RAS 10802

November 28, 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)	)	

LOUISIANA ENERGY SERVICES, L.P.'S RESPONSE TO MOTIONS FOR SUMMARY DISPOSITION FILED BY NRC STAFF AND BY NUCLEAR INFORMATION AND RESOURCE SERVICE/PUBLIC CITIZEN

I. INTRODUCTION

In accordance with the schedule established by the Atomic Safety and Licensing Board ("Licensing Board") by order of November 9, 2005,[1] Louisiana Energy Services, L.P. ("LES") herein replies to (1) the NRC Staff Motion for Summary Disposition[2] and (2) the Nuclear Information and Resource Service and Public Citizen ("NIRS/PC") Motion for Partial Summary Disposition,[3] both dated November 18, 2005. Both motions ostensibly relate to aspects of NIRS/PC Environmental Contention EC-4, "Impacts of Waste Storage," that were remanded by the Commission in its decision of October 19, 2005,[4] for further consideration by the Licensing Board. The remanded issues relevant here specifically relate to that portion of

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1 "Order (Accepting Joint Report Proposals)," dated November 9, 2005.

2 "NRC Staff Motion for Summary Disposition," dated November 18, 2005 ("Staff Motion").

3 "Motion for Partial Summary Disposition Submitted on Behalf of Intervenors Nuclear Information and Resource Service and Public Citizen," dated November 18, 2005 ("NIRS/PC Motion").

4 CLI-05-20, 62 NRC ___ (slip op. October 19, 2005).

Contention EC-4 that addresses the NIRS/PC challenge to the Draft Environmental Impact Statement ("DEIS") and Final Environmental Impact Statement ("FEIS") for the National Enrichment Facility ("NEF"), insofar as these documents include estimated doses from deep geologic disposal of depleted uranium ("DU"). LES supports the Staff Motion. That motion is fully consistent with the terms of the remand and the guidance provided in the Commission's order. LES opposes the NIRS/PC Motion. That motion raises numerous matters beyond the scope of the remanded issues and fails to demonstrate how NIRS/PC is entitled to relief.

II. BACKGROUND

The complex background related to the remanded issues is concisely stated in the Staff Motion. Without repeating that entire recitation here, it is important to emphasize the precise scope of issues presently before the Licensing Board and presently subject to dispositive motions.

The aspects of NIRS/PC Contention EC-4 that are presently at issue relate only to the NRC Staff's estimates of doses from deep disposal of DU from the NEF. Dose estimates for deep disposal were first addressed in the NEF Environmental Report ("ER") filed by LES in December 2003.[5] LES specifically cited the NRC Staff's analytical conclusion contained in the 1994 FEIS (NUREG-1484 cited as "NRC 1994a") for the Claiborne Enrichment Center ("CEC"). The Staff there concluded that the estimated impacts of DU disposal in a deep disposal unit or mine are less than the 10 C.F.R. Part 61 standard. NIRS/PC did not challenge that dose assessment — either the methodology or conclusion — in its April 2004 intervention petition.

The NRC Staff included a brief discussion of the CEC FEIS dose evaluation in its September 2004 DEIS for the NEF. In Table 4-19 ("Maximum Annual Exposure from

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[5] *See* ER Section 4.13.3.1.5, at 4.13-13 to 4.13-14 (LES Exhibit 109).

Postulated Geologic Disposal Sites"), the Staff presented the estimated doses in the year of maximum exposure for the proposed NEF, for two scenarios (granite and sandstone/basalt sites), based on the results of CEC evaluation. The Staff, in essence, performed a simple linear extrapolation, basing the impacts of disposal of NEF-generated DU on the quantity of material to be processed relative to that postulated for the previously proposed and analyzed CEC facility.

