold standby, so the incident
19 goes down.

20 In 2001, there's one. USEC had a break in
21 2003. There wasn't an enforcement action notice there
22 and in 2004, there's a new one which is also in the
23 same subject as the Level 2, the Level 2 assessment.
24 It concerns the quality control managers suspended and
25 terminated for raising safety concerns. That's DA-

1 04123.

2 So the argument is that if USEC has 15
3 enforcement actions in seven years, then we have no
4 other baseline data to assess how frequently these are
5 going to occur in the future. Then over the course of
6 30 years, we can expect that they shall receive 60,
7 including four level 2 assessments.

8 The part of CFR here in -- let's see,
9 76.35 contents of application, A4 says an assessment
10 of accidents based on the requirements of 76.85.
11 76.85 is one paragraph and it says "the corporation
12 shall perform an analysis of potential accidents ...
13 Special attention must be directed to assure that
14 plant operation will be conducted in a manner to
15 prevent or mitigate the consequences from a reasonable
16 spectrum of postulated accidents." And then later on
17 in the same paragraph it says "plant operating history
18 relevant to the assessment shall be included."

19 JUDGE McDADE: Anything further?

20 MR. TODD: No, that's it.

21 JUDGE McDADE: Mr. Silverman, do you wish
22 to respond?

23 MR. SILVERMAN: Yes, Your Honor. Again,
24 hopefully, briefly. Your question to the intervenors
25 was are there any individuals or operational

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1 procedures that were involved in the prior cited
2 enforcement actions that would be employed or used at
3 the American Centrifuge Plant and Mr. Todd has not
4 identified any and frankly, he cannot because the
5 operating organization and the operating procedures
6 for the new centrifuge plant have not been developed
7 yet.

8 In other words, the individuals who will
9 be performing those operating functions and the
10 procedures they will use, have not been decided yet.
11 The fact that some existing facilities on the site
12 will be used is irrelevant.

13 In addition, with respect to the
14 enforcement actions, the intervenors cite enforcement
15 actions that go back five to seven years, and Mr. Todd
16 has indicated that they have no other baseline data to
17 predict the future.

18 Well, in fact, as we indicated in our
19 response, there is considerable more recent baseline
20 data that for which you could predict the future.
21 There are fewer violations now, as USEC has become
22 much more experienced in operating the GDP. There are
23 the licensee performance reviews which are integrated
24 reviews performed by the staff on a regular basis for
25 the last five years that conclude USEC has operated

1 its plant safely.

2 There are reports to Congress that
3 conclude that and there is the most recent certificate
4 of renewal, certificate of compliance renewal by the
5 staff to USEC for the full five-year term which the
6 staff had the discretion to issue even a one-year
7 certificate if they were uncomfortable with USEC's
8 performance. None of that data is mentioned by the
9 intervenors.

10 And then finally, the references by Mr.
11 Todd to part 76, the regulations are inapplicable.
12 They have nothing to do with the American Centrifuge
13 Plant. That is a regulation that applies only to the
14 certificates of compliance for a gaseous diffusion
15 plant.

16 JUDGE McDADE: Thank you, Ms. Zabler, does
17 the NRC staff have anything further?

18 MS. ZOBLER: Yes, Your Honor. I think Mr.
19 Todd mentioned a number of enforcement actions which
20 were not originally mentioned in their initial
21 petition. If I heard him correctly, a review of their
22 petition indicates that the most recent violations
23 were in 1999.

24 In addition, if you were to read through
25 the staff resolution, or the staff and the licensee's

1 resolution of the bases for those enforcement actions,
2 they were all resolved to the satisfaction of the
3 staff and with appropriate corrective actions taking
4 place.

5 JUDGE McDADE: All right. Thank you.

6 Okay. I think -- Judge Abramson, do you
7 have any other questions of PRESS? Judge Wardwell?

8 Okay. I think that's it for our questions
9 for PRESS right now. We'll turn now to Mr. Sea. It
10 has taken us a long time to get to you.

11 Before we start having questions, I do
12 want to note that we did receive yesterday a motion
13 for leave to file amended petition. Mr. Silverman,
14 did you receive a copy of that?

15 MR. SILVERMAN: I did, Your Honor.

16 JUDGE McDADE: And, Ms. Zobler, did the
17 NRC staff?

18 MS. BROCK: This is Sara Brock for the NRC
19 staff. Ms. Zobler did, though in terms of the -- the
20 certificate of service, only Ms. Zobler was on it, and
21 we do have multiple attorneys who have entered
22 appearances in this case.

23 JUDGE McDADE: Okay. Mr. Sea?

24 MR. SEA: I will say that on previous
25 filings I included all of the NRC attorneys. I had

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1 asked yesterday -- because I am in the midst of moving
2 my office, I didn't have access to the computer that
3 has my hard disk. I did ask the ASLB law clerk to
4 e-mail me the distribution list for the case, because
5 I did not otherwise have it available. And I used
6 that list as she e-mailed it to me.

7 So if there were omissions, that is the
8 reason. And I will correct that in the future.

9 JUDGE McDADE: Okay. If you could, just
10 contact the NRC staff after this conference call and
11 make sure that you and they are on board as to who
12 they --

13 MR. SEA: I do -- on previous filings, I
14 did include those other counsel. And I would have if
15 I had had those names available yesterday.

16 JUDGE McDADE: I appreciate that. And let
17 me just note that, at this point in time, in the
18 motion you filed you indicated that you had no
19 objection to the conference call schedule -- that it
20 pertained to matters already raised in the existing --

21 MR. SEA: Correct.

22 JUDGE McDADE: -- additional filings in
23 the future. So with regard to your motion, it seems
24 that there's nothing for us to rule on at this point
25 in time. If and when additional filings are

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1 submitted, you know, as I indicated earlier in our
2 discussion, that 309(c) that would be needed --
3 whether to support a subsequent filing in that.

4 So what we would do is just simply wait.
5 If and when you make an additional filing, we will
6 review it, and the other parties will have an
7 opportunity to comment on it, both substantively
8 and --

9 MR. SEA: I could only hear parts of what
10 you just said. I'm sorry.

11 JUDGE McDADE: Okay. What I was saying is
12 that there does not appear to be anything for us to
13 rule on on your motion at this point in time. If and
14 when you send in an additional filing, the other
15 parties will have an opportunity to comment on it,
16 both substantively and procedurally.

17 And just note procedurally that with any
18 subsequent filing there are requirements under the
19 regulation 2.309(c) and 2.309 (f) procedurally that
20 you would have to establish in order to support any
21 additional filing. But that's something that, if and
22 when you do submit an additional filing, we can
23 address after we've had an opportunity to hear from
24 the other parties on it.

25 Are there any questions with regard to

1 that?

2 MR. SEA: I appreciate that. The reason
3 I made a point of filing that yesterday was so that
4 the Judges could take into account in making a
5 schedule -- a hearing schedule that an additional
6 filing was anticipated, and would have come very
7 quickly were it not for the fact that the scheduled
8 tour of the archaeological site near the river that's
9 on DOE property, which was scheduled last Thursday,
10 was canceled by the Department of Energy and needs to
11 be rescheduled. And that is a very essential part of
12 my -- the planned additional filing.

