

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)		
)		
USEC, Inc.)	Docket No.	70-7004
)		
(American Centrifuge Plant))	ASLBP No.	05-838-01-ML
)		

NRC STAFF'S BRIEF IN OPPOSITION
TO GEOFFREY SEA APPEAL OF LBP-05-28

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November 3, 2005

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Atomic Safety and Licensing Board:

USEC, Inc.

(American Centrifuge Plant)

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(a), the Staff of the Nuclear Regulatory Commission ("Staff") hereby files its brief in opposition to the Brief of Geoffrey Sea on Appeal of LBP-05-28 ("Appeal"). The Appeal addresses a decision issued by the Atomic Safety and Licensing Board ("Board") in the above-captioned proceeding denying Mr. Sea's petition to intervene. *USEC, Inc. (American Centrifuge Plant)*, LBP-05-28, slip op., 61 NRC __ (Oct. 7, 2005). The Board found that Mr. Sea had demonstrated standing, but had not offered any admissible contention. As discussed below, the Board correctly determined that Mr. Sea did not proffer an admissible contention and the Board's Order denying intervention should be affirmed.

BACKGROUND

On August 23, 2004, USEC, Inc. filed an application for a license to construct and operate a uranium enrichment plant, to be known as the American Centrifuge Plant ("ACP"), in Piketon, Ohio. On October 7, 2004, the NRC published a "Notice of Receipt of Application for License; Notice of Availability of Applicant's Environmental Report; Notice of Consideration of Issuance of License, and Notice of Hearing and Commission Order" related to the foregoing application. See *USEC, Inc. (ACP)*, CLI-04-30, 60 NRC 426. On February 28, 2005, Mr. Sea

filed a petition to intervene in the instant hearing.¹ On May 12, 2005, the Commission determined that Mr. Sea had standing and referred his petition to the Board for a determination of whether he had presented one or more admissible contentions. See *USEC, Inc. (ACP)*, CLI-05-11, 61 NRC 309, 310 (2005). Subsequently, the Board rejected Mr. Sea's intervention petition, finding that none of his contentions was admissible.² On October 24, 2005, Mr. Sea filed the instant appeal challenging the denial of Contentions 1.1, 1.2, 2.1, 2.2, 3.1, and 3.2. The Staff will address each of these contentions in turn.

DISCUSSION

I. Legal Standards for the Admission of Contentions

The standard for admission of contentions is outlined in 10 C.F.R. § 2.309(f). For each admissible contention, the petitioner must provide: (1) a specific statement of the issue of law or fact to be raised or controverted, (2) a brief explanation of the basis for the contention, (3) a demonstration that the issue is within the scope of the proceeding, (4) a demonstration that the issue is material to the findings the NRC must make regarding the action subject to the proceeding, (5) a concise statement of the alleged facts or expert opinions which support the contention and on which the petitioner intends to rely at hearing, including references to the specific sources and documents, and (6) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(i)-(vi). A

¹ "Petition to Intervene by Geoffrey Sea," dated Feb. 28, 2005 ("Petition to Intervene")

² Mr. Sea's contentions, as initially set forth in his intervention petition, were supplemented by additional filings entitled. The first, also entitled "Petition to Intervene by Geoffrey Sea," but differing substantially from the Petition to Intervene filed on February 28, 2005, was filed on March 1, 2005. It was followed by several other documents. See "Geoffrey Sea's Motion for Leave to File an Amended Petition" (Jul. 18, 2005); "Motion for Leave to Supplement Replies to USEC and the NRC Staff by Geoffrey Sea" (Aug. 17, 2005); "Supplement to Replies to USEC and the NRC Staff by Geoffrey Sea" (Aug. 17, 2005); "Amended Contentions of Geoffrey Sea" (Aug. 17, 2005); "Geoffrey Sea's Reply to Answer of USEC and Response of NRC Staff to Filings of August 17" (Sept. 6, 2005). While the Board noted that these additional filings were untimely, it nevertheless considered all of the arguments presented by Mr. Sea in determining whether an admissible contention had been proffered due to his status as a pro se intervenor. LBP-05-28 at 2-3.

