

November 29, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
LOUISIANA ENERGY SERVICES, L.P.)	Docket No. 70-3103
)	
(National Enrichment Facility))	ASLBP No. 04-826-01-ML
)	

NRC STAFF RESPONSE TO MOTION ON BEHALF OF INTERVENORS
NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN
FOR ADMISSION OF SUPPLEMENTAL AND ADDITIONAL
LATE-FILED CONTENTIONS UNDER 10 C.F.R. § 2.309(c)

INTRODUCTION

Pursuant to the Board's Order of November 14, 2005,¹ the Nuclear Regulatory Commission Staff ("Staff") hereby responds to the motion filed by Nuclear Information and Resource Service and Public Citizen ("NIRS/PC")² requesting the admission of supplemental and late-filed contentions. As discussed below, upon consideration of the factors that govern the admission of late-filed contentions and the Commission's standards for admissibility of contentions, none of the supplemental contentions advanced by NIRS/PC should be admitted into this proceeding.

BACKGROUND

On December 15, 2003, the Commission received an application from Louisiana Energy Services, L.P. ("LES") for a license for the construction and operation of the National Enrichment Facility ("NEF"), a gas centrifuge enrichment facility to be located near Eunice,

¹ Order (Schedule for Responses to Late-Filed Contention Admission Motion).

² "Motion on Behalf of Intervenors Nuclear Information and Resource Service and Public Citizen for Admission of Supplemental and Additional Late-Filed Contentions under 10 C.F.R. § 2.309(c)," November 11, 2005, ("NIRS/PC Motion").

New Mexico. LES submitted an Environmental Report (“ER”) in December, 2003.³ In that ER, LES stated that it relied upon the deep disposal dose estimates included in Appendix A from the Claiborne Enrichment Center (“CEC”) Final Environmental Impact Statement (“CEC FEIS”).⁴ In a July 14, 2004 Memorandum and Order, the Board admitted NIRS/PC as a party to this proceeding and admitted several contentions, including NIRS/PC EC-4. *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 75-76 (2004). None of these contentions challenged the sufficiency of the underlying deep disposal dose estimates from the CEC FEIS.

In September 2004, the Staff published a Draft Environmental Impact Statement for the NEF (“NEF DEIS”).⁵ On October 20, 2004 NIRS/PC filed a motion to amend or supplement previously admitted contentions based on certain additional information contained in the NEF DEIS. Motion on Behalf of [NIRS/PC] To Amend and Supplement Contentions (Oct. 20, 2004). On February 2, 2005, NIRS/PC filed a second motion for the admission of late-filed contentions, which included an attempt to supplement its previously filed deep disposal contentions. Motion on Behalf of Intervenors For Admission of Late-Filed Contentions (Feb. 2, 2005). In June 2005, the Staff published a Final Environmental Impact Statement for the NEF (“NEF FEIS”).⁶

The Board disallowed the new deep disposal impacts contentions in the October and February Motions. Following issuance of a Board decision on the admitted contentions, the

³ National Enrichment Facility Environmental Report (Dec. 2003) (“NEF ER”).

⁴ NIRS/PC Ex. 58. NUREG-1484 “Final Environmental Impact Statement for the Construction and Operation of Claiborne Enrichment Center, Homer, Louisiana,” Public Comments and NRC Response, Appendix A (August 1994) (“CEC FEIS”).

⁵ NUREG-1790 “Environmental Impact Statement for the Proposed National Enrichment Facility in Lea County, New Mexico,” Draft Report for Comment (Sept. 2004) (“NEF DEIS”).

⁶ NUREG-1790 “Environmental Impact Statement for the Proposed National Enrichment Facility in Lea County, New Mexico,” Final Report (June 2005) (“NEF FEIS”).

Commission issued a Memorandum and Order on October 19, 2005 limited to the issue of whether the Board erred in not allowing NIRS/PC to amend contention EC-4—Impacts of Waste Storage, to include allegations concerning the adequacy of the NEF DEIS discussion of waste disposal impacts. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC ___ (2005). The Commission found that the Board erred in determining NIRS/PC's supplemental claims untimely to the extent they were based on new information contained in the DEIS and remanded those issues to the Board. *Id.* slip. op. at 11.