13 And I'm not exactly sure how to deal with
14 this in terms of relationship between DOE, NRC, and
15 the applicant.

16 JUDGE McDADE: Well, Mr. Sea, at this
17 point in time, one of the issues that you will have to
18 describe in any amended application, any amended
19 contention, will be why it wasn't submitted earlier.
20 So, you know, your discussions with DOE, why that's
21 necessary, that all would be part of your application.

22 But at this point in time, we appreciate
23 it that you have notified us that there may be an
24 additional filing submitted. And if and when that
25 filing is submitted, we'll deal with it. But

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1 meanwhile, we are going to be moving forward, ruling
2 on the contentions that we have. And what we're going
3 to do is give you an opportunity here today to discuss
4 issues before us and --

5 MR. SEA: Very well. Would it be possible
6 for me to ask for guidance on one question? Because
7 the DOE problem will hold up a filing on that
8 particular issue. It's an important issue, but it's
9 not the only issue. Would you recommend that I go
10 ahead and make a filing -- an amended filing
11 pertaining to the other issues? Leaving that issue --
12 leaving that outstanding.

13 JUDGE McDADE: We're in no position to
14 make a recommendation to you. What you submit, we
15 need to adjudicate, and we can't be --

16 MR. SEA: Okay.

17 JUDGE McDADE: -- advising you and at the
18 same time adjudicating. The regulations 2.309(c) and
19 2.309(f) specify what it is that you need to submit
20 procedurally. One of that is demonstrating that you
21 are submitting things as quickly as you reasonably
22 can. But the idea is not to have things come in in
23 dribble and drabs. The idea is to have this
24 adjudication move forward in a linear fashion.

25 MR. SEA: I understand, and that -- I'm

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1 performing that balancing act, and that's why I asked
2 for guidance. But I understand.

3 JUDGE McDADE: Okay. What I'd like to do
4 at this point in time, and, you know, may wish to
5 discuss with USEC, in fact, whether or not they can be
6 of any assistance in dealing with DOE to arrange the
7 tour that you desire. But that's not something that
8 we can get involved in. I mean, when -- if and when
9 you make an additional submission, we will review it
10 and adjudicate based on it.

11 Secondly, at this point in time, what I'd
12 like to do with regard to what's already been
13 submitted is just a clarification. Other than the
14 license from the NRC here, are there any other federal
15 licenses, permits, approvals, that must be obtained by
16 USEC in connection with the ACP from your standpoint
17 that you are aware of that you'd like to draw to our
18 attention?

19 MR. SEA: Yes. Well, I think I may
20 facilitate things here by condensing a number of the
21 questions as they were laid out into one response
22 possibly. And that is by saying that while it's not
23 exactly a permit, compliance with the National
24 Historic Act and related legislation, and one of the
25 questions was: what other related legislation is

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1 involved?

2 And I will mention that the two important
3 ones are the Archaeological Resources Preservation Act
4 and what's usually referred to as NAGPRA, which stands
5 for the Native American Graves Protection and
6 Repatriation Act. Those are two federal -- pieces of
7 federal legislation that are often consolidated into
8 NHPA reviews, but that have some of their own
9 provisions. And I can provide citations for those
10 acts, if necessary.

11 JUDGE McDADE: It's not necessary. But
12 let me just ask specifically with respect to the
13 National Historic Preservation Act, is it your
14 contention that the National Historic Preservation Act
15 puts any obligation at all on the USEC as opposed to
16 the NRC? And, if so, how and what?

17 MR. SEA: Okay. Yes. It doesn't do that
18 directly, meaning that the responsibility for
19 compliance with the NHPA and -- as with all federal
20 statutes, including NEPA, rests with the agencies. So
21 the responsibility rests with DOE and with NRC.

22 However, NHPA compliance is an exactly
23 parallel process as NEPA compliance. And so just as
24 we engage in very lengthy deliberations where -- about
25 USEC's compliance with the provisions of NEPA, as

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1 elaborated in regulations of the NRC and other
2 agencies, the very same principles apply to compliance
3 with NHPA.

4 In other words, the agency transfers -- in
5 this kind of a case transfers its responsibility for
6 compliance to the contractors or license applicants,
7 as the case may be, that are involved with performance
8 of the work, or with doing the assessments.

9 And there is a provision within NHPA that
10 says that specifically, and that is Section 112, which
11 places the -- which concerns the transfer of authority
12 -- not the transfer. I'm sorry, that's the wrong
13 word. Which concerns the fact that the agency's
14 responsibility for compliance with NHPA includes the
15 responsibility for ensuring that all of its
16 contractors, employees, and licensees also comply with
17 the Act and the performance standards placed upon
18 them.

19 JUDGE McDADE: Okay. Under NRC
20 regulations, specifically Section 51.45(b), it
21 requires that the applicant's environmental report
22 include a description of the environment affected.

23 MR. SEA: Yes.

24 JUDGE McDADE: That seems to be the
25 difference between you and USEC, that they've

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1 described the environment affected as the site, and
2 you're arguing that it should be broader than that.
3 Is that correct?

4 MR. SEA: Well, first of all, NEPA
5 includes protection of cultural resources. And there
6 is often confusion in this area. There is a NEPA
7 requirement to --

8 JUDGE McDADE: Before we -- before we get
9 into that, the question, can you answer it? The
10 question was: under 51.45(b), there is a requirement
11 that the applicant include a description of the
12 environment affected. You know, as I --

13 MR. SEA: Yes.

14 JUDGE McDADE: -- understand USEC, they
15 are saying that the environment affected includes the
16 facility, when it comes to historical and cultural
17 resources, and you're saying that it's broader than
18 that.

19 MR. SEA: Oh, of course it's broader than
20 that. Yes, obviously.

21 JUDGE McDADE: That's the difference
22 between your position and USEC's position. Is that
23 correct?

24 MR. SEA: Yes. It makes no sense to say
25 that it -- and it -- it's a ridiculous conflation of

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1 the meaning of the terms to say that the environment
2 that USEC is responsible for is essentially only the
3 inside of the buildings that it will be occupying and
4 operating in.

5 JUDGE McDADE: Is there anything in your
6 application that indicates that there will be an
7 impact of the -- on historical and cultural resources
8 offsite? Is there anything specifically in your
9 application that describes that the impact would be?

10 MR. SEA: Well, both onsite and offsite.
11 We should not exclude onsite effects on -- there are
12 historic cultural resources onsite as well as offsite.
13 So I'll deal with those in turn.

14 Onsite there are two areas of the site --
15 of DOE land not identified in USEC's environmental
16 report that clearly contain Earthworks on them on
17 underneath them. One is the pump field along the
18 banks of the Scioto River that was built and the land
19 was acquired for the purpose of supplying a centrifuge
20 plant.

