

historic sites.¹ It was not necessary for Petitioner to prove those impacts in order to gain admission of a contention.

As well, the briefs of USEC and NRC contradict each other in a fundamental sense. USEC's general line of attack is to say that the Petitioner has demonstrated nothing, raised no valid points of concern, identified no potential impacts at all. NRC Staff, on the other hand, argues that the Petitioner has been so effective at raising issues and identifying potential impacts, that the Staff has now been alerted to all these issues, which now can be corrected. Indeed, NRC Staff goes on to enumerate the many potential impacts identified by Petitioner at page 6 of its brief.²

These arguments cannot both persuade. If the Applicant is so recalcitrant that it still refuses to acknowledge the many properties and potential impacts that the Petitioner has identified and that the Staff is now assessing, then that is prima facie cause for discovery and hearing so that these disputes about impact on historic properties can be debated publicly and resolved. Similarly, the Staff cannot rest content that it has fulfilled its NHPA obligations by filling in and covering up for an Applicant that continues to show utter insensitivity to the concerns of historic preservation.

In fact, both USEC's and the Staff's statements attempt to hide the truth by sleight of hand. In his scoping testimony, his petition, his subsequent filings, and his amended contentions, Petitioner identified an integrated constellation of historic properties in the immediate vicinity of ACP. Contrary to USEC's claim, two of these are obviously within the APE, however the APE is defined. One is the Petitioner's residence, the Barnes Home, which is within the APE even according to the DEIS (page 4-5.) The other is the earthwork on federal land leased by USEC, directly underneath and in between the wells that USEC will use to supply ACP with water. Both USEC and NRC Staff neglect to include that well field as part of "ACP site," and

¹ Nevertheless, neither USEC nor NRC Staff address Petitioner's argument that there is some presumptive impact upon a historic property so close to a uranium enrichment plant as to share a one-mile fence-line (in the case of the Barnes Home property) or to have wells dug into it (in the case of the GCEP Water Field earthwork). (Petitioner's Appeal Brief at page 15.)

² The Staff admits that "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)." (Staff Brief, p. 3) This directly contradicts the USEC assertion that "Mr. Sea has

therefore dismiss it, but that is their neglect, not the Petitioner's. Definition of the ACP "site" would indeed be at the heart of this contention at hearing. Petitioner has shown and will show that by defining the site only as the footprint of the prospective ACP process buildings, USEC and NRC have merely wished away important impacts on historic properties. Indeed this definition of the site arose before the petitioner's historic preservation concerns were ever considered, and is therefore deficient, as is the NRC's process for defining the APE (a term not even used by USEC in its Environmental Report.) The NRC process for establishing the APE in its DEIS considers only the "source" facility and then arbitrarily defines the distances from that source in which effects could occur. This is a method derived from radiological risk assessment that starts with a "source term" and works outward, with all the standard assumptions about amelioration over distance.

An essential element of cultural resource assessment, however, is that one starts from the historical property, and works from there, not the other way around. Until one understands the nature of a property, one cannot possibly understand the potential impacts upon it, or the distances over which those impacts might occur.³

One must also consider the interrelatedness of cultural resources within their historical landscape, something that neither USEC nor NRC Staff comes close to doing. Petitioner provided a map and narrative to explain this interrelatedness, all of which has been ignored by USEC, the Staff, and the Panel. All three typically refer to the large Hopewell earthwork complex as "the Scioto Township Works." This appears to be an innocuous name, but it is used for a reason. It is neither the historic name (Squier and Davis used the name "Seal Township Works" in 1848), nor is it the most recently used scientific or common name (Gerard Fowke called it "the Barnes Works" in 1902 and that is how local people would refer to it). But to call it the Barnes Works would immediately reveal its intimate connection to the Barnes family and the Barnes Home.

identified no existing potential historic or cultural resources within the APE [Area of Potential Effects] and has failed to challenge any of the analysis of the potential impacts of the ACP." (USEC Brief, p. 15)

³ With his original petition and his Reply to NRC Staff, Petitioner submitted two expert statements as exhibits from Thomas F. King that speak to these very points. Dr. King is a principal author of the NHPA Section 106 implementing regulations, and the author of numerous books and textbooks on Section 106 implementation.

Petitioner did explain that the Barnes family brought these works to public attention, hosted Abraham Lincoln on a visit to see them (with the Sargent family), and cared for the works on their estate for many decades. The earthworks were visible from the second story of the Barnes Home, and if they are reconstructed, they would be visible again. (Indeed, the house was built in precise geometrical relationship to the earthworks.) Restoration of the Barnes Home and the Barnes Works is an integral project (along with the Sargent Home, Rittenour Home and other sites). Students and tourists would come to visit and study these sites together, not apart. (Two study groups involving professors and students have already come.) Thus the USEC argument that all of this is outside the APE, or the NRC Staff argument that the Barnes Home is within the APE but the Barnes Works and the Sargent Home are outside it, are equally untenable. All of this is ripe for disputation at hearing.

