

November 28, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

November 28, 2005 (4:59pm)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)	
)	Docket No. 70-3103-ML
Louisiana Energy Services, L.P.)	
)	ASLBP No. 04-826-01-ML
(National Enrichment Facility))	

**LOUISIANA ENERGY SERVICES, L.P.'S
RESPONSE TO INTERVENORS' SUPPLEMENTAL
AND ADDITIONAL LATE-FILED CONTENTIONS**

I. INTRODUCTION

Pursuant to the Board's Order (Schedule for Responses to Late-Filed Contention Admission Motion) issued November 14, 2005, Louisiana Energy Services, L.P. ("LES") hereby responds to the November 11, 2005 motion of Nuclear Information and Resource Service and Public Citizen ("NIRS/PC") to amend and supplement NIRS/PC Contention EC-4. See "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)" ("Late-Filed Motion"). LES opposes the NIRS/PC motion for the reasons set forth below.

II. BACKGROUND

In its July 19, 2004, Memorandum and Order (Rulings Regarding Standing, Contentions, and Procedural/Administrative Matters), the Board admitted Contention NIRS/PC EC-4 ("Impacts of Waste Storage and Disposal"). As then admitted to the proceeding, Contention NIRS/PC EC-4 concerned only the adequacy of the applicant's and the Staff's evaluation of the potential environmental impacts of the construction and operation of a

commercial facility to deconvert depleted DUF_6 from the NEF to depleted U_3O_8 (“ DU_3O_8 ”) for purposes of disposing of the DU byproduct.

Following the submission of the parties’ various proposed findings and conclusions of law in February and March 2005, on June 8, 2005, the Board issued its First Partial Initial Decision, resolving all four environmental contentions in favor of LES and/or the NRC Staff. On June 23, 2005, however, NIRS/PC petitioned the Commission to review the Board's First Partial Initial Decision, alleging seven discrete Board errors, including the Board’s denial of amended contentions presented by NIRS/PC on February 2, 2005. As discussed further below, it is that petition for review that led the Commission to reverse, in part, a prior Board ruling that rejected a proposed amendment to Contention NIRS/PC EC-4 concerning the NRC Staff's evaluation of the environmental impact of DU disposal and to remand for further consideration the amended version of Contention NIRS/PC EC-4. *See Louisiana Energy Services, LP* (National Enrichment Facility), CLI-05-20, slip op. at 13-14 (2005). The remainder of the issues raised in the petition were rejected by the Commission. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-28, slip op. at 1 (2005).

In light of the “unusually complicated procedural history”, the Commission took the opportunity in CLI-05-20 to clarify the effect of its ruling on the scope of amended NIRS/PC EC-4. CLI-05-20, slip op. at 11. The Commission “direct[ed] the Board and parties to focus on the terms and bases of the contention [EC-4] submitted in the [October 20, 2004] motion rather than the overbroad claims in the [February 2, 2005] renewed motion.” *Id.* at 11-12. The Commission further held that the “renewed motion may be considered only to the extent that it raises or elaborates upon essentially the same impacts analysis arguments made following the DEIS.” *Id.*, at 12. In short, on remand, the Board and parties were to address the amended

contention “on the DEIS waste impact analysis, as proposed in NIRS/PC’s October 20, 2004 contention challenging the DEIS as renewed early this year in the wake of our decision in CLI-05-5.” *Id.*, at 13-14.

The nature and scope of the remanded contention was also addressed during the October evidentiary hearing. Specifically, the Board stated, in discussing the scope of the remanded contention, that the issue to be considered is whether the analysis in the DEIS is sufficient given the large quantities of depleted uranium at issue and “whether the referenced studies adequately bound what can be expected from the quantity of DU anticipated under the LES application.” Tr. at 1819. The Board further refined the scope of the remanded contention in its ruling on LES’s motion to dismiss certain of NIRS/PC’s bases for Contention EC-4.¹ The Board specifically stated that it “wouldn’t be considering any challenges to the adequacy of the dose estimates for the wet and dry disposal sites, to the degree that those are set forth in the [DOE] PEIS” and reiterated its view that a number of the issues raised by NIRS/PC in its February Motion were not appropriate for consideration.² Tr. at 2600.