21 Now, that was done in the 1980s when DOE
22 intended to build a centrifuge plant on its own in
23 those same buildings. But that was -- should be,
24 under NHPA, considered a precursor to USEC's project.
25 In other words, it's all part of the same federal

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1 activity. From the Federal Government's point of
2 view, it's part of the same activity that -- they
3 acquired that land and built those pumps really on
4 Earthworks.

5 JUDGE McDADE: Yes. We understand, Mr.
6 Sea. Please get on with it.

7 MR. SEA: So that's -- that's an enormous
8 impact that USEC will be fulfilling that -- that
9 original intent, which is to pump water out from
10 underneath those Earthworks. That's a tremendous
11 impact.

12 The second area of the site, there are --
13 where clearly Earthworks are underneath the southwest
14 access road, which was originally built in the 1950s
15 to -- as a construction entrance for the diffusion
16 plant, but which for many years was closed and was
17 grown over with weeds and other material. That road
18 has now been reopened for the purpose of providing
19 access to ACP. It's directly in front of ACP.

20 It's where much of the traffic for ACP
21 currently comes into and exits the plant, and where,
22 if ACP opens, we can anticipate the traffic flow being
23 much greater on that southwest access road. That road
24 has been resurfaced. I don't know if it's been
25 widened, but I suspect it has been. And it has been

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1 painted with fluorescent orange decals.

2 That road is built directly over Hopewell
3 Earthworks, and the alterations to that road were
4 never studied. There was no indication that they were
5 ever studied. No Section 106 process was undertaken
6 for that.

7 JUDGE McDADE: Well, there was no
8 Section 106 at the time, was there?

9 MR. SEA: No. I'm talking about the
10 reopening, resurfacing of that road, which was just
11 done in the past four months.

12 JUDGE McDADE: Okay.

13 MR. SEA: And clearly was done for USEC or
14 ACP. There would be no other reason to reopen that
15 road.

16 So a 106 -- 106 is applicable to that kind
17 of activity. Clearly, there was destruction in the
18 '50s, but to -- to resurface the road and widen it,
19 and bring traffic onto it, is -- constitutes a new
20 activity that definitely falls under 106.

21 All right. That -- that --

22 JUDGE ABRAMSON: Mr. Sea, this is Judge
23 Abramson. Who do you think undertook that activity?

24 MR. SEA: I think that is part of -- I
25 think multiple parties were involved. USEC clearly is

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1 involved. DOE is involved. The site manager, Lata-
2 Parallax, is clearly involved.

3 JUDGE ABRAMSON: I'm sorry.

4 MR. SEA: But the test --

5 JUDGE ABRAMSON: Let me make it simple.

6 In what way was the NRC involved in that?

7 MR. SEA: Is the -- in what way is the NRC
8 involved in that?

9 JUDGE ABRAMSON: Yes.

10 MR. SEA: A study of those kind of impacts
11 should be included in the NRC's 106 review of the
12 centrifuge project, of the ACP.

13 JUDGE ABRAMSON: All right. So that as
14 the NRC performs its obligations under the NHPA, it
15 should consider those. Is that correct?

16 MR. SEA: Well, it remains to be seen.
17 The NRC -- I understand that the NRC's enforcement or
18 -- or active capacity to influence the project is
19 confined to licensing. And so the purpose of the
20 intervention is to say that the 106 concerns, the NHPA
21 concerns and related concerns, must be reflected in
22 the NRC licensing process. And NRC must consider
23 those impacts.

24 And should you, in fact, use those impacts
25 to either deny a license or to alter the conditions

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1 for the license sufficiently that those impacts are
2 mitigated. So NRC yet has -- yet has to show, yet has
3 to implement, its Section 106 responsibilities under
4 -- under NHPA.

5 And NHPA is very clear in Section 106
6 itself --

7 JUDGE ABRAMSON: Let's get on with it. We
8 understand.

9 MR. SEA: Okay.

10 JUDGE McDADE: Okay. I'm trying to focus
11 on -- and I thought I asked before, and I just -- so
12 that I understand it, so let me ask again, because I
13 don't think I got an answer. That at this point in
14 time, obviously there are things that NRC will be done
15 in the future under the National Historic Preservation
16 Act.

17 The obligation -- that the obligations on
18 USEC at this point in time, and specifically asking at
19 this point in time are there any other obligations
20 with regard to cultural/historical sites on USEC,
21 other than that imposed by 51.45(b), which is to
22 identify the environment affected, is there any other
23 obligation on them? And, if so, what -- where does
24 that come from?

25 And, again, not the obligations on NRC,

1 but obligations on USEC.

2 MR. SEA: Well, we didn't talk about
3 offsite impacts. And so if I can briefly talk about
4 some of those.

5 JUDGE McDADE: Well, before you do, can
6 you answer the question? I mean --

7 MR. SEA: Just as -- just as NRC places
8 responsibility on USEC to undertake -- to undertake
9 certain assessments, environmental assessments, in
10 compliance with NEPA, the same is done in reference to
11 NHPA. And it does extend beyond identification.

12 JUDGE ABRAMSON: Excuse me. Excuse me.
13 It's Judge Abramson again. We understand your
14 analogy. What we're asking you is to be very precise.

15 MR. SEA: Okay.

16 JUDGE ABRAMSON: Under what regulation of
17 the NRC --

18 MR. SEA: Okay.

19 JUDGE ABRAMSON: -- does the NRC do what
20 you're suggesting that other agencies do in your
21 knowledge?

22 MR. SEA: Not regulations of the NRC, but
23 regulations -- the implementing regulations of NHPA.
24 And the implementing regulations are -- of NHPA are
25 very specific about what the agency's responsibility

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1 is, and those do transfer to USEC's responsibility.

2 JUDGE ABRAMSON: In what way do they
3 transfer? How --

4 MR. SEA: Okay.

5 JUDGE ABRAMSON: -- legally are they
6 transferred? Not --

7 MR. SEA: One way -- okay. One way is
8 that USEC must engage in the same kind of notification
9 that -- for NHPA that it did for -- in Appendix B for
10 agencies to obtain permits and regulations regarding
11 NEPA. In other words --

12 JUDGE ABRAMSON: I'm sorry. What is the
13 legal authority for that claim, that USEC has an
14 obligation?

15 MR. SEA: The legal authority for that
16 claim is the NHPA implementing regulation -- is NHPA
17 Section 112, which talks about the responsibility of
18 contractors and license applicants. And the section
19 of the implementing regs for NHPA that regard to
20 consulting parties and the identification of
21 consulting parties, and that is at 36 CFR 800.2(c).

22 Now, in addition to consultation, I would
23 say that USEC is also required to engage in
24 undertaking the kinds of studies and research efforts
25 involved in the process of identifying impacted

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1 cultural resources. And that is specified -- and that
2 is specified in 36 CFR 800.4, and I'd like to read
3 that because it's very important language.

4 This is under the heading of "Level of
5 Effort." "The agency official shall make a reasonable
6 and good faith effort to carry out appropriate
7 identification efforts, which may include background
8 research, consultation, oral history interviews,
9 sample field investigation, and field survey. The
10 agency official shall take into account past planning,
11 research and studies, the magnitude and nature of the
12 undertaking, and the degree of federal involvement,
13 the nature and extent of potential effects on historic
14 properties, and the likely nature and location of
15 historic properties within the area of potential
16 effects."