contention that fails to comply with any of these requirements is inadmissible. See, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

II. The Board Properly Denied Admission of Mr. Sea's Contentions

A. The Board Properly Denied Contention 1.1 Regarding USEC's Identification of Cultural Resources Potentially Impacted by the American Centrifuge Plant

In Contention 1.1, Mr. Sea asserts that USEC failed to identify cultural resources potentially impacted by the ACP as required by 10 C.F.R. § 51.45, which requires a description of the environment affected by a proposed project. Petition to Intervene at 16. The Board denied admission of this contention finding (1) that 10 C.F.R. § 51.45 requires that the Environmental Report ("ER") need only identify cultural resource sites that can reasonably be expected to be affected by the proposed action; and (2) that the purpose of 10 C.F.R. § 51.45 has been satisfied because, as a result of Mr. Sea raising the issue, the NRC would consider the potential effects on cultural and historic resources located off of the Department of Energy (DOE) reservation. See LBP-05-28, slip op. at 45-47. Indeed, Mr. Sea has made the Staff aware of historically sensitive properties surrounding the ACP site and the Staff has considered these properties in completing its Draft Environmental Impact Statement (DEIS). See NUREG-1834, "Environmental Impact Statement for the Proposed American Centrifuge Plant in Piketon, Ohio," § 3.3 and § 4.2.2. It is also important to note that, in this case, the Staff's National Historic Preservation Act (NHPA) consultation process is being satisfied through the National Environmental Protection Act (NEPA) process, as allowed in 36 C.F.R. § 800.8. See NUREG-1834, App. B (all of the Staff's consultation letters point out that they are conducting the Section 106 process under § 800.8). Section 106 of the National Historic Preservation Act (NHPA), implemented by the Advisory Council on Historic Preservation (ACHP) through regulations set out in 36 C.F.R. Part 800, requires the NRC to take the effects of licensed

activities on historic properties into account before issuance of any license. See 16 U.S.C. § 470f (2005). Section 106 also requires that Federal agencies afford ACHP a reasonable opportunity to comment on such activities. *Id.* The ACHP's regulations establish what amounts to a three step process for considering the effects of federal action, including licensed activities, on historically sensitive sites: (1) identification of historic properties; (2) assessment of potential adverse effects of the undertaking on such properties; and (3) the development of measures to mitigate, avoid, or minimize any adverse effects. The Federal agency completes this process through consultation with state officials, affected Indian Tribes and, in certain cases, the ACHP itself. See 36 C.F.R. § 800 (2004). The NRC implemented 10 C.F.R. § 51.45(b) in part to comply with 36 C.F.R. Part 800. As the Board pointed out, "[t]he obvious purpose of [10 C.F.R. § 51.45(b)] is to identify resources for the NRC Staff . . . so the NRC can meet its obligations under NEPA . . . the National Historical [sic] Preservation Act (NHPA) . . . and other relevant environmental statutes." LBP-05-28, slip op. at 43-44.

Since the alleged deficiency in the ER has been cured, and the NRC has considered the sites at issue in meeting its obligations under NEPA and the NHPA, Contention 1.1 is now effectively moot. Mr. Sea's arguments to the contrary are: (1) that adopting this reasoning would allow dismissal of virtually any petition for intervention; (2) that adopting this reasoning fails to address the material dispute, which he describes as "USEC's utter neglect of its neighbors;" and (3) that the Staff and Board's "awareness" of the issues raised by Contention 1.1 comes too late. See Appeal at 10-11.