On October 20, 2004, in response to the DEIS, NIRS/PC sought to amend Contention NIRS/PC EC-4 to include, *inter alia*, a challenge to the Staff's "modeling" of releases resulting from the disposal of DU from the NEF. The proposed amendment and supporting basis stated as follows:

> CONTENTION: The DEIS contains an incorrect analysis of the environmental impacts of the disposal of depleted uranium hexafluoride waste. The DEIS assumes that depleted uranium may be disposed of as low-level waste, which is incorrect. The DEIS fails to recognize the Commission's stated position that depleted uranium is not appropriate for near-surface disposal. ***The DEIS fails to support or explain the modeling of disposal of depleted uranium.***
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> * * * *
>
> C. The DEIS attempts to estimate the impact of disposal of depleted uranium from the NEF in its modeling of the releases expected from the site. (at 4-58, 4-59 and Table 4-19). ***The DEIS fails to disclose the models used or the parameter values.*** The text suggests that models used in analyzing the CEC site were used; however, the results are unlike any reported in connection with the CEC facility. Further, the model addresses only two hypothetical disposal sites and fails to examine any actual location of disposal. Performance of a disposal site is highly site-specific.[6]

In a November 22, 2004 ruling, the Licensing Board rejected this proposed amendment to Contention NIRS/PC EC-4 on timeliness and admissibility grounds.

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[6] "Motion on Behalf of [NIRS/PC] to Amend and Supplement Contentions" (Oct. 20, 2004), at 13, 16 (emphasis added).

In the interim, in a November 10, 2004 interrogatory response, the NRC Staff confirmed that the basis for Table 4-19 of the DEIS lies in the previous evaluation of impacts of disposal of U_3O_8 in deep disposal units that was documented in the CEC FEIS.[7] The Staff further explained how it extrapolated the CEC dose values to reflect dose impacts from disposal of the larger volumes of depleted uranium DU to be generated by the NEF (*i.e.*, 157,000 MT of DU_3O_8 for the NEF versus 91,000 MT for the CEC).

On February 2, 2005, NIRS/PC submitted another motion seeking to amend Contention NIRS/PC EC-4. This proposed amendment alleged, in part, that the "[t]he analyses of disposal methods in the DEIS are unsupported and technically deficient."[8] In supporting Basis K, NIRS/PC stated, in relevant part:

> The estimates [in Table 4-19 of the DEIS] are said to be based on those in the CEC FEIS. ***However, NRC has declined to provide the methods and assumptions underlying the dose calculation.*** Moreover, doses in the DEIS are not broken down by radionuclide, and the totals are different from those in the CEC FEIS by nearly a factor of 2, with one notable exception. The difference partly may be explained by the NEF's generation of roughly twice the amount of DU of the CEC proposal. ***However, the estimate for the drinking water dose in the river scenario with a sandstone/basalt is almost 54,000 times lower in the current DEIS than in the CEC FEIS. This discrepancy remains unexplained.***[9]

Significantly, in Bases L and M, NIRS/PC also sought — for the first time — to challenge the *validity* of the dose estimates contained in the CEC FEIS which the Staff had adapted for use in the NEF DEIS. In Basis L, NIRS/PC characterized the dose estimates as "likely to be wrong by many orders of magnitude," noting that the drinking water dose from

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7 "NRC Staff's Response to Interrogatories and Document Request by Petitioners [NIRS/PC] to Commission Staff" (Nov. 10, 2004), at 6-7 ("Staff Discovery Response").

8 "Motion on Behalf of [NIRS/PC] for Admission of Late-Filed Contentions" (Feb. 2, 2005), at 8 (emphasis added).

9 *Id.* at 17 (emphasis added).

mine disposal of U_3O_8 powder estimated by the NRC in the CEC FEIS is a million to a trillion times lower than "the annual background dose due to drinking water containing approximately 0.1 pCi/liter of uranium [i.e., 0.02 mrem EDE]."[10] In Basis M, NIRS/PC further asserted that their own "simple estimates of potential doses from DU disposal in a mine" suggest drinking water doses from U-238 alone in the range of tens of millirem per year."[11] These estimates purportedly were "based on assumptions that water would enter the mine and reach equilibrium with the DU powder, with or without the presence of carbon dioxide (*i.e.*, air)." Again, in its May 3, 2005 ruling, the Licensing Board refused to admit intervenors' CEC-related challenges.