17 JUDGE McDADE: Each of those that you just
18 read talks about the agency official. And what we're
19 concerned with is the jump from the agency official
20 responsibility to the USEC responsibility.

21 MR. SEA: But that's part of the
22 identification effort. If USEC doesn't identify the
23 resources themselves, then how can the agency fulfill
24 its responsibility to conduct studies, field
25 investigations, etcetera? In other words, USEC must

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1 not only identify, in order to comply with NHPA -- I
2 mean, it's not only identify what the resources are,
3 and the impacts, but must inform the agency of the
4 actions necessary.

5 And where Earthworks are involved, clearly
6 that involves -- that has not been identified
7 officially. People know they're there, many local
8 people, and I've provided evidence of that. But
9 clearly the extent of those Earthworks has not yet
10 been determined.

11 And so clearly this is a textbook case,
12 where we need further investigation of those
13 resources. We need archaeological surveys done and
14 other studies, other kinds of studies. At the river,
15 we need hydrological studies. None of those have been
16 done.

17 And so it was USEC's responsibility not
18 just to identify the resources and the impacts, but
19 the steps that the agency would need to take to assess
20 those impacts, and that all needs to be reflected in
21 the scheduling.

22 If USEC is pushing NRC for a licensing
23 schedule that takes no account of this need of -- as
24 identified under NHPA federal law, then it obviously
25 is -- is actively trying to inhibit the agency from

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1 carrying out this legal responsibility.

2 JUDGE McDADE: Okay. Let me interrupt
3 here for a second -- and I'm sorry -- because of the
4 time. I'm not exactly sure when we're going to get
5 cut off on this conference call. So what I'd like to
6 do very quickly is give Mr. Silverman an opportunity
7 to comment on what you've said, specifically
8 addressing my question: what is the obligation of
9 USEC under either the National Historic Preservation
10 Act or under that aspect of NEPA, the National
11 Environmental Policy Act, that requires the government
12 take steps to preserve important historical, cultural,
13 and natural aspects of our national heritage.

14 What's the obligation on USEC? What is
15 the statutory or regulatory basis for that? And have
16 they met? Mr. Silverman?

17 MR. SILVERMAN: Thank you, Your Honor.
18 The obligation of USEC is to provide information and
19 input to the agency to allow the agency to execute its
20 statutory responsibilities under the National Historic
21 Preservation Act.

22 It is not correct to indicate that the
23 agency transfers those responsibilities to the
24 licensee. The statute, the NHPA, and the regulations
25 Part 800, all make that very clear.

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1 Mr. Sea refers to Section 112 of the NHPA,
2 and he keeps indicating that it's applies to
3 licensees. The version that I reviewed only applies
4 to contractors and employees of an agency. It does
5 not apply to licensees. We don't think that is at all
6 relevant.

7 Furthermore, the regulation that he points
8 to in 10 CFR Part 800, which is 800.3(c) I believe,
9 specifically talks about the consultation process and
10 the parties to the consultation process. I guess it's
11 800.2(c), I believe.

12 And with respect to the applicant for a
13 license, it does not say that they take on any special
14 role or responsibility, or assume the responsibilities
15 of the Federal Government, or have to obtain any
16 special NHPA permit. All it says is the applicant is
17 entitled to participate as a consulting party.

18 And then, finally, Your Honor, the notion
19 that the licensing schedule is taking no account of
20 the NHPA process is completely erroneous as well.
21 USEC has provided information in its environmental
22 report, once again, to support the NRC's statutory
23 obligations. The NRC is presently engaged in an
24 outreach and consultation process. That will be
25 reflected in the milestone documents, such as the

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1 environmental report, that are the decision documents
2 for the license application.

3 JUDGE McDADE: Okay. Ms. Zobler, or
4 anyone else from the NRC staff?

5 MS. BROCK: This is Sara for the NRC
6 staff. The only thing I'd add, Your Honor, is we
7 disagree with Mr. Sea that the NRC has ceded or in any
8 way given outright authority on the NHPA process. We
9 do consider the Section 106 consultation process to be
10 ours.

11 And what we expect from an applicant are
12 the requirements outlined in 51.45, that they would
13 contain sufficient data to aid -- aid the Commission
14 in its independent analysis. But in terms of the
15 consultation with the SHPO and the relevant Indian
16 tribes, those letters have been sent by the NRC staff,
17 and that obligation goes to the NRC, not to the
18 applicant.

19 JUDGE McDADE: Let me ask a question here,
20 and this shows a little bit of my thinking. As I read
21 the National Historic Preservation Act, also as I read
22 NEPA -- the cultural and historic aspects -- the
23 primary obligation is upon the agency. Here that lead
24 agency would be the NRC. Is the discussion that Mr.
25 Sea suggests --

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1 MR. SEA: Excuse me. But can I just ask
2 you for the basis of that statement? Because I don't
3 -- I am not aware that any lead agency has been
4 determined.

5 JUDGE McDADE: Let me finish the question
6 I had for the NRC staff. And the question to the NRC
7 staff was specifically whether or not the issues
8 raised by Mr. Sea, in your view, is premature, that at
9 the time the DEIS is prepared by the NRC staff, that
10 that would indicate the steps that have been taken to
11 comply with the National Historic Preservation Act,
12 the steps that would be taken to comply with
13 43.31(b)(4) of NEPA.

14 And at that point in time, if in the DEIS
15 the actions of the NRC were inadequate, it would be an
16 appropriate time for Mr. Sea or anyone else to file a
17 contention to challenge the adequacy of compliance.
18 Is that the position of the NRC staff, or is your
19 position different?

20 MS. BROCK: Your Honor, we would largely
21 agree with that statement. In terms of the NRC
22 staff's compliance with Section 106 of the NHPA, the
23 time to challenge that would be after we've completed
24 our Section 106 review, which would come after the
25 publication of the final EIS.

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1 However, to the extent that a Petitioner
2 has information available to it that it doesn't raise
3 early on, the Petitioners have to raise information
4 that they have available to it. But if they're
5 specifically challenging a consultation requirement,
6 that would be premature.

7 JUDGE McDADE: Judge Wardwell had a
8 question?

9 JUDGE WARDWELL: Yes. If I understand you
10 correctly, I'm a bit confused, then. Why don't you
11 object to this contention being omitted, then?

12 MS. BROCK: Well, see, in terms of both
13 NEPA and the NHPA, the burden runs to the staff to
14 finally adjudicate it. But especially with regards to
15 NEPA contentions, an applicant -- a petitioner is
16 expected to identify an omission in the applicant's ER
17 that they think needs to be included in the EIS, and
18 that needs to be identified based on the ER.

19 So to the extent that Mr. Sea is stating
20 that something hadn't been considered in the area of
21 potential effects, we are willing to concede that that
22 could be an admissible contention. To the extent that
23 he is saying we have failed to consult, I believe we
24 are saying that that was premature.