Mr. Sea's arguments fail to identify any error in the Board's decision. As explained above, the purpose of 10 C.F.R. § 51.45(b) is to provide information to the Staff so that it can meet its obligations under NEPA and the NHPA. In this case, because the Staff took this information into account in the DEIS and began the consultation process under NHPA, Mr. Sea's contention was rendered moot before issuance of the Board's decision. In such a

case, the proper action is denial of the contention. See *Texas Utilities Elec. Co.* (Comanche Peak Steam Elec. Station, Unit 2), CLI-93-10, 37 NRC 192, **XX** (1993) (Holding that a contention becomes moot “when effective relief cannot be granted because of subsequent events”). This is would not, as Mr. Sea claims, broadly deny rights of intervenors including the right to a hearing on properly framed contentions. Appeal at 10-11.

Mr. Sea’s argument claiming that the Staff’s awareness comes too late to resolve disputes in keeping with the broad purposes of the NHPA fails to identify any error in the Board’s reasoning. As explained in all of its consultation letters, the NRC is using the EIS process in order to comply with Section 106 of the NHPA, as allowed in 36 C.F.R. § 800.8. This process is ongoing and Mr. Sea has been identified as a consulting party. See, NUREG-1834, App. B. Should Mr. Sea disagree with the outcome of the NHPA process, he may raise that claim when the Section 106 process is completed pursuant to 10 C.F.R. § 2.309(f)(2). This decision does not preclude such a claim. Therefore, the cure has not come too late to “resolve the disputes in keeping with the broad purposes of NHPA. . . .” Appeal at 11.

In essence, Mr. Sea argues that allowing USEC’s alleged failure to identify historic properties to be cured by NRC’s consideration of such properties in its DEIS would fail to address the material dispute at issue – that dispute being “USEC’s utter neglect for its neighbors.” See Appeal at 11. These general allegations of USEC’s insensitivity to historic property owners on its fence-line do not raise with the requisite specificity any issue material to the Board’s decision regarding the admissibility of Contention 1.1. See, 10 C.F.R. § 2.309(f)(1)(iv). Therefore, for the reasons stated above, Mr. Sea has not established that the Board erred in holding that Contention 1.1 is inadmissible.

B. The Board Properly Denied Contention 1.2
Regarding USEC's Identification of Potential Impacts of the
American Centrifuge Plant on Nearby Historic and Prehistoric Sites

In Contention 1.2, Mr. Sea asserts that USEC failed to identify potential impacts of the ACP on historic and prehistoric sites. Petition to Intervene at 25. Mr. Sea provided a list of five potential adverse impacts bases for this contention: (1) potential direct damage to the Scioto River earthworks caused by renewed water pumping once the ACP is in operation; (2) continuation of the DOE policy of using herbicides to defoliate a "security strip" around the site perimeter; (3) maintenance of the "national security" regime, with its profusion of barbed wire fences, security gates, and closed access to rare cultural treasures; (4) discouragement of tourism and academic study caused by real and perceived nuclear dangers; and (5) additional degradation, contamination and obliteration of priceless archaeological sites caused by additional road-building, traffic congestion, waste storage, and plant emissions. *Id.* The Board properly held Contention 1.2 inadmissible finding that the contention was not supported by facts or expert opinion, did not raise a genuine dispute of material fact or law, and no longer presented a dispute that could affect the outcome of the proceeding. LBP-05-28, slip op. at 49.

The Board properly found that the Mr. Sea has failed to provide adequate factual or expert support for his Contention 1.2. LBP-05-28, slip op. at 49. In his appeal, Mr. Sea states that the Board erred based on the information provided in the declarations of John Hancock, Frank L. Cowan, and Cathryn Long in support of his contention. Appeal at 12. However, the expert statements cited in the Appeal regarding the possible earthworks located near the wellheads which will be used in conjunction with operations at the ACP and other properties failed to show any error on the Board's part. In regard to effects on earthworks, these statements amounted to no more than statements that more research would be needed to first "determine the age and identity of this structure" and then, "if the structure is determined to have historical significance" to assess visual and physical impacts of the ACP on the structures.

