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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

December 8, 2005 (4:33pm)

**OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF**

In the Matter of

Docket No. 70-3103

Louisiana Energy Services, L.P.

ASLBP No. 04-826-01-ML

**REPLY ON BEHALF OF INTERVENORS
NUCLEAR INFORMATION AND RESOURCE SERVICE
AND PUBLIC CITIZEN ("NIRS/PC")
TO RESPONSE BY LOUISIANA ENERGY SERVICES
TO NRC STAFF MOTION FOR SUMMARY DISPOSITION
AND TO NIRS/PC MOTION FOR
PARITAL SUMMARY DISPOSITION**

Preliminary statement

This reply is submitted on behalf of Intervenors Nuclear Information and Resource Service and Public Citizen ("NIRS/PC") in answer to the Response filed by the Applicant, Louisiana Energy Services, L.P. ("LES") to the NRC Staff Motion for Summary Disposition and the NIRS/PC Motion for Partial Summary Disposition, filed November 18, 2005, pursuant to the Order of the Atomic Safety and Licensing Board (The "Board") dated November 9, 2005 and 10 CFR 2.710.

LES in substance repeats the motion for dismissal of contentions that LES made on October 25, 2005, which the Board denied on October 26, 2005. The Board should reject LES's position for the second time.

Factual background

In the Environmental Report ("ER") LES referred briefly to the analysis of deep disposal of depleted uranium contained in the Claiborne Enrichment Center Final Environmental Impact Statement ("CEC FEIS"). The entire entry is as follows:

In order to compensate for the lack of knowledge of a specific deep disposal site, two representative sites whose geological structures have previously been characterized were selected for the NRC analysis. Potential consequences of emplacement of U_3O_8 in a geological disposal unit include intake of radionuclides from drinking water, irrigated crops, and fish. Under the assumed conditions for the undisturbed performance scenario, groundwater would be discharged to a river. Under conditions not expected to occur, an individual would obtain groundwater by drilling a well down gradient from the disposal unit.

The estimated impacts for a deep disposal facility were less than the 0.25 mSv/yr (25 mrem/yr) level adopted from 10 CFR 61 (CFR, 2003r) as a basis for comparison. The assumptions used in the analysis, included neglect of potential engineered barriers, mass transfer limitations in releases, and decay and retardation during vertical transfer contribute to a conservative analysis. (NIRS/PC Ex. 133 at 4.13-14)

That is all LES saw fit to include in the ER. The ER is intended to form the basis for preparation of an EIS. (10 CFR 51.45). An EIS is a public disclosure document that is meant to contain an analysis of the environmental impacts of the proposed action and appropriate alternatives. (10 CFR 51.71). Significantly, LES did *not* include in the ER any more specific statement of the "estimated impacts" of deep disposal, stating only that they were less than the 25 mrem limit in 10 CFR Part 61. LES did *not* include the dose results for individual radionuclides contained in the CEC FEIS. (NIRS/PC Ex. 58 at A-14, A-15). LES did *not* incorporate even by reference those CEC FEIS dose results. LES did *not* even mention that more detailed dose results were contained in the CEC FEIS.

The presentation in the Draft EIS was very different. In the Draft EIS, issued in September, 2004, Commission Staff included the first version of Table 4-19:

Table 4-19 Maximum Annual Exposure from Postulated Geologic Disposal Sites

		Granite Site	Granite Site	Sandstone/Basalt Site	Sandstone/Basalt Site
Scenario	Pathway	millisieverts	Millirem	millisieverts	millirem
Well	Drinking Water	3×10^{-4}	3×10^{-2}	2×10^{-7}	2×10^{-5}
	Agriculture	4×10^{-3}	4×10^{-1}	4×10^{-6}	3×10^{-4}
River	Drinking Water	9×10^{-13}	3×10^{-11}	3×10^{-16}	3×10^{-14}
	Fish Ingestion	2×10^{-12}	2×10^{-10}	5×10^{-11}	5×10^{-9}

Nothing resembling Table 4-19 appeared in the ER. The text of the Draft EIS stated that analyses of impacts of deep disposal were previously presented in the CEC EIS and that impacts of deep disposal of depleted uranium from the NEF would be “proportional to the quantity of material.” (NEF DEIS at 4-59 (NIRS/PC Ex. 152)). However, the origins of the figures in Table 4-19 were not explained. The figures in Table 4-19 were, in fact, not all “proportional” to data presented in the CEC analyses, and some were wildly at variance with the CEC results.