25 JUDGE WARDWELL: I understand. So you're

1 saying that because the applicant hasn't identified or
2 described all of the historic and cultural impacts,
3 that is a contention you wouldn't object to, but you
4 would in regards to the 106 and the transfer
5 associated with the responsibilities of that.

6 MS. BROCK: Yes. Our --

7 JUDGE ABRAMSON: Ms. Brock, this is Judge
8 Abramson. Let me ask you a question that's more
9 focused. I want to focus what Mr. Wardwell asked you,
10 and that is -- and that is this. Where in the
11 regulations does -- do you find authority for the
12 proposition that an applicant is required or that a
13 petitioner is required to raise these sorts of issues?

14 MS. BROCK: I'm sorry. Is your question
15 where an applicant is required, or where a petitioner
16 is required?

17 JUDGE ABRAMSON: Either one. You show me
18 where in the regulations that the applicant is
19 required to do more than it has done, where in the
20 regulations a petitioner is required to raise
21 something in order for it to be not prohibited from
22 raising it later when it shows up as new in the DEIS.

23 MS. BROCK: Okay. 51.45 requires an
24 applicant to provide information to aid the staff. It
25 contains sufficient data to aid the Commissioners'

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1 development of independent analysis. So to the extent
2 that an applicant has failed to provide sufficient
3 information to aid the Commission in its independent
4 analysis, that could be an admissible contention.

5 In terms of where the contention
6 requirement comes from -- 2.309(f)(2) -- where a
7 contention must be based on documents or other
8 information available at the time the petition is to
9 be filed, would specifically include the environmental
10 report. So to the extent that a petitioner is looking
11 at the environmental report, and identifies an
12 omission of it, say of a historic resource, the staff
13 does take the position that the appropriate time to
14 raise that is when the petition is initially filed.

15 However, to the extent that a petitioner
16 is raising a contention that the staff has failed to
17 consult with a party as required under Section 106,
18 that would be premature.

19 JUDGE McDADE: All right. This is Judge
20 McDade again. And let me just ask Mr. Silverman, and
21 just make sure I understand it and I understand your
22 position. I understand Mr. Sea -- this is part of
23 what you said, and I'm sure you're not going to agree
24 with all of it.

25 But that under 51.45(b) you have an

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1 obligation to identify and describe the environment
2 affected, that Mr. Sea is saying that you did not
3 identify the potential effect on the Earthworks from
4 the pumping of water, that you did not identify the
5 impact on historical -- the Hopewell Earthworks firm
6 changes that would be made to the access road, and
7 that you did not describe the effects to the
8 historical sites in the immediate environs of the APC
9 site.

10 MR. SILVERMAN: I'm sorry, Your Honor. If
11 there was a question, it got cut off.

12 JUDGE McDADE: Okay. The -- again, part
13 of what Mr. Sea has alleged, as I understand it, is
14 that your environmental report was inadequate under
15 51.45(b), because it did not completely and adequately
16 identify the environment affected.

17 He identified specific things onsite --
18 the pumping of water from under the Earthworks and the
19 effect that that would have, the effect that the
20 increased access road might have on the Hopewell
21 Earthworks that are buried underneath it, and the
22 various offsite facilities in the immediate area, such
23 as the Barnes house, such as the other facilities
24 noted on the historic register, as well as the
25 Earthworks in the area.

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1 Is that a well-taken objection? Should
2 your ER have described the potential impact on those?
3 And is it deficient because it didn't?

4 MR. SILVERMAN: We don't believe the ER is
5 deficient, Your Honor, because we don't believe those
6 impacts are impacts of the ACP.

7 JUDGE McDADE: Okay. And, specifically,
8 what do you think is necessary? Now, as I read some
9 of the regulations, it talks about under 800.16, you
10 know, the proposed action may cause alterations in the
11 character or use of the historical property. Is it
12 your position that, in relationship to the APC, that
13 the APC's actions will not cause alterations in the
14 character or use of historical properties?

15 MR. SILVERMAN: Yes.

16 JUDGE McDADE: Okay. Specifically
17 addressing what Mr. Sea raised with regard to the
18 pumping of water, is that going to be something that
19 is going to be -- occur as a result of the operation
20 of the APC?

21 MR. SILVERMAN: Your Honor, as I
22 understand the situation with the pumping of water,
23 there has been -- there has a well field -- there have
24 been well fields and pumps that have been installed,
25 some in the '50s and some in the '80s, I believe.

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1 They have been in operation throughout the time that
2 the GDPs have been operating.

3 There is information about that pumping in
4 the environmental report. We do indicate that there
5 will be some pumping associated with the ACP. It is
6 a very small percentage of the historical pumping on
7 the site. If the existing -- or if the historical --
8 if there were resources there affected by that
9 pumping, they would have been affected, presumably,
10 long ago by the much larger amount of water pumping
11 that was there to support the GDP than the much
12 smaller amount that is going to be attributable to the
13 ACP.

14 JUDGE McDADE: Okay. And what about the
15 effect of the increased traffic on the Hopewell
16 Earthworks that are under the access road? Is that
17 something that should have been identified?

18 MR. SILVERMAN: Bear with me one second,
19 please.

20 Your Honor, this is with respect to
21 traffic on the southwest access road. I failed to
22 mention earlier Mr. Sea is factually incorrect that
23 that road was open for purposes of the ACP. That was
24 a GDP-related security change. There is no intention
25 to have that road open for ACP operations. In fact,

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1 the intention is to reclose that road.

2 JUDGE McDADE: Okay. And what about the
3 offsite historical resources that he makes reference
4 to, the Earthworks in the area -- should USEC have
5 identified them? Or does Mr. Sea have an obligation,
6 as part of the petition, to identify how the APC would
7 impact them before there's a requirement for you to
8 identify them?

9 MR. SILVERMAN: Well, we agree that Mr.
10 Sea, as a petitioner, needs to come forward with all
11 of the requisite information to demonstrate that there
12 is a potential impact in order to support his
13 contention on those Earthworks.

14 The American centrifuge plant is -- as I
15 believe you know, is being built inside an existing
16 structure with some additional buildings being built
17 adjacent to it in a heavily disturbed area, well
18 within the boundaries of the center of the GDP
19 facility. And we don't believe that there will be any
20 additional effects of those construction or operating
21 activities on the Earthworks.

22 I would point out, however, that as part
23 of our environmental report we have established --
24 committed to environmental mitigation measures. And
25 if in the course of whatever construction work is

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1 being done there there were resources identified,
2 there would be actions taken to address that
3 consistent with the regulatory requirements.

4 JUDGE McDADE: Okay. Thank you. And I
5 don't mean to cut you off, but time is running short
6 here, and I do want to specifically ask a question of
7 Mr. Sea.

8 With regard to the offsite historical
9 sites, can you just explain for us the impact that the
10 APC would have on those, based on your petition.

11 MR. SEA: Yes. But may I briefly respond
12 to what Mr. Silverman just said?

13 JUDGE McDADE: Could you answer my
14 question first?

15 MR. SEA: Sure. I think there are a
16 number of impacts. Number one, my home, the Barnes
17 home, is a 200-year old home with extraordinary
18 historical value, that it was my intention from the
19 beginning in terms of planning to purchase the home to
20 convert into a museum, a place where the public can
21 come and learn about the incredible history of
22 southern Ohio, which is captured amazingly in one
23 house -- a house that involved the involvement of four
24 U.S. Presidents.