Appeal at 13. With regard to the Barnes Home property, Mr. Sea cites statements describing two benefits of preserving the entire Barnes Works. Mr. Sea then makes the leap in logic that the individual providing the statement had, in effect, stated that the ACP would adversely impact the historic properties on its boundary.³ *Id.* at 14-15. However, simply stating in non-expert filings that there will be adverse effects does not compensate for the fact that the statements relied upon by the Mr. Sea did not make any such statement.

Mr. Sea also seems to argue that because he was granted standing, the Board erred in requiring him to literally comply with 10 C.F.R. § 2.309(f). *See* Appeal at 15. However, the requirements for demonstrating standing and the admissibility of contentions are distinct from those governing the admission of contentions and it is well established that neither mere speculation nor bare assertions alleging that an issue should be considered is enough to allow admission of a contention. *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). Further, if a petitioner fails to provide the required factual support for its contention, it is not within the Board's power to make assumptions of fact for the petitioner. *See Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149 (1991). Because Mr. Sea failed to provide adequate supporting facts and expert opinions, the Board properly dismissed Contention 1.2. *See* 10 C.F.R. § 2.309(f)(1)(v).

In addition, as explained above with respect to Contention 1.1, Mr. Sea's adverse effects contention is moot to the extent the deficiency in the ER has been cured through consideration of the sites in question during the preparation fo the DEIS. For example, the only

³ In his Brief on Appeal Mr. Sea states that he made a strong case that the ACP would impact the possible earthworks and the Barnes Property "in multiple filings following the original petition, in part by cross-reference to other parts of the petition and exhibits, in part by late-filed bases for contentions." Appeal at 12-13. However, he states that the expert statements discussed above were the most important "facts and citations to expert opinion" included in that material. *Id.* at 13

relevant, specific, and particularized basis for Contention 1.2 is basis 1, which asserts that there is potential for direct damage to the Scioto River earthworks caused by renewed water pumping once ACP is in operation. However, the alleged absence of this potential adverse effect in USEC's ER has been cured by the Staff's consideration of this effect in the DEIS. See NUREG-1834, at 4-7 (finding "that there would be no effect on potential earthworks located near the DOE wellfields" and explaining the basis for that determination). Since the effect of this defect in the ER has been cured, the Board properly dismissed Contention 1.2, finding that the contention no longer presented a dispute which can affect the outcome of this licensing proceeding. See LBP-05-28, slip op. at 49.

Finally, as the Board points out, Mr. Sea has failed to distinguish between the potential impacts of current site activities on historical properties (unrelated to NRC licensed activities) and potential impacts related to NRC's licensing of the proposed ACP. See LBP-05-28, slip op. at 48 (discussing Mr. Sea's failure to offer any evidence that changes to the Southwest Access Road were related to the proposed ACP). To the extent that Mr. Sea asserts adverse effects resulting from activities that are unrelated to licensing the ACP, the Board properly dismissed Contention 1.2 because it does not raise a genuine dispute of material fact or law. See 10 C.F.R. § 2.309(f)(1)(vi).

C. The Board Properly Denied Contention 2.1 Regarding Compliance with the NHPA Under the USEC-DOE Collaborative Arrangement

In his Petition to Intervene, Mr. Sea contended "the USEC-DOE collaborative arrangement is out of compliance with the National Historic Preservation Act and related legislation." Petition to Intervene at 23. In support, Mr. Sea argued that "compliance with NHPA has been shoddy at best, especially for Department of Energy sites that generally predate the [NHPA]." In addition, he alleged that neither USEC nor DOE had consulted with affected parties including the Absentee Shawnee Tribe of Oklahoma and area landowner

Charles Beegle. *Id.* at 23-24.

