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ADJUDICATIONS STAFF

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	Docket No. 70-3103
Louisiana Energy Services, L.P.	ASLBP No. 04-826-01-ML

MOTION IN LIMINE ON BEHALF OF INTERVENORS NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN TO EXCLUDE INADMISSIBLE EVIDENCE AND TO ADMIT RELEVANT EVIDENCE UNDER RULING OF NUCLEAR REGULATORY COMMISSION DATED OCTOBER 19, 2005

Preliminary statement

This motion is submitted on behalf of Intervenors Nuclear Information and Resource Service and Public Citizen ("NIRS/PC") on the basis of the decision of the Nuclear Regulatory Commission (the "Commission") dated October 19, 2005 (CLI-05-20) for the purpose of conforming the evidence at the forthcoming hearing to the scope permitted by that decision.

Factual background

On October 19, 2005, the Commission released its decision in connection with a pending Petition for Review filed by NIRS/PC on June 23, 2005. That decision bears upon, and directs certain proceedings in, the hearings scheduled to begin on October 24, 2005. Briefly, the Commission has made the following determinations:

1. The Commission has ruled that NIRS/PC has timely challenged the discussion in the Draft Environmental Impact Statement ("DEIS") of the environmental impacts of

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near-surface disposal of depleted uranium from an enrichment plant such as is proposed by the Applicant ("LES").

2. The Commission has also ruled that NIRS/PC timely complained that the classification of depleted uranium from enrichment plant waste streams as Class A low-level radioactive waste under 10 CFR Sec. 61.55 has no foundation in analysis of environmental impacts under NEPA. It ruled that only the small amounts of depleted uranium disposed of as waste at the time of the EIS related to 10 CFR Part 61 can be considered Class A, in contrast to the large enrichment plant waste streams. The Commission therefore explicitly excluded large amounts of depleted uranium from the Class A definition and directed the Staff to review the issue, since the environmental analysis for inclusion of such waste in 10 CFR Sec. 61.55 had not been done.
3. The Commission has also ruled that NIRS/PC timely asserted that depleted uranium from an enrichment plant should be disposed of in a manner similar to Greater than Class C waste.
4. The Commission has also ruled that NIRS/PC timely complained that the Draft EIS did not account for statements by the Commission that near-surface disposal may not comply with dose limitations in 10 CFR Part 61, Subpart C.
5. The Commission has also ruled that NIRS/PC timely complained that calculations of releases of radioactivity from a deep disposal site that were reported in the Draft EIS were in error.

6. The Commission directed Staff to undertake environmental analyses of the application of waste classification rules contained in 10 CFR Sec. 61.55 to depleted uranium from enrichment plants.
7. The Commission directed that the hearings scheduled for October 24 should go forward and should assess the environmental impact of near-surface disposal of depleted uranium from an enrichment plant using "estimated impacts at one or more representative or reference sites" and that making bounding estimates was one feature of this "this type of analysis." The Commission did not limit the issues to matters contained in the October 20, 2004 NIRS/PC motion to amend and explicitly directed that the February 2, 2005 NIRS/PC motion may be considered where it "raises or elaborates upon essentially the same 'impacts' analysis arguments made following the DEIS."

Summary of NIRS/PC position

Based on these Commission determinations NIRS/PC take the following positions:

1. First, the Atomic Safety and Licensing Board (the "Board") may not, in this proceeding, make a determination as to the classification under 10 CFR Sec. 61.55 of the classification of the depleted uranium from enrichment plants. No NEPA analysis has been conducted, and a classification determination cannot be made. The Commission explicitly required the Staff to consider this issue "outside of this adjudication."
2. Since a classification decision for depleted uranium from enrichment plants under 10 CFR Sec. 61.55 cannot be made, testimony in support of a classification of depleted uranium from an enrichment plant as Class A low-level radioactive waste should not

be admitted, nor should testimony be admitted whose basis is the assumption that the depleted uranium from the proposed NEF is Class A and can therefore be disposed of in a shallow land burial facility.

3. Further, a determination that depleted uranium from an enrichment plant (a) may be disposed of at one or more specific sites because it is Class A low-level radioactive waste or (b) would cost a certain amount to dispose of because it is Class A low-level radioactive waste cannot be made, because the underlying classification determination cannot be made.

4. NIRS/PC therefore move that the Board exclude the following testimony as inadmissible in the present proceeding:

    a. LES direct testimony on disposal:

        i. page 4, question and answer 10.

        ii. page 8, question and answer14.

        iii. page 9, question and answer18.

        iv. page 11, in A.19, first sentence beginning "I would note . . ."

        v. page 15, in A.26, sentence beginning "By way of . . ."

        vi. page 16, in A.26, sentence beginning "As reflected in the FEIS . . ."

        vii. page 16, question and answer 27.

        viii. page 17, question and answer 28.

    b. LES rebuttal testimony on disposal:

        i. page 3, beginning "With respect . . ." through end of answer.

        ii. page 4, question and answer 4.

iii. page 5, question and answer 5.

iv. page 6, question and answer 6.

v. page 7, question and answer7.

vi. page 8, beginning with "Therefore, the authorization . . ." through end of answer.

vii. page 15, question and answer 16.

c. NRC Staff direct testimony on disposal:

i. page 4, question and answer 7.

ii. page 5, question and answer 8.

iii. page 6, question and answer 11.

iv. page 8, question and answer 15.

d. NRC Staff rebuttal testimony on disposal:

i. page 4, from "As explained . . . " through the end of the answer.

ii. pages 5-6: question and answer 7.

iii. Page 6, question and answer 9.

e. LES direct testimony on contingency factor:

i. page 10, paragraph beginning "Finally . . ."

ii. page 12, question and answer 21.

5. The Board should now determine that the following testimony submitted by Dr. Makhijani is admissible pursuant to the Commission's direction to assess "estimated impacts at one or more representative or reference sites":

a. NIRS/PC September 16, 2005 direct testimony on disposal:

i. page 20, question and answer 10.

ii. page 20, question and answer 11, through "performance of the WCS site" on page 31.

iii. page 42, question and answer 12.

iv. page 42, question and answer 13.

v. page 47, answer 14, sentence beginning "Our analysis . . . "

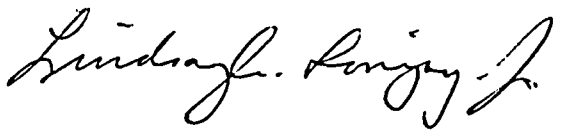
vi. page 48, answer 14, sentence beginning "As I have previously . . ." through the end of the answer.

b. NIRS/PC October 11, 2005 rebuttal testimony on disposal:

i. page 15, question and answer 11, all deleted passages.

6. The Board should admit testimony on the other matters identified above as supported by contentions timely made.

Respectfully submitted,



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October 18, 2005

CERTIFICATE OF SERVICE

Pursuant to 10 CFR § 2.305 the undersigned attorney of record certifies that on October 21, 2005, the foregoing Motion in Limine on behalf of Nuclear Information and Resource Service and Public Citizen to Exclude Inadmissible Evidence and to Admit Relevant Evidence under Ruling of Nuclear Regulatory Commission dated October 19, 2005 was served by electronic mail and first class mail upon the following:

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