III. APPLICABLE LEGAL STANDARDS

The standards governing the admissibility of late-filed and amended contentions are set forth in the Board’s November 22, 2004 ruling on late-filed contentions.³ Where, as here, the issue of an intervenor’s standing already has been resolved, the Board must weigh the

¹ See “Motion on Behalf of Louisiana Energy Services, L.P. to Dismiss Certain Bases Proffered in Support of Amended Contention NIRS/PC EC-4 Regarding Depleted Uranium (“DU”) Disposal Impacts” (October 25, 2005).

² These items are found on pages 13-15 and 24-30 of the February 2005 Motion and raise many of the “array” of other “untimely claims” also identified by the Commission in footnote 38 of CLI-05-20, including claims about “federal drinking water regulations, transportation, depleted uranium’s toxicity as a heavy metal, and alternative depleted uranium product forms.” CLI-05-20, slip op. at 10 n.38.

following five factors: (1) good cause, if any, for the failure to file on time; (2) the availability of other means whereby the requestor's interest will be protected; (3) the extent to which the requestor's interests will be represented by existing parties; (4) the extent to which the requestor's participation will broaden the issues or delay the proceeding; and (5) the extent to which the requestor's participation may reasonably be expected to assist in developing a sound record.⁴ The first factor, good cause for lateness, carries the most weight in the balancing test, and the lack thereof requires the petitioner to make a "compelling showing" relative to the remaining factors.⁵ The finding of good cause for late-filing of contentions is related to the "total previous unavailability of information."⁶

Additionally, the proffered late-filed contentions also must meet the admissibility standards set forth in 10 C.F.R. § 2.309(f)(1), which are discussed at length in the Board's July 19, 2004 ruling in this proceeding.⁷ In short, a proposed contention must contain (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 that 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

³ See Memorandum and Order (Ruling on Late-Filed Contentions) at 5-6 (November 22, 2004).

⁴ See 10 C.F.R. § 2.309(c)(1)(i), (v)-(viii).

⁵ See *State of New Jersey* (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 296 (1993) (citations omitted).

⁶ See 10 C.F.R. § 2.309(f)(2); *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983) (emphasis added).

⁷ See *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 54-58 (2004); see also 10 C.F.R. § 2.309(f)(1)(i)-(vi).

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.

Lastly, on issues arising under NEPA, such as those in EC-4, contentions are initially based on the applicant's Environmental Report (ER). Intervenors may amend those contentions if there are data or conclusions in the Draft or Final EIS that "differ significantly from the data or conclusions in the applicant's documents." 10 C.F.R. § 2.309(f)(2). Otherwise, contentions may be amended only if (1) the information upon which the amended or new contentions is based was not previously available; (2) the information upon which the amended or new contention is based is materially different than information previously available; and (3) the amended or new contention has been submitted in a timely fashion based on the availability of subsequent information. 10 C.F.R. § 2.309(f)(2)(i)-(iii).

IV. ANALYSIS OF NIRS/PC LATE-FILED CONTENTION AMENDMENTS

Before delving into the substance of the Intervenors' amended contentions, a solid grounding in the scope of Contention NIRS/PC EC-4, as remanded, is an imperative. As discussed *supra*, the Commission directed the Board and parties "to focus on the terms and bases of the contention [EC-4] submitted in the [October 20, 2004] motion rather than the overbroad claims in the [February 2, 2005] renewed motion." CLI-05-20, slip op., at 11-12. Since contentions addressing alleged deficiencies in the DEIS are automatically construed to address the FEIS without the need for modification, Contention EC-4 currently alleges that the FEIS fails to take an adequate "hard look" at the environmental impacts of depleted uranium disposal. See Late-Filed Motion, at 4; 10 C.F.R. § 2.309(f)(2); *Louisiana Energy Services, LP* (Claiborne Energy Center), CLI-98-3, 47 NRC 77, 84 (1998). Specifically, as paraphrased by the Board during the October 2005 evidentiary hearing, the substance of Contention NIRS/PC EC-4

challenges whether the analysis in the FEIS is sufficient given the large quantities of depleted uranium at issue and “whether the referenced studies adequately bound what can be expected from the quantity of DU anticipated under the LES application.” Tr. at 1819.