25 And so there are tremendous impacts on

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1 those plans, on the historic character of the
2 property, by having ACP open and operate next door.
3 The public will not exactly be drawn to a tourist
4 attraction, an educational center, a place devoted to
5 the celebration of nature and natural resources that's
6 on the fenceline of a uranium enrichment facility,
7 that --

8 JUDGE McDADE: Is that different than
9 what's already there? I mean, it --

10 MR. SEA: There is no current production
11 on that site. So, yes, it is significantly different.

12 JUDGE McDADE: Just explain what --

13 MR. SEA: If ACP does not operate, there
14 will be no nuclear production on the site. There are
15 currently plans to open a facility to convert the
16 depleted uranium waste that's onsite for removal. I
17 strongly support those efforts. That will be
18 completed sometime in -- sometime after 2010.

19 And the desire of the local community that
20 I strongly share and have been a part of trying to
21 achieve for many years is to clean up that site, to
22 get the waste out, to get nuclear production stopped.

23 JUDGE ABRAMSON: Could you get back to the
24 question, please?

25 MR. SEA: That's the question. So that --

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1 that's the current -- if ACP doesn't open and operate,
2 what will happen at that site -- there is an
3 organization established called SODI, called Southern
4 Ohio -- which stands for Southern Ohio Diversification
5 Initiative. That was set up to transfer unused
6 Department of Energy buildings on the site to the
7 community for reuse.

8 That is what will happen if ACP doesn't
9 operate. The buildings will be leased to some non-
10 nuclear tenant, and the barbed-wire fences with the No
11 Trespassing signs can be torn down. The defoliation
12 of a 10-foot security perimeter around the entire site
13 can stop.

14 And the historic character of the
15 Earthworks and my home, which are integrally related
16 -- the Barnes family owns the major portion of the
17 Earthworks, and Abraham Lincoln and others visited the
18 home in order to view the Earthworks, so these are all
19 related, these various sites. That can be restored,
20 and --

21 JUDGE McDADE: Would it be the same for
22 the other historic sites that you mentioned in your
23 petition, the other houses in the area?

24 MR. SEA: Yes. Specifically, there are
25 two other houses that are certainly eligible for the

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1 National Register and that belonged historically to
2 families that were related to the Barnes family, and
3 that are part of the same constellation.

4 So what I think -- it's a common feeling
5 in that community, among the people who are aware of
6 it, which is not everyone, but those who are aware and
7 it's increasing every day, that we'd like to see that
8 restored as a kind of little historic district with
9 restoration of the Earthworks and of the three homes
10 involved. And that plan cannot -- would be severely
11 impacted by operation of ACP.

12 JUDGE McDADE: Would there be any
13 difference to --

14 MR. SEA: Could I respond to Mr.
15 Silverman's points before --

16 JUDGE McDADE: Answer my question first,
17 sir. I'm trying to decide something here, and there
18 are certain questions I have. And, specifically, what
19 I want to understand is in the event the APC does not
20 operate, but that the SODI were unsuccessful in
21 renewing the current facility, would there be a
22 difference on these historic properties?

23 MR. SEA: A difference in what way? I
24 mean, aesthetically? Economically? I'm not sure what
25 you're asking.

1 JUDGE McDADE: Does the status quo already
2 impact these historical properties? And would the APC
3 impact them more than the status quo?

4 MR. SEA: Well, it's hard to define the
5 status quo. The GDP was placed into cold standby in
6 2001: Now, many people believe that it is only being
7 maintained in cold standby, operated by USEC, to
8 provide for continuity of operations. In other words,
9 the idea is to keep it in cold standby until ACP
10 opens, so that USEC can maintain a kind of continuity
11 of management and of the site itself.

12 So the site is now being not permitted to
13 revert to its -- what one could call its natural
14 state, it's natural development patterns, by the
15 promise that ACP will soon open. So it's -- so one
16 cannot really -- the status quo is artificial.

17 What ought to happen, if ACP is moved to
18 another site, as I would like to see, or is denied a
19 license, or is canceled by USEC, if their funding
20 falls through, what would then happen is the GDP would
21 be closed -- that is, not kept in cold standby but
22 actually closed. And then, the security at the site
23 can change, and the waste can be cleaned up. That's
24 a process that will take some years, but then we begin
25 to renew the site. It's a time-dependent process.

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1 JUDGE ABRAMSON: Mr. Sea, let me -- this
2 is Judge Abramson. Let me drag us back to the
3 question which really underlies this. I understand
4 your personal economic/professional goals related to
5 the Barnes house. But what is at issue before us is
6 compliance with the National Historic Preservation Act
7 -- an obligation placed on the NRC. Is anything that
8 you're saying about what you would like to see happen
9 relevant to the NRC's compliance with the NHPA?

10 MR. SEA: Yes.

11 JUDGE ABRAMSON: Can you briefly -- and I
12 emphasize the word "briefly" -- tell us what is
13 relevant to the NRC's compliance?

14 MR. SEA: Well, we didn't get to the whole
15 issue, and I don't know that we'll have time, of the
16 Department of Energy's NHPA compliance status.

17 JUDGE ABRAMSON: I'm not talking about the
18 Department of Energy, and if we have time that's
19 something for Judge McDade to think about whether he
20 wants to fit it in. Let's get to my question.

21 MR. SEA: The reason why that's so
22 important is that it is my -- part of NHPA deals with
23 the requirement for projects that involve more than
24 one federal agency, and here we clearly have two
25 agencies involved. So one cannot talk about only one

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1 agency's NHPA compliance over this project.

2 (Whereupon, at 5:25 p.m., the Court
3 Reporter was disconnected from the
4 teleconference for approximately one
5 minute.)

6 COURT REPORTER: Excuse me. This is the
7 Court Reporter. I just lost contact with you about 30
8 seconds ago when Mr. Sea was readdressing the
9 importance of the two agencies, NHPA responsibility to
10 respond. I dropped out. It was probably about 30
11 seconds ago. It was before Judge Abramson came back
12 on and while Mr. Sea was finishing up his answer. I
13 don't have that in the transcript.

14 JUDGE ABRAMSON: He has not answered my
15 question.

16 JUDGE McDADE: Before we do, Mr. Sea, just
17 so the record is complete, could you repeat that? You
18 were describing the obligations of why it's important
19 for both DOE and NRC compliance with the National
20 Historic Preservation.

21 MR. SEA: NHPA mandates that when two
22 federal agencies are involved in a major federal
23 action, as in this case, they must either separately
24 conduct 106 reviews or they must collaborate, appoint
25 a lead agency, and receive approval of that joint

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1 operating plan from the Advisory Council on Historic
2 Preservation.

3 Neither agency has pursued the latter
4 course. So, therefore, each agency -- there is no
5 lead agency, legally. And both agencies retain
6 complete responsibility under Section 106 of NHPA.