Since then NIRS/PC have learned that the results in Draft EIS Table 4-19 (a) had their source in data published in the CEC FEIS, (b) but were summed rather than stating dose values for individual radionuclides, (c) were multiplied by 1.72 in an effort to adjust linearly for a different inventory size, (d) three of the data points were grossly misstated by deriving them from text in the CEC FEIS that mistook values in mSv for values in mrem, and (e) there was apparently another typographical error in one of the values. (NRC Motion for Summary Disposition, at 10, 15-17 (Nov. 18, 2005)). Thus, the figures were so altered from results shown in the CEC FEIS that their derivation could not be identified. The text did not tell the reader the connection, *if any*, between the CEC FEIS and the figures in Table 4-19.

NIRS/PC could not determine the origins of the numbers, which appeared to be incredibly low. NIRS/PC moved to amend their contentions and asserted that the DEIS contains an incorrect analysis of impact of disposal of depleted uranium and that the derivation of the dose results was impossible to determine from the Draft EIS. (NIRS/PC motion to amend, Oct. 20, 2004, at 13, 16).

On November 10, 2005, Commission Staff stated that the results shown in Draft EIS Table 4-19 were, in fact, derived from CEC analyses and the values were adjusted based on a projected larger waste inventory, but the Staff gave no further information and disclosed no additional documents supporting the reported results. Further, Staff did not correct any errors in the table. (NRC Staff responses to interrogatories, Nov. 10, 2004, at 6-7).

NIRS/PC in February 2005 (after the Commission's waste classification decision) moved again to assert a contention that Staff had declined to provide the methods and assumptions underlying the dose calculation. (NIRS/PC Motion to amend, Feb. 2, 2005, at 17).

Staff published a corrected version of Table 4-19 in the Final EIS in June 2005:

Table 4-19 Maximum Annual Exposure from Postulated Geologic Disposal Sites

		Granite Site	Granite Site	Sandstone/Basalt Site	Sandstone/Basalt Site
Scenario	Pathway	millisieverts	Millirem	millisieverts	millirem
Well	Drinking Water	3×10^{-4}	3×10^{-2}	2×10^{-7}	2×10^{-5}
	Agriculture	4×10^{-3}	4×10^{-1}	4×10^{-6}	3×10^{-4}
River	Drinking Water	9×10^{-13}	9×10^{-11}	3×10^{-11}	3×10^{-9}
	Fish Ingestion	2×10^{-12}	2×10^{-10}	5×10^{-11}	5×10^{-9}

On October 27, 2005, Staff witnesses explained that several figures had been misstated, so that dose results had been grossly understated in the Draft EIS. (Tr. 2851-54).

On October 19, 2005, the Commission remanded the NIRS/PC deep disposal contentions for further proceedings in CLI-05-20 (Oct. 19, 2005).

Argument

LES asserts that the contentions advanced by NIRS/PC on October 20, 2004, and on February 2, 2005, concerning the deficiencies in the NEPA presentation of deep disposal impacts in the Draft EIS, must now be dismissed, because, LES claims, the contentions:

- (a) should have been made in response to the ER,
- (b) have been rendered moot by Staff's explanations and the Final EIS, and
- (c) fail because Staff says their results are "reasonable."

The first two arguments were previously rejected by the Board and should be rejected again. All of the LES arguments are erroneous and factually unsupported.

a. The claim that the contention should have been made as to the ER.

LES says that, if NIRS/PC made no immediate challenge to the ER, any complaints about any of the contents of the CEC EIS were waived. LES's theory seems to be that the ER, in stating that, in the CEC analysis, the "estimated impacts for a deep disposal facility were less than the 0.25 mSv/yr (25 mrem/yr)," supposedly incorporated by reference all of the assumptions, calculations, and reported results in that previous CEC EIS analysis, and NIRS/PC's claims should have been advanced at that time. LES is in error, because the ER presentation stated only that modeling of generic sites showed that deep disposal could meet the dose limits of 10 CFR Part 61. The ER *did not contain* the incredible dose results that Staff have presented in Table 4-19, either as issued in the Draft EIS or as later corrected in the Final EIS.

The ER does not set forth specific dose calculation results. Neither did the ER purport to incorporate by reference the dose results in the CEC FEIS.