Like the Commission, the Board acknowledged the procedural difficulties in filing amended contentions based on the FEIS while an appeal was pending on EC-4. As a result, the Board decided to “collapse the [contention filing] process” to avoid having to spend time fixing one error in the DEIS and then having to consider a new contention on the corrected FEIS—an efficiency obviated by this Late-Filed Motion.⁸ Tr. at 2486. Nevertheless, any late-filed amended contentions allegedly based on changes from the DEIS to FEIS must still satisfy all of the amended contention criteria in 10 C.F.R. § 2.309(c) and (f), including the requirement that the information not have been previously available. For the reasons stated below, LES opposes the admission of the late-filed contention amendments and supplemental contention as proffered by NIRS/PC.

A. Proposed Amended Contention A for Contention EC-4 is Inadmissible.

Amended Contention 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

⁸ In this regard, NIRS/PC’s instant motion “to update” EC-4 based on the FEIS is redundant in that Board has already ruled that FEIS “impacts” are part of the remanded EC-4. *See* Late-Filed Motion at 4. As is discussed further below, this reveals the true purpose of the Late-Filed Motion to be an attempt to improperly expand the issues to be considered beyond the scope of the initial EC-4; otherwise, the contention, as it currently exists, would be sufficient.

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.

Late-Filed Motion, at 8-9. The Intervenor apparently intend for supplemental bases A-K to support its amended contention EC-4. *Id.* at 10-13.

1. *The Proposed Amended Contention Fails to Satisfy the Requirements for Amending a Contention in 10 C.F.R. § 2.309(f)(2).*

Nothing in the self-styled amended contention actually amends the original contention. Instead, the Intervenor's motion is merely another in a long line of increasingly desperate attempts to induce delay and broaden the scope of the proceeding by introducing entirely new issues late in the proceeding. Although the Intervenor focus on the discussion of a reference site that was added in the FEIS, at bottom, the proposed amended contention still alleges that the "discussion contained in the FEIS falls far short of the hard look that NEPA requires." Late-Filed Motion at 8. This "hard look" contention is the same contention EC-4 that was litigated during the October hearing.

Focusing closely on the substance of the proposed amended contention, it is clear that the Intervenor are improperly attempting to exceed the scope of the original "hard look" contention that the Commission deemed admitted. To properly amend its contention, the Intervenor must demonstrate some 'significant' difference between the DEIS and the FEIS. *See*

e.g., 10 C.F.R. § 2.309(f)(2).⁹ Here, those significant differences simply do not exist. Both the DEIS and FEIS conclude that the DU_3O_8 is a Class A low-level radioactive waste that will be disposed of at a licensed facility. DEIS, at 4-58; FEIS, at 4.63. Both the DEIS and the FEIS also state that the “environmental impacts at the shallow disposal sites considered for disposition of low-level radioactive wastes would have been assessed at the time of the initial license approvals of these facilities.” DEIS, at 4-58; FEIS, at 4.63. But most importantly, the ultimate ‘impacts’ conclusion in both the DEIS and the FEIS relies on the same syllogism—disposal at a licensed site ensures compliance with the performance objectives of Part 61, Subpart C and therefore results in only SMALL impacts. DEIS, at 4-58; FEIS, at 4-63. This conclusion is the crux of the Staff’s reasoning in the DEIS and FEIS. Since the basis, the reasoning, and the conclusions are the same in the DEIS and the FEIS, the Intervenor failed to establish any significant differences between the DEIS and FEIS that would satisfy 10 C.F.R. § 2.309(f)(2)(i) and (ii). Accordingly, the amended contention must be rejected.¹⁰

2. *The Proposed Amended Contention Fails to Satisfy the Standards for an Admissible Contention in 10 C.F.R. § 2.309(f)(1).*

The problems with the proposed amended contention do not end there. NIRS/PC is endeavoring to dramatically expand the scope of its Contention to include a wide-ranging inquiry into the adequacy of the licensing decisions of the State of Utah (an NRC Agreement

⁹ The requirement to show a significant difference between the DEIS and FEIS is closely related to the “good cause” factor in 10 C.F.R. § 2.309(c)(1)(i) since the “difference” is the new information in the FEIS which was unknown prior to the FEIS’s publication.