7 Because the actual impact of the project
8 is mediated largely through DOE, as it operates on DOE
9 land, the NRC, in order to meet its NHPA
10 responsibility, must assess the DOE non-compliance
11 issue. There is no way to assess the impact of the
12 project being licensed without looking at how DOE has
13 implemented or not implemented its NHPA
14 responsibility. And since the two agencies have not
15 developed a cooperation agreement, there's no other
16 way to do it than in the licensing process.

17 JUDGE McDADE: Okay. This is Judge McDade
18 again. Earlier you had indicated that you wanted to
19 respond to something that Mr. Silverman said.

20 MR. SEA: Yes.

21 JUDGE McDADE: And I wanted to get my
22 question answered first. Do you have something
23 further to respond to Mr. Silverman's statement?

24 MR. SEA: Yes. He said something that is
25 absolutely factually incorrect. He said there were

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1 lots of different wells operating, that some opened in
2 the 1950s and some in the 1980s. The way he put it is
3 simply not correct.

4 The well field that was opened in the
5 1950s to supply the GDP is located in the town of
6 Piketon. To my knowledge, there are no Earthworks
7 associated there, although I doubt it has been
8 studied, so they may well be there, but I've never
9 been to that site. And we don't know -- we don't
10 know, and it's not relevant to this case.

11 A new well field was identified and opened
12 and purchased by DOE in the 1980s, after NHPA was in
13 effect, on the Scioto River, far south of the Piketon
14 site, to supply a new centrifuge plant. No Section
15 106 review was conducted at that time. Indeed, the
16 State Historic Preservation Office was never notified
17 by DOE that there were Earthworks there, or that there
18 was any need to conduct any 106 review.

19 So nothing has been done regarding that
20 site. And that is the site that ACP will rely on for
21 its water. So I just want that to be really clear.

22 JUDGE ABRAMSON: Have you -- this is Judge
23 Abramson again. Have you taken any of these matters
24 to DOE?

25 MR. SEA: Are you asking me?

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1 JUDGE ABRAMSON: That's for you, yes.

2 MR. SEA: Yes. Absolutely I have. I
3 asked in -- in January, I submitted a detailed letter
4 to DOE -- well, I should say first, in December I
5 attempted to determine who at DOE, if anyone, was in
6 charge of their 106 process. I spoke with the --
7 their Historic Preservation Officer, who is in
8 Washington.

9 I spoke with the Oak Ridge operations
10 office, which had been exercising responsibility over
11 the area until their Kentucky field office was opened
12 with responsibility over the site. I spoke with
13 Kentucky. I spoke with people at the site in Piketon.
14 No one at any of the DOE offices claimed to have any
15 knowledge of any NHPA process ever conducted regarding
16 the Piketon site.

17 I also spoke with the State Historic
18 Preservation Office to try to get their version of
19 events and what had gone on, which I did and learned
20 from the State Historic Preservation Office that the
21 DOE process had been highly -- that the whole process
22 had been highly constrained by the fact that they
23 essentially were misinformed by DOE and had been told
24 by DOE that the only facility eligible and important
25 for 106 review was, if you can believe this, impact on

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1 the old gaseous diffusion plant itself.

2 In other words, the concern expressed to
3 the state -- to the Ohio State Historic Preservation
4 Office was the question of whether in preparations for
5 the future of the site we needed to preserve the old
6 GDP as a historic building. That was the only issue
7 brought to the state.

8 And so when you see that there's a record
9 of a 106 process, that was initiated by DOE and the
10 State Historic Preservation Office, that's true, there
11 was. But it only related to preservation of the GDP
12 buildings and never mentioned, and never got into, any
13 of the issues regarding the Earthworks, regarding
14 neighboring historic properties.

15 So, yes, I did, in January. I then,
16 after --

17 JUDGE McDADE: I think you have fully
18 answered Judge Abramson's question. He was --

19 MR. SEA: Okay.

20 JUDGE McDADE: -- wondering whether or not
21 you did raise it with that agency.

22 MR. SEA: I could go on and on.

23 JUDGE McDADE: In some detail. Again, I'm
24 not sure when we're going to get cut off on this
25 conference call, so just very briefly I wanted -- you

1 know, is there anything on any other aspects of Judge
2 Abramson's question that you wanted to say in response
3 to Mr. Silverman?

4 MR. SEA: I think that in Mr. Silverman's
5 response, and in Ms. Zobler's response, I think there
6 is a constrained point of which, which is
7 understandable because this is an NRC proceeding. But
8 when we talk about USEC's responsibility for
9 compliance with NHPA, we have only been talking about
10 it in relation to the NRC.

11 And I fully understand that the NRC has a
12 very small part of the Section 106 responsibility
13 here. The larger part is the DOE's. And so the
14 larger part of the responsibility, as it falls to
15 USEC, is to somehow make up for the fact that DOE has
16 defaulted on its Section 106 and Section 110
17 responsibilities -- Section 110 covering stewardship
18 of historic resources on its own land.

19 JUDGE McDADE: Okay. I think that
20 responds. Again, I'm not sure when we're going to get
21 cut off here on the conference call. What I'd like to
22 do is hear very briefly, Mr. Silverman, if you have
23 any response, and then hear from the NRC staff, and
24 then we can wrap this up.

25 Mr. Silverman, do you have anything

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1 further?

2 MR. SILVERMAN: Thank you, Your Honor.
3 Again, briefly, the fundamental focus of Mr. Sea's
4 comments over the last few minutes have been concerns
5 and criticisms about the Department of Energy, and
6 actions they may or may not have taken or should have
7 taken in the past. That is outside the scope of the
8 NRC's authority. It's not a matter for this Licensing
9 Board.

10 Neither the NRC staff or anyone else in
11 the NRC can oversee the DOE activities. It's a
12 separate undertaking. These are separate issues for
13 the Department of Energy. It's not the NRC's
14 responsibility to make up for any alleged default that
15 the DOE has or has not undertaken.

16 There are two different agencies operating
17 here, and they have two independent roles. The NRC is
18 engaged in the consultation in the 106 process with
19 respect to the action before it, which is the
20 licensing. The only relationship that the Department
21 of Energy has to the ACP is that they will be leasing
22 the existing buildings to USEC, and we understand that
23 they are, in fact, initiating their -- whatever
24 obligations they have under 106 with respect to that
25 action.

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1 JUDGE McDADE: Okay. And, Mr. Silverman,
2 real quickly, and I'm just posing this as a
3 hypothetical right now, if the Board were to find that
4 your environmental report should have included a
5 discussion of the potential impact on the Earthworks
6 by the pumping area, the Earthworks under the road,
7 and the offsite historical sites, where would we go
8 from there? If we admitted that as a contention,
9 would that be a contention of omission? What would
10 happen at that point?

11 MR. SILVERMAN: Pardon me one second, Your
12 Honor.

13 Well, Your Honor, you know, I want to
14 answer your question. The premise we don't agree
15 with, of course, because we believe we have addressed
16 impacts, and Mr. Sea has not identified any impacts of
17 the ACP on the -- on those resources in our view.