USEC makes numerous additional misstatements of fact and law:

1) USEC engages in subterfuge to try to confuse the Commission on the subject of wind direction and potential exposure at the Barnes Home. (Page 4) In the original petition, Petitioner erroneously referred to "direction of prevailing winds." The prevailing winds blow to the northeast but can reverse following the topography of the valley to blow southwest. (ER at 3-47 to 3-50) There are no nearby residences to the northeast; thus the Barnes Home is in the direction of maximum windborne contamination from ACP and the MEI is indeed southwest, that is, me. This correction was made in Petitioner's Reply to Answer of USEC (pages 9-10).

2) USEC repeatedly cites statements from the DEIS to bolster its arguments (for example on page 15), which Petitioner has not yet had the opportunity to address in the petition process.

3) USEC argues that "Mr. Sea has not shown that the Barnes Home has actually 'qualified for' listing [on the National Register for Historic Places]." (Page 17) This reveals a profound misunderstanding of the listing process. As an attachment to his petition, Petitioner submitted the letter from the Ohio Historic Preservation Office that certifies the Barnes Home as eligible for the Register under two of the four possible criteria. (It is rare to be eligible under more than one criterion.) This is the official eligibility letter.

Preparation of the nomination paper and actual listing can take years, and are underway. Section 106 of NHPA at 16 USC 470f makes clear that the process applies to all properties that are “included in or eligible for inclusion in the National Register.” There is no discrimination or taint of being “speculative” for a property determined to be eligible. Furthermore, the implementing regulations at 36 CFR 800.16(l)(2) make it clear that a formal determination of eligibility, such as that obtained by the Petitioner for the Barnes Home, is not even necessary. “Eligible properties include any property that meets the criteria” for eligibility, as must be determined by the agency. Courts have upheld this broad interpretation of eligibility. See *Boyd versus Roland*, 789 F2d347 (5th Circuit 1986).

4) USEC suggests that the other properties like the Sargent Home are negligible, merely because no nomination has been submitted to the State Historic Preservation Office (SHPO). (Page 17) It is the agency’s responsibility (in this case both DOE and NRC) to identify impacted properties that would qualify for the Register, even if those properties have not yet been identified by the SHPO. (And according to the DOE/USEC Lease Agreement, USEC contractually agreed to carry out this responsibility for DOE in regard to all leased property.) In other words, the agency cannot exclude a property from assessment just because the SHPO fails to identify it, if that property has otherwise been brought to the agency’s attention, as is here the case. The NHPA implementing regulations require that the agency “seek information as appropriate from consulting parties and other individuals and organizations likely to have knowledge of or concerns with historic properties in the area, and identify issues relating to the undertaking’s potential effects on historic properties.” (36 CFR 800.4(a)(3)) (The Petitioner certainly qualifies as such an individual.) In fact, a joint nomination for the Barnes Home, the Sargent Home, the Rittenour Home, the Barnes Graveyard and the Sargents Railway Station (and possibly other properties) is now in preparation with the assistance of architectural historians, recognizing the interrelatedness of these sites.

5) USEC contends that the Petitioner has had “ample opportunity to participate” in achieving NHPA compliance “as a Consulting Party in the ongoing Section 106 review.” (Page 19) This is pure obfuscation. The Petitioner requested that he be made a consulting party in conjunction with his demand that a Section

106 review be initiated at the scoping hearing in Piketon on January 17, 2004. Petitioner was then given verbal assurances from NRC staff that he would be “kept informed.” However, NRC staff did not include the Petitioner when consultation letters were mailed in March of 2005. Petitioner did not become aware that he was excluded as a consulting party until the Pre-hearing Conference in August of 2005. At that point, Petitioner made a series of communications by e-mail and telephone to NRC staff, demanding to be made a consulting party and asking for an explanation as to why that action had not been taken sooner. NRC staff verbally informed the petitioner that they considered consulting party status to be in conflict with potential intervenor status. Petitioner then received an e-mail from NRC staff informing him that his consulting party status was “under review.” Petitioner was not actually informed that he was a consulting party until September 29, 2005, more than eight months after the status was requested, as NRC announced that the Section 106 process was closing, and just one day before the Panel had announced it would rule on the admissibility of Petitioner’s contentions. In other words, the Petitioner was excluded from consulting party status during the period when it might have been effective, on the basis of his potential intervention. Now USEC wants the intervention denied on the basis of the eleventh hour grant of consulting party status. That’s not “ample opportunity for participation,” that’s a game of exclusion, and not at all what is required under NHPA.