¹⁰ That is not to say that there can be no consideration of the “impacts” analysis in the FEIS. Rather, NIRS/PC was already able to challenge the adequacy of the Staff’s “impacts” analysis under the existing Contention EC-4 by questioning whether the Staff exercised “independent judgment”; there is just no significant difference between the DEIS and the FEIS that would warrant admitting a new amended contention at this point in the proceeding.

State).¹¹ The licensing decisions of another regulatory body are clearly outside the scope of this proceeding.¹² Indeed, in this very proceeding, the Commission reiterated that an NRC “impacts” analysis “does not require a full-scale site-specific review, an inquiry in the purview of the responsible licensing agency, such as an Agreement State.” CLI-05-20 at 17. The Intervenor’s Proposed Amended Contention A thereby fails to demonstrate that the issue raised is within the scope of the proceeding. 10 C.F.R. § 2.309(f)(1)(iii). Accordingly, the proposed amended contention should be rejected for the separate and independent reason that it fails to satisfy the admissible contention criteria.

3. *The Intervenor’s Fail to Demonstrate that the Proposed Amended Contention Should be Admitted Upon a Balancing of the Late-Filed Contention Factors in 10 C.F.R. § 2.309(c).*

The Intervenor’s superficial discussion of the late-filed factors further fails to demonstrate that the proposed amended contention would be admissible upon a balancing of those factors. See 10 C.F.R. § 2.309(c). First, and most importantly, the Intervenor failed to establish “good cause” for the late-filed contention given that the Staff’s basis, reasoning, and conclusions were identical in both the DEIS and FEIS. See 10 C.F.R. § 2.309(c)(1); see also *supra*, Section IV.A.1. Second, to extent the Intervenor are again attempting to litigate the

¹¹ Certainly, NIRS/PC may argue under the current EC-4 that the Staff failed to exercise independent judgment in relying upon the Envirocare license and underlying State reports in concluding the Envirocare facility would accept DU in the form and quantities generated by the NEF. In fact, during the evidentiary hearing, the parties engaged in a spirited and robust discussion over whether the Staff exercised “independent judgment.” See e.g., Tr. at 2881-2887 (NIRS/PC Cross-Examination of Staff). However, such an inquiry is a far cry from the unconstrained investigation into the studies or licensing determinations underlying the Envirocare license.

¹² *Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 248 (2004) (“An NRC adjudicatory proceeding is not the proper forum for seeking to litigate and resolve controversies about other governmental agencies’ permitting authority.”); see also *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 122 n.3 (1998); *Consumers Power Co.* (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 124 (1979).

adequacy of the DOE PEIS analysis of disposal impacts, the Board has previously determined that such challenges are untimely. In its oral ruling on LES's October 25, 2005 motion to dismiss certain bases of amended contention NIRS/PC EC-4, the Board specifically stated that it "wouldn't be considering any challenges to the adequacy of the dose estimates for the wet and dry disposal sites, to the degree that those are set forth in the [DOE] PEIS." Tr. at 2600. As suggested by the Commission (*see* CLI-05-20, slip op. at 15 n.52), the Board reasoned that those challenges were waived. Tr. at 2600. Thus, the Intervenors' arguments regarding "good cause" for late-filing are unconvincing.

Since NIRS/PC failed to establish "good cause" for late-filing, they must make a "compelling showing" relative to the remaining factors.¹³ As discussed below, the Intervenors make no such showing. As to factors (v) and (vi), the availability of other means to protect the intervenors' interest and the extent to which intervenors' interests are represented by existing parties, NIRS/PC already has an admitted contention EC-4 addressing the adequacy of the Staff's "hard look." In light of the admitted scope of the existing contention EC-4, the Intervenors can already protect their interests and are already represented as the existing parties. Thus, neither of these factors supports late admission of the proposed amended contention.