It cannot be contended that, by referring in 2003 to a single statement in a 1994 EIS, the ER threw the obligation onto NIRS/PC to scour that document for errors and to advance contentions about analyses contained in that EIS—even the parts that LES did not see fit to include or even refer to in the ER. In the ER LES made a narrow statement about previous analyses, and it did *not* include the dose results contained in Appendix A of the CEC EIS—the portions that Staff has now extracted and used in their analyses, giving rise to NIRS/PC's NEPA contentions. Plainly, based on the ER, NIRS/PC had no notice that the extremely low dose results of Table 4-19 would be derived and published in later NEPA documents and had no obligation to object to such use.

Under 10 CFR 2.309, contentions addressed to deficiencies in NEPA documents are based upon the content of *those documents*, not other documents. Such contentions are required to be made when the NEPA documents are issued. For example, in *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), 39 NRC 205, LBP-94-11 (April 5, 1994), the intervenor advanced a claim about the Draft EIS discussion of the impacts of deconversion and disposal. Staff objected that the claim should have been made earlier. However, the Board observed that the “DEIS dated November 1993 is the first document that unambiguously states what the disposition of the tails will be: ‘The removal and disposition of the depleted UF6 (DUF6) generated at CEC will involve the conversion of DUF6 to triuranium octoxide (U3O8) prior to disposal.’” (at 212). The Board ruled that a contention made promptly thereafter was timely.

Thus, the obligation to assert contentions about disclosure documents arises *when the disclosure in issue is published*. Indeed, Rule 2.309 expressly states: “The petitioner may

amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents." (10 CFR 2.309(f)(2)).

The ER only included the statement that a deep disposal analysis showed compliance with 10 CFR Part 61—nothing more. NIRS/PC did not challenge that specific statement. And, clearly, NIRS/PC had no obligation to go behind the ER, to examine the documents referred to in the ER, and to seek out any deficiencies in those documents and advance contentions about such documents, since such other materials were not part of the NEPA disclosure about the NEF.

But when the Draft EIS was issued containing Table 4-19, NIRS/PC did advance contentions about the "data or conclusions in the NRC draft or final environmental impact statement . . . that differ significantly from the data or conclusions in the applicant's documents." (10 CFR 2.309(f)(2)). As the Board previously observed, the question, after looking at the ER discussion, is, "did the DEIS go deeper?" (Tr. 2550). Table 4-19 in the Draft EIS contains far more information than the ER, and the Board recognized that NIRS/PC's contention went much deeper than the ER:

JUDGE ABRAMSON: Initially you didn't know how—the only thing that you saw initially was a reference that it came from Claiborne. But the numbers didn't make sense.

MR. LOVEJOY: Right.

JUDGE ABRAMSON: Right. So, now they made the numbers make sense in at least how they got them from Claiborne. But they still don't, in your mind, explain the origin of the numbers themselves.

MR. LOVEJOY: Right.

JUDGE ABRAMSON: So, the first step was they say they came from Claiborne, but they don't look like they came from Claiborne. Now they say here's how we got them from Claiborne.

And now your argument is, those numbers themselves don't make sense. And the question that's before us is, is it too late to challenge what's in the Claiborne analysis because it was referred to generally in the ER. Have I got that right?

MR. REPKA: That is correct. (Tr. 2581-82).

The Board rejected LES's motion (Tr. 2597-98) and should do the same with LES's current argument.

LES claims that the Commission's decision on October 19, 2005 (CLI-05-20) suggested that NIRS/PC's contention about deep disposal impacts was untimely. (LES Br. 5-6). But the Commission remanded the issue for the Board to decide. And detailed analysis shows that the Draft EIS statements were significantly different from the ER and that NIRS/PC timely challenged the statements in the Draft EIS.

Further, the passages in footnotes 38 and 52 of CLI-05-20, that LES quotes, involve not the deep disposal issues but the DOE analyses of near-surface disposal sites. Thus, they have nothing to do with the present issue. (CLI-05-20, at 19 n. 38 and 27 n. 52; LES Br. 6).

b. The claim that NIRS/PC's contention is moot.

LES also claims that NIRS/PC's contentions as to deep disposal have become moot. LES says that Staff have explained how they took figures from the CEC FEIS, made adjustments, made errors, and later fixed their errors, and that NIRS/PC must accept that "explanation," no matter how incredible the results. (LES Br. 8-11). Of course, Staff's "explanation" does not provide a traceable scientific path to the dose results in Table 4-19 of either EIS. Behind LES's argument is the same theory, discussed above, that NIRS/PC may not complain about the CEC FEIS modeling analyses, because no challenge was made to the reference in the ER.