The Commission noted that NIRS/PC had raised three specific claims: (1) The DEIS incorrectly concluded that depleted uranium may be disposed of as Class A low level waste on the grounds that further environmental analysis is necessary to assure near-surface disposal is appropriate in light of the fact that the Commission did not include disposal of large quantities in adopted Part 61 and that depleted uranium should be disposed of as Greater Than Class C waste, (2) the DEIS simply assumed that disposal could occur at a near-surface disposal site and did not account for earlier statements by the NRC expressing concern about whether near-surface disposal would be appropriate for depleted uranium, and (3) the DEIS did not specify the models used to assess the impacts for deep disposal and it was not clear from the numbers reported that they were based on the models used in the Claiborne FEIS. *Id.* Slip op. at 6-7. The last issue is currently subject to a motion for summary disposition filed by the Staff.⁷

Thereafter, NIRS/PC filed the present motion for the admission of late-filed contentions, stating that it was “updating” its contentions to address statements in the FEIS. NIRS/PC Motion at 4. Specifically, NIRS/PC stated that it was relying on its right to advance new contentions when data or conclusions in the final EIS “differ significantly” from the draft EIS.

⁷ “NRC Staff Motion for Summary Disposition,” November 18, 2005.

DISCUSSION

I. Legal Standards for Admission of Late-Filed Contentions

The criteria to be considered when determining the admissibility of a late-filed contention are set forth in 10 C.F.R. § 2.309(c)(1)(I)-(viii), in relevant part as follows:

- (I) Good cause, if any, for the failure to file on time;
- (v) The availability of other means whereby petitioner's interest will be protected;
- (vi) The extent to which petitioner's interests will be represented by existing parties;
- (vii) The extent to which petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1)(I)-(viii).

NIRS/PC, as the proponent of the admission of its late-filed contentions, bears the burden of demonstrating that a balancing of these factors weighs in favor of admission by affirmatively addressing the lateness factors in its petition. Thus, NIRS/PC must demonstrate that a balancing of the factors warrants overlooking the lateness of their contentions.

Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 n.22 (1985).

Here, because NIRS/PC is already a party to the proceeding, factors (ii) and (iii) are not relevant.⁸

It has long been held that the first factor, good cause for lateness, carries the most weight in the balancing test. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 221 (2000); *aff'd*, CLI-04-04, 59 NRC 31 (2004).

Absent a showing of good cause, a compelling showing that the remaining factors outweigh the lack of good cause for the untimely filing is necessary. See, *Commonwealth Edison Co.*

⁸ Because they relate primarily to standing to intervene, factors (ii), (iii) and (iv) are not relevant to the issue of whether an existing party's late-filed contention's should be admitted.

(Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986).

In making a judgment about good cause, emphasis is placed on when sufficient information was made available to the petitioner so as to make it possible for the petitioner to raise and frame the contention with reasonable specificity and basis. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-99-43, 50 NRC 306, 313 (1999), *citing*, *Duke Power Co.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 338 (1999). Good cause does not exist when the late-filed contentions are not based on new information arising after the original deadline and, therefore, could have been included in a timely petition. In this regard, 10 C.F.R. § 2.309(f)(2) provides:

On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement . . . that differ significantly from the data or conclusions in the applicant's document.

Thus, where a contention purportedly is based on the existence of a document recently made publically available, an important consideration in assessing good cause for lateness is the extent to which the contention could have been submitted prior to the document's availability. *See Public Service Co. Of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n.4 (1983); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 292 (1998).

In addition to demonstrating that a balancing of the late-filing criteria warrants admission, the petitioner must meet the requirements for admissible contentions in 10 C.F.R. § 2.309(f)(1). That regulation provides that a contention must include: (1) a specific statement of the issue of law or fact raised, (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 which is the subject of the proceeding, (5) a concise statement of the alleged facts or

expert opinions supporting the contention and (6) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.