As to factor (vii), the extent to which the proposed contention will broaden the issues or delay the proceeding, admission of the proposed amended contention would dramatically expand the scope of the proceeding and could result in a substantial delay in this tightly-scheduled proceeding. Admitting the proposed amended contention would expand the proceeding by allowing the Intervenors to argue issues well outside the scope of the proceeding, including the adequacy of an Agreement State's licensing process. *See supra* Section IV.A.2. In

¹³ *See* CLI-93-25, 38 NRC at 296 (1993).

evaluating this factor, a Board may also consider the proximity of the hearing date to the date of late-filing and extent to which discovery had been completed prior to the filing of the new contention.¹⁴ Here, discovery has long been complete and the evidentiary hearing actually held. In any event, the Intervenors were afforded, and indeed took advantage of, the opportunity to raise these issues at the October evidentiary hearing. Thus, allowing the introduction of new issues at this late date, especially issues already encompassed by an existing contention and already presented at an evidentiary hearing, would cause unnecessary delay in the proceeding.

Lastly, the participation by the Intervenors would not assist in developing a sound record. *See* 10 C.F.R. § 2.309(c)(viii). Intervenors are expected to specify the precise issues they expect to cover, identify prospective witnesses and summarize their proposed testimony.¹⁵ The Intervenors list their issues and proposed testimony in 'bases' A through K (*see* Late-Filed Motion, at 10-13), but for each and every single basis or statement supporting the proposed amended contention, the Intervenors cite testimony and exhibits *already in the record of the proceeding*. Late-Filed Motion, at 10-13. Since all of the allegedly supporting information is in the existing record, the Intervenors wholly fail to demonstrate an ability to further assist in developing a sound record.

Therefore, since none of the late-filed contention factors weighs in favor of admitting the proposed amended contention, the Board should reject the Intervenors Proposed Amended Contention A.

¹⁴ *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 630-631 (1985), *rev'd and remanded on other grounds*, CLI-86-8, 23 NRC 241 (1986), *citing South Carolina Electric and Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 889 (1981).

¹⁵ *Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-70416 NRC 1725, 1730 (1982).

B. Proposed Amended Contention B for Contention EC-4 is Inadmissible.

Amended Contention 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.

Late-Filed Motion, at 9. The Intervenors apparently intend for supplemental basis L to support its amended contention EC-4. *Id.* at 13-14.

1. *The Licensing Board (and Commission) Previously Determined That Portions of Proposed Amended Contention B Are Inadmissible.*

As an initial matter, the Board has previously rejected one portion of the proposed amended contention as untimely. Specifically, the Board, in its May 3, 2005 Memorandum and Order (Ruling on NIRS/PC Late-Filed Contentions and Providing Administrative Directives), denied admission of the portion of the contention challenging the analyses' focus on two hypothetical sites.¹⁶ The Commission agreed with the Board that this aspect of the proposed

¹⁶ See *Louisiana Energy Services, L.P.* (National Enrichment Facility), slip op. at 10 (May 3, 2005). There, the Board rejected identical language to the current proposed amended contention: "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." See also, CLI-05-20 at 17 ("An NRC 'impacts' analysis does not require a full-scale site-specific review, an inquiry in the purview of the responsible licensing agency, such as an Agreement State.").

amended contention was untimely, thereby leaving this portion of the Board's May 3, 2005 ruling intact.¹⁷ Consequently, the rejection of the "hypothetical site" portion of the contention is the "law of the case."¹⁸ On remand, Contention NIRS/PC EC-4 only addresses (1) whether the DEIS fails to support or explain the modeling of geologic disposal of depleted uranium and (2) the NIRS/PC assertion that the DEIS fails to disclose the models or parameters values used in the CEC FEIS, including a failure to disclose the methods and assumptions underlying the dose calculations or explain the discrepancies between the DEIS and the CEC FEIS dose estimates.¹⁹ Consideration of the "hypothetical disposal site" portion of the proposed amended contention has been rejected once before and should be rejected once again.