In its October 19, 2005 Memorandum and Order (CLI-05-20), the Commission remanded Contention NIRS/PC EC-4 for further consideration and appropriate action. The Commission "direct[ed] the Board and parties to focus on the terms and bases of the contention [EC-4] submitted in the [October 2004] motion rather than the overbroad claims in the [February 2005] renewed motion."[12] The Commission further characterized NIRS/PC's challenge to "the DEIS estimate of doses from a geological repository" as "amenable to summary disposition" given the information provided and corrections made in the FEIS, and the fact that the LES ER indicated reliance on the *Claiborne* dose estimates.[13] For example, in its June 2005 FEIS, the NRC Staff had corrected a numerical transcription error in Table 4-19 of the NEF DEIS, thereby addressing the unexplained discrepancy alluded to by NIRS/PC in Basis K in their February

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10 *Id.* at 18.

11 *Id.*

12 CLI-05-20, slip op. at 11-12.

13 *Id.* at 13, fn. 48.

2005 motion. In addition, the Commission noted — with respect to possible challenges to the validity of the CEC estimates, such as Bases L and M — that:

> If NIRS/PC actually mean to challenge the dose estimates used in the *Claiborne* proceeding, such a challenge appears untimely, given that the LES Environmental Report said that it was relying on the *Claiborne* dose estimates. 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.[14]

In CLI-05-20, in footnote 38,[15] the Commission also characterized "many of the claims" in NIRS/PC's February 2005 Motion "to be late attempts to challenge the radiological dose analysis provided in the LES [ER]." In the same footnote, the Commission stated unambiguously that "[a]rguments challenging 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 *should have been raised earlier*" (emphasis added). The Commission provided further clarification in footnote 52 of its decision:

> The record already contains additional information on estimated radiological doses at representative "wet" disposal sites, typical of the humid southeastern United States, and "dry" disposal sites, typical of the western United States. These estimates derive from a Department of Energy Programmatic Environmental Impact Statement on the long-term management of depleted uranium hexafluoride. LES's Environmental Report summarized and referenced the DOE analysis and conclusions. *See* LES Environmental Report (Dec. 2003) at 4-13-12 to 4.13-13; *see also* DOE "Final Programmatic Environmental Impact Statement for Alternative Strategies for the Long-term Management and Use of Depleted Uranium Hexafluoride, DOE-/EIS-0269 (April 1999) at 1-19, 1-69 to 1-70, 1-3 to 1-4. *NIRS/PC's intervention petition did not challenge the radiological dose estimates referenced in the LES Environmental Report*, and therefore the Board should consider whether

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14 *Id.*

15 *Id.* at 10-11, fn. 38.

> they have *waived* the opportunity to challenge the adequacy of the dose estimates for "wet" and "dry" disposal sites. (emphasis added)[16]

In this context the NRC Staff has precisely framed the scope of its summary disposition motion. Focusing on the impacts of deep disposal and the issues raised in the NIRS/PC October 2004 motion to amend Contention EC-4 — as directed by the Commission — the Staff writes[17]:

> Therefore the contention language upon which the parties are to focus is as follows:
>
> "[t]he DEIS fails to support or explain the modeling of disposal of depleted uranium," and NIRS/PC's assertion that "the DEIS fails to disclose the models used or the parameter values" because, while the text suggests that the models used in analyzing the Claiborne Enrichment Center (CEC) site were used in the DEIS, "the results are unlike any reported in connection with the CEC facility."[7] NIRS/PC did elaborate upon the first issue in the February motion, claiming that (a) the NRC has declined to provide the methods and assumptions underlying the dose calculation; (b) the estimate for the drinking water dose in the river scenario with a sandstone/basalt site is almost 54,000 times lower in the current DEIS than in the CEC FEIS; and (c) the total dose estimates are different from those in the CEC FEIS by nearly a factor of 2.[8]

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7. October Motion at 12-13, 16.
8. February Motion at 17.