But, to repeat, the ER did not contain or even refer to the dose results in Appendix A of the CEC FEIS, which are the figures that Staff used in developing dose figures for the NEF. (NRC Motion for Summary Disposition, at 10, 15-17 (Nov. 18, 2005)). NIRS/PC had no obligation to challenge figures that *weren't* in the ER. NIRS/PC have worked hard to find out

the origins of the figures in Table 4-19 of the NEF NEPA documents and have only recently discovered the full story. Even after Staff published the Draft EIS, the connection to the CEC FEIS data was indiscernible. But, now that Staff have explained how they began with the CEC figures to develop Table 4-19, Staff cannot hide the CEC results from scrutiny.

LES argues (LES Br. 11-14) that NIRS/PC have not challenged the "CEC analysis." LES assumes that the "CEC analysis" is entirely separate from the "NEF analysis." But they are not separate, because Staff used the CEC analysis in doing its NEF analysis. NIRS/PC have no obligation to challenge the "CEC analysis," by itself, because LES abandoned the CEC project. But NIRS/PC clearly challenge the NEPA disclosure of impacts of the NEF. Since Staff admits that they did *use* the CEC analysis as *the underlying analysis* for NEPA disclosure about the NEF impact, the problems with that underlying analysis cannot be avoided.

LES's argument was previously rejected. After the Commission's October 19, 2005 decision, LES moved to dismiss, arguing that disclosure in the NEF Final EIS that the published results had come from the CEC FEIS, together with the correction of errors, rendered NIRS/PC's complaints moot. (LES motion to dismiss, Oct. 25, 2005). The Board flatly denied LES's motion. The Board stated that, when the Final EIS was issued in June 2005, it would have been very difficult for NIRS/PC to advance a new contention addressed deficiencies in the Final EIS Table 4-19, and it would serve no purpose to require NIRS/PC to do so; therefore, the Board said it would treat the existing contention as addressing the underlying deficiencies in the NEF Final EIS analysis:

CHAIR BOLLWERK: We are prepared to deal with both of the matters that were raised in the LES motion. As to the question of the, I think, the Claiborne matter, using the dose estimates in their relationship to what is perceived as problems with the DEIS, the Board's view is that while this was a contention of omission that raised certain questions about what wasn't there, and also about, at least peripherally, what the items that were there, and the validity of them.

Generally, with a contention of omission, procedurally, when that omission is corrected, and there was an FEIS that was issued, the way to respond is to file an additional contention which then raises questions about the omission, if it is incorrect.

To cure it, essentially to cure it, questions about the cure. The problem here was that at that point, when the FEIS came out in June of 2005, I believe it was the 15th of June, if I have the right date, this matter was pending with the Commission on appeal.

And filing a new contention at that time would have been procedurally difficult, to say the least. It is our feeling that under the circumstances that the best way to proceed, in this instance, is we are going to deny the motion with respect to that particular, I guess it is paragraph C of the original October 2004 motion, and allow that to go forward. (Tr. 2597-98).

The Board's language made clear that there are additional technical issues to be addressed:

It sounds to me like from what has been described, there are deficiencies, the Staff has provided an explanation, whether that is adequate or not I don't know.

In terms of the technical side of it we don't know the adequacy of that, either, but it needs to be addressed. . . .

CHAIR BOLLWERK: Mr. Rice has some concerns, and the Staff may well need to bring additional expertise to bear as well. (Tr. 2599-99)

Thus, the Board ruled that NIRS/PC's contention about deep disposal impacts would proceed to address the underlying bases for the results in the Final EIS. Any doubt on the matter was put to rest the next day:

CHAIR BOLLWERK: . . . I mean, my understanding of the concerns that NIRS/PC had were not only with the math that was done but also with the underlying numbers, and also the availability of the background information, as it were.

And maybe that can even be worked out, off the record, at some point. I don't know.

JUDGE ABRAMSON: Yes, and it seems to me you can write down what the source of the error correction was, and then they have a chance to look at it, rather than consuming time here.

Having accepted the concept that there are things that have to be done outside this proceeding.

MS. CLARK: Well, I think on this specific issue we see that the scope of this contention is very narrow. And I believe that on this specific issue –

JUDGE ABRAMSON: On the terms of the math error?

MS. CLARK: In terms of the, yes, of the allegation that the Staff did not do an adequate evaluation, then I think we can get sufficient testimony, that I believe we can resolve this issue.

I know that Mr. Lovejoy has a different view of that.