2. *The Intervenor's Fail to Demonstrate that the Proposed Amended Contention Should be Admitted Upon a Balancing of the Late-Filed Contention Factors in 10 C.F.R. § 2.309(c).*

Proposed Amended Contention B also fails upon a balancing of the late-filed contention factors in 10 C.F.R. § 2.309(c). With respect to the most important factor, "good cause" for late-filing, the Intervenor could have raised these supplemental issues based on the LES Environmental Report (ER). As the Commission recently noted, "NRC adjudicatory

¹⁷ See CLI-05-20 at 14 n.48 ("Similarly, if NIRS/PC seek to challenge the dose analysis because it is based upon two representative disposal sites, such a claim seemingly also could have been based upon the Environmental report, which addressed the same two representative sites."). See also, *id.*, at 17 ("An assessment of the estimated impacts at one or more representative or reference sites can be sufficient.").

¹⁸ The law of the case provides that when a court decides upon a rule of law or makes a factual determination, that decision should continue to govern the same issues in subsequent stages of the same case. *SafetyLight Corp. (Bloomsburg Site Decontamination)*, CLI-92-9, 35 NRC 156, 159-160 (1992). In short, the doctrine mandates that when the same issue is presented a second time in the same case, the first result should govern.

¹⁹ CLI-05-20, at 14 n.49. The Commission, in identifying the particular "terms or bases" subject to consideration on remand, provided "pinpoint" page citations which focused exclusively on pages 13, 15, and 16 of the October 2004 Motion, and on pages 2, 8, 9-12, and 16-17 of the February 2005 Motion.

proceedings would prove endless if parties were free at hearing to introduce entirely new claims which they either originally opted not to make or which simply did not occur to them at the outset.”²⁰ Here, on pages 4-13-13 to 4-13-14 of the ER, LES explicitly referenced the *Claiborne* FEIS (NUREG-1484), and discussed in some detail the results of radiological impacts evaluation presented therein. Based on the ER, NIRS/PC could have challenged the *Claiborne* evaluation in its original April 2004 intervention petition, but neglected to do so.²¹ There can be no cure for such tardiness as intervenors have an “ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention.”²² Further, the Intervenor offered no reason for why they could not have raised these issues based on LES’s ER.²³

The untimeliness of the proposed amended contention is further buttressed by the Commission’s decision in CLI-05-20. In limiting the scope of Amended Contention NIRS/PC

²⁰ LES, CLI-05-28, slip op. at 7 (internal citations omitted).

²¹ In this regard, the “unusually complicated procedural history” related to EC-4 has absolutely no bearing on the resolution of this proposed amended contention as the information was available in the ER, *i.e.*, before there was even a DEIS. The fact that a petition for review was pending before the Commission when the FEIS was published is immaterial. While there was ‘good cause’ for the challenge to the math errors in the DEIS since those were new ‘data’ not in the ER, the Intervenor cannot bootstrap, *post hoc*, substantive challenges to the old information in the ER based on the unrelated errors in the DEIS. Simply put, the fact that errors were introduced in the DEIS (at step 2) does not change the fact that the Intervenor waived their opportunity to challenge the conclusions in the CEC EIS (as referenced in the ER) at the outset (at step 1).

²² *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983).

²³ Any NIRS/PC argument that there is inadequate information on which to base a challenge is belied by the Intervenor’s expert’s participation in challenges to the CEC FEIS back in the 1990’s. See “NRC Staff Motion for Summary Disposition,” Attachment C (including “Testimony of Dr. Arjun Makhijani Regarding Citizens Against Nuclear Trash’s Contentions B, J.3, and W) (Nov. 18, 2005).

EC-4, the Commission took pains to identify certain NIRS/PC claims that it believes to be untimely. Those issues include, among others: (1) the manner in which “the DEIS used the earlier *Claiborne* dose estimates,” and (2) the validity of “the specific groundwater or intruder dose conclusions set forth in the LES Environmental Report, the methodology upon which the dose calculations were made, and the adequacy of generic “wet” site and “dry” site dose analyses.”²⁴ The Commission characterized the latter set of issues as issues that “should have been raised earlier,” and agreed with the Board “insofar as it ruled that those aspects of NIRS/PC’s contention were untimely.”²⁵

Incredibly, those very issues are the same ones that NIRS/PC is belatedly attempting to litigate in this proceeding. Specifically, NIRS/PC is once again alleging that dose estimates “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.” Late-Filed Motion, at 9. Those supposed bases for the proposed amended contention all challenge the adequacy of the CEC FEIS analysis which was expressly identified in the LES NEF ER. For reasons of untimeliness alone, Proposed Amended Contention B should be rejected.