II. NIRS/PC's Supplemental Contentions

NIRS/PC seeks to supplement admitted contention EC-4 with the following bases:

A. The FEIS contains a narrative description of the near-surface disposal site operated by Envirocare of Utah ("Envirocare") at page 4-63. The discussion contained in the FEIS falls far short of the hard look that NEPA requires at the impacts of near-surface disposal of large amounts of depleted uranium from an enrichment facility. The FEIS states that the Envirocare site is authorized by the State of Utah to dispose of depleted uranium with no volume restrictions and that several site-specific factors contribute to the acceptability of the Envirocare site for disposal of depleted uranium. The FEIS then concludes that the impacts of near-surface disposal at Envirocare would, therefore, be small. In fact, no valid scientific analysis underlies such a conclusion about the acceptability of the Envirocare site for disposal of large quantities of depleted uranium. Neither the State of Utah nor the NRC Staff has presented a valid scientific analysis demonstrating that the disposal of large quantities of bulk depleted uranium at the Envirocare site would meet the performance requirements of 10 CFR Part 61, Subpart C. Such an analysis should include a waste inventory of depleted uranium at the volumes and concentrations under consideration by LES, scenarios involving the future use and potential occupancy of the site, the consideration of impacts extending to the time of peak dose in compliance with the regulation, and the prospects of the loss of cover of the disposal site through erosion, intrusion, or other processes. Such analyses for "dry" sites have been conducted by the Department of Energy and by experts for NIRS/PC and show violations of the 10 CFR Part 61 dose limits by large margins. Other analyses indicate that near-surface disposal of large quantities of depleted uranium in other environments (i.e., "wet" sites) is likely, over time, to result in doses in violation of 10 CFR Part 61. No valid analyses have been presented in this case that show such near-surface disposal to be able to meet the performance criteria in 10 CFR Part 61, Subpart C at the time of peak dose.

B. The FEIS attempts to estimate the impact of disposal of large amounts of depleted uranium from the proposed NEF in its modeling of the releases expected from a generic mine site. (At 4-64, Table 4-19). The FEIS fails to adequately disclose the models used and the parameter values, and such disclosures have never been made by the Commission Staff in this case. The FEIS text suggests that the models used in analyzing generic deep disposal sites in the CEC FEIS were used, and in Table 4-19 of the FEIS certain errors made in generating Table 4-19 of the Draft EIS have been corrected: however, the modeling results shown in FEIS Table 4-19 vary by several orders of magnitude from results obtained in similar studies of depleted uranium disposal (see, e.g., NIRS/PC Ex. 128 at 14, 31; NIRS/PC Ex. 190 at 21-23), remain unsupported by adequate specification of the models and input parameters used, and the results cannot be reproduced using the information contained in the CEC FEIS. The

Commission Staff itself has apparently failed to try to reproduce the dose estimates presented in the NEF FEIS from the information presented in the CEC FEIS. The results are quite literally incredibly low and cannot be viewed as scientifically credible. Further, the model addresses only two hypothetical disposal sites and fails to examine any real-world location of potential disposal. Performance of a disposal site is highly site-specific.

III. Application of Late-Filing Criteria to NIRS/PC's Supplemental Contentions

NIRS/PC present a number of reasons for its assertion that these supplemental contentions should be considered timely, none of which have merit. First, NIRS/PC asserts that it has the right to advance new contentions based on the issuance of a FEIS if it contains data or conclusions which differ significantly from the DEIS. NIRS/PC Motion at 4. However, NIRS/PC has failed to cite any reason for concluding that it could not have raised these claims based on the draft EIS, or that the final EIS contained any substantive change from the draft regarding the subject matter of these new contentions. As noted above, the proponent of the contention bears the burden of demonstrating good cause for the untimely filing. Absent any showing that these contentions could not have been filed based on the DEIS, NIRS/PC has failed to make this necessary showing.