While the Staff considers and addresses the February "elaboration" of the issues, these elaborations are arguably untimely as suggested by the Commission in CLI-05-20. As discussed below, however, these issues in any event should be resolved by summary disposition.

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16 *Id.* at 15, fn. 52.

17 Staff Motion, at 5.

III. ARGUMENT

A. The NRC Staff Summary Disposition Motion Should Be Granted

As explained by the NRC Staff, a party is entitled to summary disposition as to all or any part of the matters involved in the proceeding "if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." 10 C.F.R. § 2.710(d)(2). Moreover, where a contention presents only an issue of law, summary disposition is "the appropriate avenue" for resolving the contention. *General Public Utilities Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-97-1, 45 NRC 7, 12 (1997), *citing* LBP-96-23, 44 NRC 143, 166-67.

1. The Alleged Failure to Support or Explain the Modeling of Disposal of DU

This aspect of the remanded contention was specifically addressed by the Commission in footnote 48 of CLI-05-20. The issue concerns whether the DEIS/FEIS are based on the same models used in connection with the CEC and, if so, how they were used. The Commission noted that, given the clarifications and corrections in the FEIS, "this issue appears to be amenable to summary disposition." The aptness of this suggestion is made even more plain by the clarifications provided with the Staff Motion. Accordingly, the Staff's Motion should be granted.

First, there can be no dispute relative to the Staff's reliance on the results of the CEC analysis. The point was previously made by the Staff's November 2004 interrogatory response:

> The basis for Table 4-19 of the DEIS lies in the previous evaluation of impacts of disposal of U_3O_8 in deep geologic disposal units provided in

> the CEC EIS (pp. 4-66 to 4-68). The impacts were adjusted based on the possible quantity of U_3O_8 assumed in the CEC EIS to the amount from the operations of the proposed NEF. Specifically, the CEC EIS states that 91,000 MT (9.1×107 kg) of U_3O_8 would need to be disposed. *See* CEC EIS at p. 4-66. The proposed NEF would generate approximately 197,000 MT of DUF_6 during the time of operation. Based on the DOE DUF_6 conversion facilities' Final Environmental Impact Statements [], these facilities would produce approximately 0.79 MT of U_3O_8 for every metric ton of DUF_6 processed. This would result in 157,000 MT of U_3O_8 from the conversion of the DUF_6 for the proposed NEF. Therefore, the CEC EIS geologic disposal units impacts were adjusted based on a ratio of 1.72 (157,000 MT divided by 91,000 MT).[18]

The point is confirmed by the Affidavit of Dr. Donald E. Palmrose ("Palmrose Aff.") accompanying the Staff Motion.[19]

Second, as the NRC Staff recognizes, NIRS/PC, in the February 2005 motion to amend the contention, elaborated on the prior simple claim of omission, alleging that:

(a) the NRC Staff has declined to provide the methods and assumptions underlying the dose calculations;

(b) the total dose estimates are different from those in the CEC FEIS by nearly a factor of 2; and

(c) the estimate for the river dose scenario with a sandstone/basalt site is almost 54,000 times lower in the DEIS than in the CEC FEIS.

The NRC Staff has addressed each of these matters in the Staff Motion and supporting affidavits. The Staff has specifically explained the methods and assumptions underlying the dose calculations, the factor of 2 difference in the CEC and NEF dose estimates, and how discrepancies in the DEIS have been corrected in the FEIS. The NIRS/PC challenge to the DEIS, as elaborated upon in the February 2005 motion, is therefore moot and should be dismissed.

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[18] Staff Discovery Response, at 6-7.

[19] Palmrose Aff., at ¶ 2.