A balancing of the other factors does not support admission of Proposed Amended Contention B either. As to factors (v) and (vi), the availability of other means to protect the intervenors’ interest and the extent to which intervenors’ interests are represented by existing parties, NIRS/PC already has an admitted contention EC-4 which addresses the

²⁴ CLI-05-20, slip op. at 10 n.38 & 13 n.48.

²⁵ *Id.*

adequacy of the Staff's hard look.²⁶ In light of the admitted scope of the existing contention EC-4, the Intervenor can already protect their interests and are already represented as the existing parties. Thus, neither of these factors supports admission of the proposed amended contention.

As to factor (vii), the extent to which the proposed contention will broaden the issues or delay the proceeding, admission of the proposed amended contention would dramatically expand the scope of the proceeding and could result in a considerable delay. Admitting the proposed amended contention would expand the proceeding by allowing the Intervenor to argue issues previously determined by the Board and the Commission to be untimely. *See supra* Section IV.B.2. The Intervenor is not entitled to a "second bite at the apple" at this late date. In any event, the parties robustly debated whether the Staff exercised "independent judgment" in relying on the CEC EIS at the October evidentiary hearing.²⁷ Allowing the introduction of previously rejected issues would add new issues and could cause unnecessary delay in the proceeding in the form of additional evidentiary presentations.

Lastly, participation by the Intervenor would not assist in developing a sound record. *See* 10 C.F.R. § 2.309(c)(viii). In support of their proposed amended contention, NIRS/PC cites Staff interrogatory responses and previously-admitted NIRS/PC exhibits—evidence already in the record. *See* Late-Filed Motion at 13-14. Since all of the allegedly supporting information is in the existing record, the Intervenor failed to demonstrate an ability to further assist in developing a sound record.

²⁶ Again, the focus of the existing EC-4 in the mine-disposal context is whether the Staff appropriately relied on the CEC FEIS and therefore took a "hard look" at the environmental impacts of disposal—not the details or line-by-line discussion of the underlying analyses. *See also*, CLI-05-28, slip op. at 10-12 (holding that reliance on other analyses and data, including other EISs, is acceptable).

²⁷ Tr. at 2862-2880 (Staff Direct), 2881-2887 (NIRS/PC Cross-Examination of Staff); *see also* Tr. at 2627-2633 (LES Direct), 2712-2714 (NIRS/PC Cross-Examination of LES).

Therefore, since none of the late-filed contention factors weighs in favor of admitting the proposed amended contention, the Board should reject the Intervenors Proposed Amended Contention B.

3. *The Intervenors' Inconsistent and Contradictory Arguments Further Demonstrate the Flaws in Proposed Amended Contention B.*

Contention NIRS/PC EC-4 is currently the subject of competing motions for summary disposition, resolution of which will likely render the proposed amended contention moot.²⁸ Regardless, a review of the NIRS/PC Summary Disposition Motion reveals the inherent inconsistency in the Intervenors' position further demonstrating the inadequacy of the proposed amended contention. On one hand, NIRS/PC argue that they have shown that the FEIS is inadequate as a matter of law. See NIRS/PC Summary Disposition Motion at 10. More specifically, summary disposition is only appropriate when "there is no genuine issue to be heard." 10 C.F.R. § 2.710(a). In contrast, to be admissible, a proposed contention must "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact." 10 C.F.R. § 2.309(f)(1)(vi).