Furthermore, these contentions are untimely regardless of which EIS one considers given the fact that the final EIS was issued in June 2005. The delay until now is not excused by the fact that other contentions had been rejected and then were pending before the Commission as NIRS/PC alleges. NIRS/PC Motion at 4. NIRS/PC concedes that it filed "similar" supplemental contentions in October 2004 and February 2005, NIRS/PC Motion at 5, but fails to explain why these contentions were not filed now, after completion of the hearing. Clearly, NIRS/PC has failed to make the necessary showing that good cause exists for this late filing and the good cause for late filing factor (I) weighs against admission.

With regard to the remaining factors governing the admission of late filed contentions, NIRS/PC has already had ample opportunity to raise issues regarding the adequacy of the

Staff's environmental review, both in hearing and through the opportunity to comment on the Staff's DEIS. While there are no other parties acting as intervenors in this proceeding, the Board will be conducting a mandatory hearing to consider, among other things, the adequacy of the Staff's environmental review. Thus, late filing factors (v) and (vi) weigh against admission. With regard to factor (vii), there is no question that permitting the admission of additional environmental contentions now will broaden the issues before the Board and delay this proceeding, particularly since all of NIRS/PC's contentions have now been thoroughly aired in two hearings. This factor therefore also weighs heavily against admission. Finally, as discussed below, NIRS/PC has not raised issues which will contribute to a sound record. Accordingly, when all factors are considered, the late filing criteria weigh against admission of these new bases.

IV. Admissibility of NIRS/PC's Supplemental Contentions

A. Basis (A)

In Basis (A) NIRS/PC argues that the FEIS is incorrect in relying on representations by the State to the effect that Envirocare is authorized to accept large quantities of depleted uranium such as those generated by an enrichment facility. NIRS/PC Motion at 8-9. Specifically, NIRS/PC argues that no valid scientific analysis demonstrating compliance with the performance requirements of 10 C.F.R. Part 61 underlies this conclusion. *Id.*

In essence, therefore, NIRS/PC is questioning the licensing determination that has been reached by the State of Utah, the regulatory authority responsibility for licensing the Envirocare facility. FEIS at 4-63. Compliance with the applicable performance requirements, however, which in this case are State of Utah regulatory requirements which are essentially equivalent to Subpart C of 10 C.F.R. Part 61, are determined by the State and not by the NRC. It is not within the purview of the NRC, or this Board, to examine whether the State's determination of compliance, and any analysis underlying that determination, is proper. As this Board noted

when considering an earlier contention challenging the sufficiency of an application filed by Waste Control Services with the State of Texas, “[t]his Board does not have jurisdiction over matter properly before state regulatory bodies such as the TCEQ [Texas Commission on Environmental Quality]” *Memorandum and Order* (Ruling on NIRS/PC Late-Filed Contention Amendments), June 30, 2005, at 11, *citing Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 121-22 (1998). Like that contention, this supplemental basis does not raise contention within the jurisdiction of this Board.

B. Basis (B)

In Basis (B) NIRS/PC raises new arguments regarding the fact that the FEIS relied upon the analysis in the Claiborne Enrichment Center FEIS in assessing the impacts of disposal of depleted uranium in an abandoned mine.⁹ Specifically, NIRS/PC claims that the results have not been reproduced by the Staff. NIRS/PC Motion at 9. The claim that the Staff must reproduce the results of the CEC study is essentially the same claim that NIRS/PC raised earlier in this proceeding when it argued that the Staff could not rely on a DOE analysis. This issue was settled by the Commission when it explained that environmental impact statements typically incorporate by reference other analyses and data by citing to the material and describing its content, and that the referenced material must be publicly available for review. *In the Matter of Louisiana Energy Services, L.P.*, (National Enrichment Facility) CLI-05-28, slip op. at 11. NIRS/PC’s attempt to resurrect this same issue in regard to the CEC FEIS should

⁹ In this response, the Staff focuses on new issues raised by NIRS/PC in the supplemental bases. NIRS/PC also repeats its earlier claim that “[t]he FEIS fails to adequately disclose the models used and the parameter values, and such disclosures have never been made by the Commission Staff in this case.” NIRS/PC Motion at 9. As this issue is already before this Board by virtue of the Commission’s remand, albeit through a contention addressing the DEIS, there is no need to consider admission of a late filed contention but only to construe the admitted contention to address the FEIS under Commission practice as argued by NIRS/PC. See, NIRS/PC Motion at 4.

therefore be rejected.