The Board found this contention premature, outside the scope of the proceeding, unsupported by material facts or expert opinion, and failing to raise a genuine dispute with regard to the license application. LBP-05-28, slip op. at 49. As the Board correctly states, the NHPA imposes no obligations directly on USEC. *Id.* at 50. Rather, the consultation requirement is placed on the NRC, which, at the time the contention was submitted had not yet completed its DEIS, including information on consultation with affected parties.⁴ *Id.* Thus, the Board found that Contention 2.1 was premature. In addition, the Board found that, to the extent it alleges deficiencies in the activities undertaken by DOE under NHPA in connection with previous licensing activities, the contention is outside the scope of the proceeding. *Id.* at 49; Staff Response at 16.

On appeal, Mr. Sea concedes that to the extent Contention 2.1 raises issues related to consultation with affected parties, it is premature. Appeal at 16. Mr. Sea also argues, however, that the activities proposed by USEC in this application are inextricably linked to past DOE activities, and thus must be analyzed by the NRC. However, the only action currently before the Board for review is the application for a license to construct and operate the ACP. While the Board may consider previous activities in the context of ascertaining present conditions of the site and surrounding areas in considering whether to grant the license application, it is not charged with reconsidering previous NHPA consultations. Thus, the Board's determination on this contention was proper and should be sustained.

⁴ As noted above, the Staff has since completed its DEIS, which includes letters of consultation from affected tribes and other individuals. See NUREG-1834, App. B.

D. The Board Properly Denied Contention 2.2 Regarding The Effect of Noncompliance with Federal Preservation Law on the USEC-DOE Agreement

In the Petition to Intervene, Mr. Sea contends that “[n]oncompliance with federal preservation law has undermined the legitimacy and legal basis of the USEC-DOE agreement.” Petition to Intervene at 27. The Board found that Contention 2.2 is “outside the scope of the proceeding, not supported by fact or expert opinion, and does not identify any genuine issue of material fact or law within the scope of the proceeding,” and therefore found that Mr. Sea’s contention did not meet the requirements of 10 C.F.R. § 2.309(f). LBP-05-28, slip op. at 51. The Board properly found that DOE actions are outside the scope of this proceeding, which relates only to the ACP license application submitted by USEC and therefore does not relate to activities performed by DOE at the site. *Id.* at 52. In addition, the Board found that Mr. Sea had not provided adequate factual or legal support for his assertion that the NRC should anticipate a potential negative finding from the Advisory Council on Historic Preservation (ACHP) relating to the ACP site and therefore deny the application or require USEC to renegotiate its lease agreement with DOE. *Id.* at 51. As the Board observed, should the ACHP render an opinion, the NRC will be required to take appropriate action if and when that occurs. *Id.*

On appeal, Mr. Sea renews his argument from Contention 2.1, stating that DOE and USEC actions are so intertwined that the NRC cannot review USEC’s actions without considering prior DOE activities. Appeal at 17-18. As explained above, these same arguments were properly disposed of by the Board. Thus, Mr. Sea has failed to identify any error that warrants overturning the Board’s determination that Contention 2.2 does not meet the requirements of 10 C.F.R. § 2.309(f) and, therefore, is inadmissible.

E. The Board Properly Denied Contention 3.1 Regarding USEC’s Failure to Consider a Broad Range of Alternatives to the Proposed Action

In Contention 3.1, Mr. Sea argued that “USEC has failed to consider a broad range of alternatives to the proposed action.” Petition to Intervene at 28. He argued that in addition to