The apparent contradiction does not make sense unless NIRS/PC recognizes that Contention EC-4 as it relates to deep disposal is limited to certain discrete issues (*i.e.*, whether the FEIS discloses the models, methods, and assumptions underlying the dose calculations or explains the discrepancies between the DEIS and the CEC FEIS dose estimates, *see* CLI-05-20, at 14 n.49) and not the wide-ranging inquiry into the adequacy of the underlying environmental analyses that the Intervenors advocate. This tacit acknowledgement betrays the Intervenors'

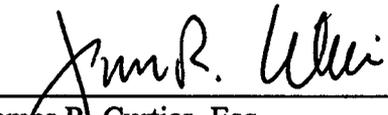
²⁸ See "NRC Staff Motion for Summary Disposition" (November 18, 2005) ("Staff Summary Disposition Motion"); "Motion for Summary Disposition Submitted on Behalf of Intervenors Nuclear Information and Resource Service and Public Citizen" (November 18, 2005) ("NIRS/PC Summary Disposition Motion").

arguments that the proposed amended contentions merely “update” the original EC-4. Late-Filed Motion, at 4, 5. Instead, the new and expansive proposed amended contention is a last-ditch effort to bring in entirely new issues not previously within the scope of Contention NIRS/PC EC-4. Simply put, the adequacy of the CEC FEIS environmental analyses does not “raise or elaborate upon essentially the same impacts arguments made following the DEIS” that, in essence, only challenged the Staff’s ability to rely on those analyses (and the math errors). *See* CLI-05-20, at 12. Viewed in this light, the purpose of the Intervenor’s belated effort to add Proposed Amended Contention B is plainly to delay and obfuscate the resolution of the proceeding. The Board should not countenance such dilatory tactics at this stage of the proceeding.

V. CONCLUSION

For the reasons set forth above, the proposed supplements and amendments to Contention NIRS/PC EC-4 should be rejected.

Respectfully submitted,



James R. Curtiss, Esq.
David A. Repka, Esq.
Martin J. O'Neill, Esq.
Amy C. Roma, Esq.
Tyson R. Smith, Esq.
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, DC 20006-3817
(202) 282-5000

John W. Lawrence, Esq.
LOUISIANA ENERGY SERVICES, L.P.
100 Sun Avenue, NE
Suite 204
Albuquerque, NM 87109

Dated at Washington, District of Columbia
this 28th day November 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	Docket No. 70-3103-ML
)	
Louisiana Energy Services, L.P.)	ASLBP No. 04-826-01-ML
)	
(National Enrichment Facility))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "LOUISIANA ENERGY SERVICES, L.P.'S RESPONSE TO INTERVENORS' SUPPLEMENTAL AND ADDITIONAL LATE-FILED CONTENTIONS" in the above-captioned proceeding has been served on the following by e-mail service, designated by **, on November 28, 2005 as shown below. Additional service has been made by deposit in the United States mail, first class, this 28th day of November 2005.

Chairman Nils J. Diaz
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Commissioner Jeffrey S. Merrifield
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Commissioner Edward McGaffigan
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Commissioner Gregory B. Jaczko
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Commissioner Peter B. Lyons
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Office of the Secretary**
Attn: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-16C1
Washington, DC 20555-0001
(original + two copies)
e-mail: HEARINGDOCKET@nrc.gov

Office of Commission Appellate
Adjudication
Mail Stop O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Lindsay A. Lovejoy, Jr.**
618 Pasco de Peralta, Unit B
Santa Fe, NM 87501
e-mail: lindsay@lindsaylovejoy.com

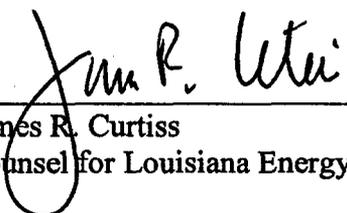
Administrative Judge
Charles N. Kelber**
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
e-mail: cnkelber@aol.com

Lisa A. Campagna**
Assistant General Counsel
Westinghouse Electric Co., LLC
P.O. Box 355
Pittsburgh, PA 15230-0355
e-mail: campagla@westinghouse.com

Office of the General Counsel**
Attn: Associate General Counsel for
Hearings, Enforcement and
Administration
Lisa B. Clark, Esq.**
Margaret J. Bupp, Esq.**
Mail Stop O-15D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
e-mail: OGCMailCenter@nrc.gov
e-mail: lbc@nrc.gov
e-mail: mjb5@nrc.gov

Administrative Judge
Paul B. Abramson**
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
e-mail: pba@nrc.gov

Administrative Judge
G. Paul Bollwerk, III, Chair**
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
e-mail: gpb@nrc.gov


James R. Curtiss
Counsel for Louisiana Energy Services, L.P.