NIRS/PC's presents a new claim that the values reported for mine disposal, which were obtained from the CEC analysis, are too low to be scientifically credible. NIRS/PC Motion at This claim is not, however, supported by any more than this bare claim and a statement that the values differ from similar studies. NIRS/PC Motion at 9, 13-14. However, NIRS/PC has not shown that the study it has cited for comparison - the 1992 Kozak report - is relevant to the issue at hand. In fact, as explained in the Staff's response to NIRS/PC motion for summary disposition,¹⁰ the analysis performed by Kozak et al. of Sandia National Laboratory assumed shallow land disposal, an entirely different type of disposal than deep mine disposal. Indeed, NIRS/PC's fundamental argument in this proceeding is that deep disposal should be required because it is more protective than shallow land disposal, meaning that radiological impacts for deep disposal would be lower than those expected for shallow land disposal. Thus, NIRS/PC has failed to provide adequate evidentiary support to raise an admissible contention in this proceeding.

NIRS/PC also complains that the CEC analysis addressed only two hypothetical disposal site when performance of a disposal site is highly site-specific. While it is undoubtedly true that a site specific analysis would provide better information than a generic analysis when a specific site is being considered, the FEIS explains that no existing mine is currently licensed to receive or dispose of low-level radioactive waste nor has any application been made to license such a facility. FEIS at 4-63. NIRS/PC fails to explain, nor is it evident, how a site specific analysis could be performed in the absence of an available mine. Thus, this does not raise a material issue of fact which could be litigated in this proceeding. For all of these reasons, none of the new issues raised by NIRS/PC in Basis (B) is admissible.

¹⁰ NRC Staff Response to NIRS/PC's Partial Motion for Summary Disposition, November 28, 2005, at 10.

CONCLUSION

For the reasons discussed above, upon consideration of the factors that govern the admission of late-filed contentions and the Commission's standards for admissibility of contentions, none of the supplemental contentions advanced by NIRS/PC should be admitted into this proceeding.

Respectfully submitted,

/RA/

Lisa B. Clark
Counsel for NRC Staff

Dated at Rockville, Maryland
this 29th day of November, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO MOTION ON BEHALF OF INTERVENORS NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN FOR ADMISSION OF SUPPLEMENTAL AND ADDITIONAL LATE-FILED CONTENTIONS UNDER 10 C.F.R. § 2.309(c)" in the above-captioned proceedings have 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 (*), and by electronic mail as indicated by a double asterisk (**) on this 29th day of November, 2005.

Administrative Judge * **
G. Paul Bollwerk, III
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
E-Mail: gpb@nrc.gov

Administrative Judge * **
Charles Kelber
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
E-Mail: cnkelber@aol.com

Administrative Judge * **
Paul Abramson
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
E-Mail: pba@nrc.gov

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

Office of the Secretary * **
ATTN: Rulemakings and Adjudication Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555
E-mail: HEARINGDOCKET@nrc.gov

Mr. Rod Krich, Vice President
Licensing, Safety and Nuclear Engineering
Louisiana Energy Services
2600 Virginia Avenue NW.
Suite 610
Washington, D.C. 20037

James. R. Curtiss, Esq. **
Dave Repka, Esq. **
Martin O'Neill, Esq. **
Amy C. Roma, Esq. **
Tyson R. Smith, Esq. **
Winston & Strawn
1700 K Street, N.W.
Washington, D.C. 20006
E-mail: jcurtiss@winston.com
drepka@winston.com
moneill@winston.com
aroma@winston.com
trsmith@winston.com

Lindsay A. Lovejoy, Jr. **
Nuclear Information and Resource Service
1424 16th Street, NW.
Suite 404
Washington, D.C. 20036
E-mail: lindsay@lindsaylovejoy.com
llovejoy@cybermesa.com

/RA/

Lisa B. Clark
Counsel for NRC Staff