18 If you admit the contention, I'm not sure
19 where we go with it, because it is the staff's
20 responsibility here. There is no legal requirement
21 other than to provide information to support the
22 staff's review.

23 JUDGE McDADE: Okay. Do you have anything
24 further, sir?

25 MR. SILVERMAN: No, Your Honor.

1 JUDGE McDADE: And from the NRC staff, Ms.
2 Zabler, Ms. Brock, do you have anything further?

3 MS. BROCK: Your Honor, the only thing
4 that we would add is that we agree that the NRC has no
5 jurisdiction over DOE, and that that is a separate
6 action. And that the status of their compliance, or
7 lack thereof, with Section 106 is outside this
8 regulatory procedure.

9 In terms of your question also, you talk
10 about if you found that this was an admissible
11 contention. I think if it was a contention of an
12 omission that the applicant had failed to consider
13 that, and the Board found that it should have been
14 considered, then the Board could order the NRC staff
15 to include it.

16 If the NRC staff didn't include it in the
17 final environmental impact statement, the Board could
18 amend the environmental impact statement to include
19 that.

20 JUDGE ABRAMSON: As I recall -- this is
21 Judge Abramson. As I recall, Ms. Brock, we don't have
22 the authority to order the staff to do anything.

23 MS. BROCK: You wouldn't -- I agree with
24 you, Judge Abramson. But the Board does have the
25 authority to amend -- the Board has the ultimate

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1 licensing authority.

2 JUDGE ABRAMSON: We understand our
3 authority to amend -- to amend an ER, or an EIS,
4 rather. But let me come back for a second with you to
5 Judge McDade's question, which was, what will be the
6 upshot of this?

7 Let's suppose for a moment hypothetically
8 that we found that there was an omission, and we were
9 very explicit there was an omission from the ER to
10 cover these particular sites, and that the -- the
11 applicant then included something in his -- as an
12 amendment to his ER that addressed those.

13 For example, it's possible we might say
14 there's no impact. They might set out specific
15 impacts. Then, what would happen? And how would that
16 differ from the possibility that the staff simply asks
17 or requests additional information asking the
18 applicant to identify those sites and discuss the
19 impacts? What would the substantive difference of us
20 admitting it purely as an omission, which would then
21 subject to cure, and the staff simply handling it as
22 an RAI?

23 MS. BROCK: Well, procedurally I don't
24 know. I mean, ultimately I don't know that there is
25 a difference. I believe the staff already has asked

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1 -- a request for additional information.

2 JUDGE ABRAMSON: On those sites?

3 MS. BROCK: In general, on the area of
4 potential effects. And if -- if it can -- if the
5 Board admitted it, and the information had already
6 been cured by the time the Board admitted it, then I
7 think that it would be ripe for summary judgment.

8 JUDGE McDADE: And one of the things that
9 Mr. Silverman raised -- and I want the staff's view on
10 it -- he indicated that although Mr. Sea discussed
11 various impacts on historical sites, that those
12 impacts were not as a result of the APC -- or ACP,
13 but, rather, as a result of historical issues that
14 already are in existence there.

15 What is the staff's view on that? And if
16 that is correct, would that preclude the admission of
17 this contention?

18 MS. BROCK: The staff is reviewing what
19 the impacts are on the various historical sites. We
20 expect to publish our EIS on September 9th. To the
21 extent that Mr. Sea has identified an omission of some
22 -- of an impact that hasn't even been considered, we
23 agree it -- if the applicant hasn't discussed it at
24 all, we agree that that could be an admissible
25 contention.

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1 JUDGE ABRAMSON: And, in fact, you -- is
2 it correct to say that -- or that the staff intends to
3 pursue an examination of those sites whether or not
4 it's admitted?

5 MS. BROCK: Yes, Your Honor.

6 JUDGE McDADE: This is Judge McDade. I
7 don't have any additional questions. Judge Wardwell?
8 Judge Abramson?

9 Very briefly before we ring off here.
10 We've been talking here for a while, and we appreciate
11 your patience, bearing with us while we talked on the
12 PRESS matters. Very briefly, do you have anything
13 specifically that you would like to say to us before
14 we go ahead and try to make a decision here?

15 MR. SEA: I assume that you're asking me?

16 JUDGE McDADE: Yes.

17 MR. SEA: Okay. Yes. I want to -- it's
18 been said a number of times in the conversation by
19 various parties that I somehow am alleging that NRC
20 has jurisdiction over DOE. I want to very clearly
21 state that I am not under that illusion. I understand
22 that completely, and I am not asking for NRC to
23 exercise jurisdiction or to regulate DOE in any way.

24 What I am saying is that NRC must assess,
25 and assessment is not exercising jurisdiction or

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1 regulatory power. It is merely assessing the historic
2 process by which DOE has implemented or not
3 implemented its NHPA responsibilities.

4 And that assessment must be tailored to
5 the peculiarities of this case. This is a highly
6 unusual case where you have a private applicant
7 operating in federal buildings, on federal land, under
8 special legislation -- the USEC Privatization Act. So
9 it's hard to find precedents.

10 There is a precedent, and I would ask the
11 NRC to consider it, and that is the MOx facility at
12 Savannah River, which was licensed by NRC to be run by
13 a private contractor on -- within a DOE facility. And
14 in that case, in terms of implementing the NEPA
15 requirements, the NRC did, in fact, assess various
16 aspects of the site as were planned, and as plans
17 changed by DOE, because the assessment of the DOE site
18 planning had a direct bearing on the ability to assess
19 the environmental impact of the MOx facility.

20 And so I'm saying the exact same thing
21 applies in the USEC case, and that NRC must not
22 regulate DOE -- exercise jurisdiction, but must look
23 at the DOE's management of the site and its failure to
24 implement NHPA as part of assessing its own NHPA 106
25 responsibility for the ACP project.

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1 JUDGE McDADE: Okay. Thank you. I think
2 that beeping was giving us our two-minute notice here,
3 so I do need to cut you off.

4 Mr. Silverman, with that understanding, do
5 you have anything very briefly to say?

6 MR. SILVERMAN: Yes, Your Honor. Just to
7 reiterate one more time, if I may, the notion of
8 admitting the contention because there is an omission
9 in the application is -- we have a problem with that,
10 because we don't believe -- before you can do that,
11 you have to find that the intervenor has identified
12 some adverse impacts on those resources resulting from
13 the ACP itself. And we do not believe he has done
14 that. We believe there is no basis to admit this
15 contention.

16 JUDGE McDADE: Ms. Zabler, Ms. Brock,
17 anything further?

18 MS. BROCK: The staff has nothing further
19 to add.

20 JUDGE McDADE: Okay. Thank you. We are
21 going to go off the record at this time.

22 (Whereupon, at 5:46 p.m., the proceedings
23 in the foregoing matter went off the
24 record.)

25

CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: USEC, Inc. (American
Centrifuge Plant)
Telephone Conference

Docket Number: 70-7004; ASLBP No. 05-08-ML

Location: (Telephone conference)

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.



John Mongoven
Official Reporter
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