Specifically, the "methods and assumptions" of the CEC analysis are explained in the Affidavit of Dr. Rateb Abu-Eid ("Abu-Eid Aff.").[20] Moreover, as the Staff witness states, the methodology for that analysis was amply discussed in the CEC FEIS itself — a public document available to NIRS/PC. Without repeating the substance here, that information is discussed in the CEC FES at pp. 4-66 to 4-48 and Appendix A. The NIRS/PC assertion that the NRC Staff has declined to provide the methods and assumptions underlying the dose calculations is simply incorrect. This contention, as elaborated in February, should be dismissed.

The issue related to the difference between the dose estimates for the CEC and NEF — by "nearly a factor of 2" — has also been amply explained. As explained in the Staff's November 2004 interrogatory response, the conclusion with respect to NEF impacts is based on an extrapolation from the CEC based on a ratio of 1.72, which is based on the greater production of the NEF relative to that of the CEC. This is again explained in the NEF FEIS[21] and in the Affidavit of Dr. Palmrose.[22] Therefore, there is no genuine issue remaining in dispute.

The elaborated contention related to the estimate for the drinking water dose in the river scenario, with a sandstone/basalt site, has also been explained and has been corrected in the NEF FEIS. The Staff Motion, and supporting affidavits, addresses an error in the NEF DEIS based on an error in the text of the CEC FEIS (an incorrect value from the text of the CEC FEIS was used rather than the correct value from the CEC FEIS tables).[23] The mistake was corrected in the NEF FEIS, Table 4-19. Dr. Palmrose has also explained another error corrected in the

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20 Abu-Eid Aff., at ¶¶ 2-4.

21 NEF FEIS at 4-63.

22 Palmrose Aff. at ¶ 5.

23 *Id.* at ¶ 7.

NEF FEIS.[24] Accordingly, the specific issue identified by NIRS/PC in the February 2005 motion to amend the contention has been explained and has been cured in the FEIS. The issue as framed in the Staff Motion should be dismissed, consistent with the Commission's guidance in CLI-05-20.

2. The Assertion that the Corrected Results Are "Unexplained and Unbelievably Low"

The NIRS/PC Motion seeks summary disposition with respect to aspects of Contention EC-4 in its own right. (This is discussed further in Section III.B below.) However, the NIRS/PC Motion could be read as an attempt to demonstrate those aspects of the current contention that remain in dispute. As discussed here, the arguments identified by NIRS/PC are of no avail with respect to the Staff Motion.

Specifically, the NIRS/PC Motion elaborates yet again on the issues raised in the October 2004 motion to amend Contention EC-4 and the February 2005 motion to further amend the contention. The NIRS/PC Motion now challenges the *corrected dose results in the FEIS* — arguing that the results remain "unexplained" and "unbelievably low." NIRS/PC Motion, at 3. NIRS/PC bases its argument on affidavits by Dr. Arjun Makhijani and George Rice. These NIRS/PC arguments are not material or relevant to either admitted Contention EC-4 or the Staff Motion for summary disposition. These arguments are in fact untimely challenges to the CEC FEIS that should be rejected at this late stage consistent with the Commission's guidance in CLI-05-20.

The NIRS/PC Motion lists seven specific arguments, all related to the adequacy of the CEC FEIS. These arguments can be summarized as follows:

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[24] *Id.*, at ¶ 8.

(a) The disclosure in the CEC FEIS and in the NEF FEIS is inadequate to enable other scientists to independently verify the dose results published in the CEC FEIS.

(b) There is no justification for concluding that releases or doses from the NEF will bear a simple linear relationship to the volume of waste (relative to the CEC impacts and volumes).

(c) Drinking water doses reported in the CEC FEIS are "incredibly low." In particular, the U-234 and thorium concentration in the sandstone/basalt site are "so low as to be incredible."

(d) The thorium and radium 2-226 concentrations in the river scenarios are "so low as to be incredible."

(e) The CEC modeling assumed that the dominant solid phase for DU would be UO_2 rather than $U_3 O_8$ (without explanation), and that this results in inappropriately low solubility values.