Likewise, NRC Staff argues on page 5 of its brief that “NRC is using the EIS process in order to comply with Section 106 of the NHPA, as allowed in 36 CFR 800.8. This process is ongoing and Mr. Sea has been identified as a consulting party.” Well, there are three things wrong with that argument. It misleads as to when the Petitioner was made a consulting party. The Petitioner was not consulted and received no consultation letter before NRC decided to fold its 106 process into the EIS. And 36 CFR 800.8 allows such a conflation only under specific conditions which have not here been met.

6) USEC mischaracterizes Petitioner’s argument in alleging that he takes issue with “past DOE activities.” (Page 16) Petitioner was very clear in his appeal brief that he is not counting past DOE activities in his assessment of impact but only those DOE-USEC joint activities that are part and parcel of ACP; ie, that would not produce continuing impact were ACP not licensed. In regard to the use of Garlan-4 herbicide

on Petitioner's fence-line, Petitioner made clear that it is not a "past practice," rather it only started in 2003, after the Gaseous Diffusion Plant had ceased production, in preparation of the site for ACP. It is an impact of ACP, not of activities that predated the practice. Again, on page 23, USEC asserts that the DOE/USEC lease agreement is "beyond the scope of these proceedings," yet elsewhere, on page 12, USEC complains that Petitioner has not provided evidence of a USEC obligation under NHPA. The DOE/USEC lease agreement is the evidence of that obligation because it contains a regulatory compliance provision that binds USEC as the responsible party for regulatory compliance on the property it leases, including the water field site. Information from DOE or that mentions DOE cannot be "beyond scope" by definition, because that information is vital to any assessment of the ACP project. NRC Staff says as much on page 9 of its brief: "While the Board may consider previous [DOE] 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."

Consideration of the DOE/USEC lease agreement certainly falls within "ascertaining present conditions of the site." And Petitioner is not asking NRC to reconsider previous NHPA consultations of DOE, because there were none. There were none because USEC had assumed NHPA compliance responsibility from DOE in its lease agreement, and then defaulted. That fact is relevant for consideration of current and future compliance status.

7) USEC asserts that "The ER determined there would be no impacts to any potential historic or cultural resources outside the DOE reservation boundary." (Page 22). But, as discussed in Petitioners' contention, the ER gives no indication that it gave any thought at all to the impact of the ACP on sites outside of the DOE reservation boundary. "Simple conclusory statements of 'no impact' are not enough to fulfill an agency's duty under NEPA." *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 151 (D.C. Cir. 1985). Similarly, under NHPA, if the agency concludes that there are no historic properties, or that there are historic properties but no effect, it must provide the SHPO and the ACHP with documentation of this finding. (36 CFR 800.4(d) (1)) Clearly, USEC's ER did not provide NRC with a sound basis for producing the kind of documentation required.

Moreover, the water field is *on* the DOE reservation, not outside of it. (As evidenced by the DOE/USEC lease agreement attached as an exhibit to Petitioner's amended contentions, which lists the field.) USEC has consistently thwarted Petitioner's attempts to investigate the potential impacts of the ACP on historic resources within DOE reservation boundaries.⁴ "The spirit of [NEPA] would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review." *Save our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973). A more complete assessment of likely impact can only come when USEC and DOE are more forthcoming with information and access rights, and that can only happen with discovery and a hearing after admission of Petitioner's contention.

On pages 7-8 of its brief, NRC Staff considers the potential impact on the water field earthwork as "the only relevant, specific, and particularized basis for Contention 1.2" regarding impacts. And yet the Staff goes on to dismiss this impact because absence of any discussion of it in the ER "has been cured by the Staff's consideration of this effect in the DEIS... (finding 'that there would be no effect on potential earthworks located near the DOE wellfields' and explaining the basis for that determination." (Page 8) There is an enormous problem with this argument. NRC concluded its analysis for the DEIS before it considered the results of the August 5 visit to that site of the Petitioner and three cultural resource experts.⁵ In other words, the expert declaration of the three experts, submitted along with Petitioner's amended contentions, was not considered in preparation of the DEIS. Therefore the "finding" of no effect is nullified. It appears

⁴ USEC and DOE together denied Petitioner's archaeological research team basic information about the site including its extent, any hydrological reports, or any prior archaeological surveys. We requested a map of the site and were given none, and no map is publicly available from other sources. USEC barred us from taking photographs or soil samples. USEC deposited our team at the opposite end of the site from where the earthwork is located. Under these conditions, the experts did as complete an assessment as could be done. They did verify the initial claim of the Petitioner that an earthwork appearing to be ancient sits underneath and between USEC wells.