the alternatives discussed by USEC in its ER (i.e., the “no action” alternative, moving the ACP elsewhere on the Piketon site, or moving the ACP to Paducah, Kentucky), USEC, and consequently the Staff in its DEIS, should also have considered a number of other options for the site, including building a monument to the extinct passenger pigeon on the site or moving part of Oak Ridge National Laboratory to Piketon. *Id.* at 30. The Board found that Contention 3.1 fails to demonstrate a genuine dispute on any issue within the scope of the proceeding. LBP-05-28, slip op. at 54. The Board noted an applicant must provide a discussion of alternatives to the proposed action in its ER. *Id.* at 53. This discussion must be “sufficiently complete to aid the Commission in developing and exploring appropriate alternatives to the recommended course of action.” *Id.*, citing 10 C.F.R. § 51.45(b)(3). However, “only alternatives reasonably related to the goals of the proposed action, and the no action alternative, need be considered.” *Id.*, citing *City of Carmel-by-the-Sea v. Dept. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-02, 33 NRC 61, 65 (1991). Mr. Sea’s proposed alternatives are unrelated to the purpose of the proposed project, which is to provide a source of enriched uranium, and therefore need not be included in the ER. Therefore, the Board was correct in finding that Contention 3.1 does not raise a genuine dispute on any issue within the scope of the proceeding.

On appeal, Mr. Sea claims that “the [Board’s] decision is in error, because it focuses only on NEPA’s requirements for consideration of alternatives and does not address NHPA’s requirements for consideration of alternatives, which is also called for in the contention.” Appeal at 18. While Contention 3.1 does mention the NHPA in passing (see Petition to Intervene at 29), the contention does not outline any of the requirements for consideration of alternatives under NHPA, nor does it identify any specific deficiency in USEC’s ER under the NHPA. An appellant cannot assert new bases for a contention for the first time on appeal. See

Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980). Moreover, Mr. Sea fails to provide any support for a claim that NHPA requires an applicant to consider alternatives unrelated to the purposes of the project proposed in the license application. Thus, Mr. Sea has therefore not shown that the Board erred in its decision that Contention 3.1 does not demonstrate a genuine dispute on a material issue of law or fact.

F. The Board Properly Denied Contention 3.2
Regarding the Failure to Evaluate USEC's Stated Action Alternatives

Contention 3.2 states that "USEC's stated action alternatives should be seriously evaluated." Petition to Intervene at 31. In the Petition to Intervene, Mr. Sea argued that USEC did not adequately evaluate the alternative of locating the ACP in Paducah, Kentucky and that USEC "should . . . be instructed to move ACP to Paducah." *Id.* at 32. However, Mr. Sea did not provide any factual support for his contention that USEC erred in concluding that the impacts at the proposed site for the ACP and the impacts at the alternative sites evaluated for the ACP would be the same. *Id.* Nor did Mr. Sea identify any specific inadequacy in the ER alternatives analysis. *Id.* The Board found that Contention 3.2 "fails to identify any defect or deficiency in USEC's [license application] or the ER, is not supported by any relevant factual basis or expert opinion, and does not raise a genuine dispute on a material issue of fact or law."⁵ LBP-05-28 at 55.

On appeal, Mr. Sea identifies no error in the Board's decision. Rather, he renews his argument, unsupported by any factual or legal basis. Appeal at 20. Mr. Sea has, therefore, identified no error regarding the Board's determination the Contention 3.2 fails to meet the

⁵ In addition, the Board notes that Contention 3.2 was not included in the electronically filed version of the Petition to Intervene, timely filed on February 28, 2005. Contention 3.2 was included in one of several later filings, after the deadline to submit petitions to intervene had passed. Nevertheless, because Mr. Sea is proceeding *pro se*, the Board elected to consider the admissibility of the late-filed information. LBP-05-28, slip op. at 54, fn. 174.

requirements of 10 C.F.R. § 2.309(f).

CONCLUSION

For the reasons stated above, the Staff requests that the Commission affirm the Board's decision denying Mr. Sea's request for intervention.

Respectfully submitted,

/RA/

Lisa B. Clark
Margaret J. Bupp
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Dated at Rockville, Maryland
this 3rd day of November, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN OPPOSITION TO GEOFFREY SEA APPEAL OF LBP-05-28" in the above-captioned proceeding has been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), or by electronic mail as indicated by a double asterisk (**) on this 3rd day of November, 2005.

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