(f) The "specifics" of the CEC modeling of flow of groundwater and transport of radionuclides are not disclosed in the CEC FEIS and, in any event, the CEC FEIS used "inappropriately high retardation factors."

(g) Without knowing the specific parameter values used at each step of the CEC modeling, "it is not possible to state what other errors may be behind the modeling results reported in the CEC FEIS" and therefore the results in Table 4-19 in the NEF FEIS.

Issues (a) through (g) all raise matters that could have been timely raised in connection with the LES ER or Staff DEIS. Most of the issues are plainly directed to the *substance of the CEC analysis* and (in the case of issue (b)) the applicability of that analysis to the NEF. It is very revealing that many of these issues are also raised by NIRS/PC in the pending NIRS/PC motion to amend and supplement Contention EC-4.[25] Obviously, even NIRS/PC recognizes that these issues are *not* currently part of Contention EC-4. Therefore,

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[25] "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)," dated November 11, 2005 ("Late-Filed Motion"). In particular, these issues are raised in proposed amended Contention B. LES is responding to the Late-Filed Motion separately.

these issues present no impediment to the Staff Motion and clearly do not support summary disposition of the existing contention for NIRS/PC.

As discussed above, the LES ER identified the CEC FEIS dose evaluation. The Staff DEIS also made very clear that doses in Table 4-19 were based on an extrapolation from the CEC FEIS. These NIRS/PC issues — which are apparently now based on a tardy review of the CEC analyses and which are clearly not premised on any new information provided by the NRC Staff — are simply untimely and beyond the scope of the remanded issues. These matters could easily have been more timely raised — in most cases as early as the original intervention petition. Consistent with the Commission's guidance in CLI-05-20, they should not be considered and should not preclude summary disposition of the issue framed in the Staff Motion.

B. The NIRS/PC Motion for Partial Summary Disposition Should Be Rejected

The NIRS/PC Motion argues for summary disposition, in favor of NIRS/PC, of Contention EC-4 insofar as that contention relates to deep disposal matters addressed in the NEF FEIS based on the CEC FEIS. The principal NIRS/PC argument is that the NRC Staff has violated the National Environmental Policy Act ("NEPA") and 10 C.F.R. § 51.45, in failing to quantify the factors and adequately set forth the methodologies, sources, and analyses underlying the Staff's conclusions in the FEIS.[26] As also reflected in issue (a) above, NIRS/PC assert that the disclosure made in the CEC FEIS and the NEF FEIS "is inadequate to enable other scientists independently to verify the dose results published in the CEC Final EIS."[27] However, the argument is untimely, unfounded, and inaccurate as a matter of law.

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26 NIRS/PC Motion, at 6-9.

27 *Id.* at 4.

First, in its discussion of the "transparency" of the Staff analyses, NIRS/PC again introduce new technical issues related to the analysis in the CEC FEIS.[28] NIRS/PC discuss (a) the solubility values for U_3O_8 relative to the values assumed in connection with the CEC proceeding, and (b) the retardation factors assumed in the CEC FEIS. As previously discussed, problems NIRS/PC may perceive in the substance of the CEC analysis should have been raised much earlier than the present motion. Therefore, these issues are not currently admitted as part of Contention EC-4 and therefore cannot be resolved in NIRS/PC's favor.

Second, as noted in the Staff Motion, the NRC Staff experts have in fact reviewed the CEC impact analysis and have concluded that the analysis "was reasonable and appropriate for incorporation into the NEF EIS."[29] The Staff has therefore independently evaluated the prior analysis, data, and report, and met the required standard. For example, under 40 C.F.R. § 1506.5(a), an agency can rely on prior, or outside, work to satisfy the NEPA obligation; the work should be "verified," but need "not be redone." Further, an agency need not include "a written point-by-point recitation of each piece of information utilized" or the "particular steps undertaken . . . to verify that piece of information." *Airport Impact Relief, Inc. v. Wykle*, 192 F.3d 197, 207-08 (1st Cir. 1999). NIRS/PC is essentially arguing that the Staff must document every detail of the CEC evaluation to allow an intervenor — of unspecified expertise — to recreate that analysis. There is no legitimate legal support offered for this extraordinary standard.