⁵ E-mail communication from Matthew Blevins to Geoffrey Sea regarding "Section 106 Questions," August 23, 2005. Mr. Blevins wrote: "Regardless of your status, the NRC staff has considered the information you provided in your NEPA scoping comments provided on February 2, 2005 and pleadings before the Atomic Safety and Licensing Board Panel on February 28, 2005; April 1, 2005; July 18, 2005; and August 10, 2005; as well as the various emails you have submitted." Note that this list does not include Petitioner's amended

that NRC Staff together with the Applicant arranged the schedule so as to permit a finding of “no impact” in the DEIS, even after Petitioner had produced concrete evidence of effect, backed by expert testimony.

Both USEC and NRC Staff argue that the deficiency of USEC’s Environmental Report has been corrected and made moot by issuance of the DEIS. But the case is not moot because the ER conditioned some of the worst deficiencies in the DEIS. For instance, the DEIS adopts the ER’s definition of the project site as limited to the footprints of the process buildings, and the ER’s implicit restriction of impact zones to certain distances from the “source.”

Furthermore it is far from clear that the NRC Staff decision to fold the NHPA Section 106 review process into the NEPA EIS process is lawful. To do so, NRC must have met a series of preconditions specified in 36 CFR 800.8(c), conditions that the agency has not met. NRC must have notified in advance both the SHPO and the Advisory Council on Historic Preservation, filing a set of detailed documents pertaining to the meeting of NHPA standards. One of those standards is the notification of consulting parties, with their ability to object to the conflation of NHPA and NEPA. (36 CFR 800.8(c)(1)(i)) This consulting party was not so notified and he objects. Therefore, the “correction” of the deficiencies of the ER in the DEIS is invalid under NHPA.

USEC makes an important admission in its discussion of Petitioner’s contentions on alternative use. On pages 25-26, USEC states that the NHPA provision on alternative use under 36 CFR 800.6(a) is meant to take effect only after a historic property is identified and adverse impacts are determined to exist. Petitioner asserts that USEC failed to identify those properties and impacts as both a leasing agent with contractual responsibilities to DOE, and in its preparation of an ER for NRC. Based on USEC’s admission, Petitioner further asserts that if his contentions on failures of identification and/or failures of NHPA compliance are admitted, then his contention on alternative use must also be admitted in consequence.

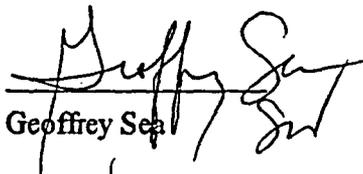
And this undercuts the Panel’s argument in LBP-05-28 that admission of Petitioner’s contention 1.1 would have no effect because it would be at any time correctable and thereby rendered moot. Petitioner has

contentions submitted on August 17, 2005, even though these were available to Mr. Blevins and his staff before he sent his e-mail.

shown that the deficiency is not easily correctible, but even if it were correctible through the DEIS, it would not be rendered ineffective because it would trigger the admissibility of Petitioner's two contentions on alternative use (3.1 and 3.2). In other words, if USEC had properly identified historic properties in the vicinity of ACP, then it should have also considered alternatives to the proposed action that better provide for historic preservation, and too, they should have given serious weight to moving the project to Paducah.

In conclusion, Petitioner has more than met his burden to provide facts and expert opinion to support his contentions regarding failures to identify important historic properties and potential impacts of ACP upon them; failures to comply with laws, regulations, and contractual agreements that secure the protection of America's historical legacy; and requirements to consider alternatives to the proposed action that better preserve and protect that legacy. Information from USEC about resources on land it controls has not been forthcoming. For these reasons, it is imperative for the public good that the disputes over ACP's impacts on cultural resources be subject to formal discovery and be heard at hearing. LBP-05-28 should be reversed and Petitioner's contentions should be admitted.

Respectfully submitted,


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October 24, 2005

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

_____)	Filed November 8, 2005
In the Matter of)	
)	
USEC Inc.)	Docket No. 70-7004
(American Centrifuge Plant))	
)	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that copies of **GEOFFREY SEA'S MOTION FOR LEAVE TO ANSWER THE BRIEFS OF USEC AND NRC STAFF ON PETITIONER'S APPEAL OF LBP-05-28** and **GEOFFREY SEA'S REPLY BRIEF ON APPEAL OF LBP-05-28** in the above-captioned proceeding have been served on the following by deposit in the United States mail, and by electronic mail on this 8th day of November, 2005.

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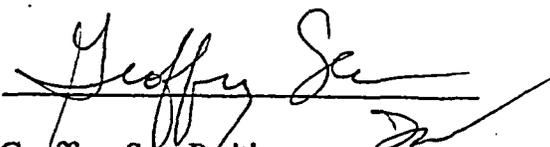
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