NIRS/PC has previously in this proceeding offered a similar theory regarding the Staff's ability to rely on environmental analyses contained in the Department of Energy

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28 NIRS/PC Motion, at 8-9.

29 Staff Motion, at 15.

Programmatic Environmental Impact Statement ("PEIS") and the site-specific FEIS's for the Portsmouth and Paducah deconversion facilities. The Licensing Board rejected that theory and stated the standard as follows:

> [T]he Staff is generally required to *independently evaluate* all information contained in the DEIS. It is, however, within the agency's discretion to rely on an EIS, draft or otherwise, prepared by another federal agency if such reliance will aid the presentation of issues, eliminate repetition, or reduce the length of the EIS. 10 C.F.R. Part 51, App. A, § 1(b). This "tiering" or "incorporation by reference" allows the Staff to adopt the *underlying scientific data and inferences* from the analysis conducted by the other agency without independent review, so long as the Staff exercises *independent judgment* with respect to the conclusions about the environmental impacts relative to the current proposed agency action. *See Philadelphia Electric Co.* (Limerick Generation Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1467-1468 (1982).[30]

This conclusion was specifically affirmed by the Commission in its Memorandum and Order of November 21, 2005.[31]

> Environmental impact statements typically incorporate by reference other analyses and data by citing to the material and describing its content. Incorporated material must be reasonably available for inspection by interested persons within the time allowed for comment. Here, the DEIS properly incorporated by reference conclusions from two DOE Environmental Impact Statements which had studied the environmental impacts expected from a DUF6 conversion facility to be located at Portsmouth, Ohio and Paducah, Kentucky, respectively. These EISs were publicly available for review.
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> In addition, the NRC Staff's expert repeatedly affirmed during the hearing that he had assessed the reasonableness of the DOE assumptions, calculations, and conclusions, even though he did not redo its underlying calculations. Actually redoing the DOE's calculations would have been a duplication of resources not required by law. What an agency cannot do is "reflexively rubber stamp a statement prepared by others." Here, the Staff's expert found the DOE conversion impacts analyses reasonable "based on an assessment of the material presented and their surrounding

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30 LBP-05-13, 61 NRC 385, 405 (emphasis added).

31 CLI-05-28, 62 NRC __ (slip op. November 21, 2005) (footnotes omitted).

documents." In short, there was an independent evaluation of the DOE conclusions.[32]

In the present context, the Staff is similarly entitled as a matter of law to rely on its own prior environmental analysis. The Staff is permitted to draw from the underlying scientific data and the direct basic factual conclusions contained in the CEC FEIS, without actually "reproducing" (and again documenting) that analysis. The Staff experts have, in the Staff Motion, confirmed their review of the technical data and the conclusions set forth in the CEC FEIS. There is no basis either for relief to NIRS/PC or for further litigation of NIRS/PC's untimely technical issues.[33]

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32 *Id.*, slip op. at 10-11 (footnotes omitted).

33 It should also be noted that an "agency's decision-making process is accorded a presumption of regularity." *Akiak Native Cnty. v. United States Postal Serv.*, 213 F.3d 1140, 1146 (9th Cir. 2000).

IV. CONCLUSION

For the reasons discussed above: (1) the Staff Motion should be granted; and (2) the NIRS/PC Motion should be denied.

Respectfully submitted,

James R. Curtiss, Esq.
David A. Repka, Esq.
Martin J. O'Neill, 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 MOTIONS FOR SUMMARY DISPOSITION FILED BY NRC STAFF AND BY NUCLEAR INFORMATION AND RESOURCE SERVICE/PUBLIC CITIZEN" 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.

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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
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Washington, DC 20555-0001
(original + two copies)
e-mail: HEARINGDOCKET@nrc.gov

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

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

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

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
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

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

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

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