JUDGE ABRAMSON: So does the Board. Weren't we clear yesterday? Maybe you can repeat, Judge Bollwerk, what we said.

CHAIR BOLLWERK: No, again, if the problem is an exchange of information, and the basis for the underlying – I don't know how we are going to resolve that here, but we can – let me put it this way.

I don't have a problem with spending a couple of minutes here, very briefly, laying whatever foundation you want, and then we can see where we go from there. But I don't think it is going to get resolved today.

MR. LOVEJOY: Our problem, as the Board says, goes beyond the arithmetic.

JUDGE ABRAMSON: And that is what we said, quite clearly, yesterday. That once the arithmetic was – it was quite clear, to us, that there was an alleged error, and there was an alleged omission.

And that fixing the alleged error would have then put NIRS/PC in a position of having the right to submit an amended contention challenging whatever it saw, now, from the correct, in the results from the corrected error.

And our idea, the Board's view, as expressed yesterday was that we were going to collapse that process, so that we don't spend time fixing the error, and then having to have another contention that we are going to let the parties deal with that, generally, which is the allegation that this didn't take a sufficiently hard look in this area. (Tr. 2844-46).

Thus, on October 26 and again on October 27, 2005, the Board emphasized that, contrary to LES's arguments, the underlying analysis is in issue.

It should also be noted that NIRS/PC *did* make a motion to add contentions about the treatment of deep disposal in the Final EIS. On July 5, 2005, NIRS/PC moved to add a contention stating as follows, among other things:

The Final Environmental Impact Statement does not comply with the National Environmental Policy Act, 42 USC 4321 et seq., or Commission regulations, 10 CFR 51.71, 51.91, in that it fails to set forth any analysis of the environmental impacts of disposal of depleted uranium waste from the proposed facility in accordance with the proposed action and appropriate alternatives. The analysis at pages 4-62 through 4-64 of the FEIS is based upon erroneous or outdated assumptions concerning the Envirocare facility or relates to a deeply flawed analysis of a proposal to dispose of depleted uranium in an abandoned mine, which is not now the Applicant's apparent proposal. *In any case the purported "maximum annual exposure" data in Table 4-19 of the FEIS are derived from purported analyses of hypothetical disposal sites, which are both technically incredible and irrelevant to understanding the impacts of the proposed action or appropriate alternatives. Moreover, the detailed technical bases for these calculations were not presented in the FEIS and are apparently no longer available even to NRC Staff.* NIRS/PC Mot. to Amend, July 5, 2005, at 35-36. (*emphasis supplied*).

Thus, LES's position that NIRS/PC made no timely challenge has utterly no basis.

c. The argument that Staff can rely upon the CEC analyses.

Finally, LES argues that Staff may rely upon the CEC analyses in projecting impacts of the NEF. (LES Br. 14-16). However, there are limits to Staff's power to use analyses in previous documents. Here, the critical solubility values are undeniably very low, even when compared with similar analyses of the same question. (See NIRS/PC Ex. 190 at 22; Kozak et al., NIRS/PC ex. 128, at 31). Moreover, no scientist can retrace the steps that led to such extreme results. The input data used in the CEC calculations are lost and, for that reason, the calculations cannot be reproduced. In this situation, reliance on CEC results is impermissible.

All precedent addressing the use in an EIS of previous calculations (NRC Motion for summary disposition at 14 (Nov. 18, 2005)) emphasizes that the agency must *assess* the previous studies and *understand* them and reach an independent judgment that they are reasonable. The Commission in this case authorized Staff's use of prior DOE studies only where Staff had "assessed the reasonableness of the [previous] assumption, calculations, and conclusions." (CLI-05-28 at 21 (Nov. 21, 2005)). Here, the assumptions and calculations of the CEC analysis are not available; Staff can do no assessment and achieve no understanding, because the CEC studies are gone. It does no good for Commission Staff personnel to repeat that the results are "reasonable," because on the undisputed facts the assumptions and calculations have *disappeared*. Judgment cannot legitimately be expressed about analyses that no longer exist.

Conclusion

The Board should not entertain for a second time the rejected arguments of LES, seeking dismissal of NIRS/PC's well-founded contentions. The problems in the EISs are real. The dose results are incredibly low, Staff cannot explain them, and the underlying data are gone. LES

argues that NIRS/PC should have made contentions earlier about the dose results from the CEC proceeding that underlie Staff's analysis. But the ER did not publish those results. And since the Draft EIS was published, with its incredibly low dose figures, NIRS/PC have worked hard to find out exactly where Staff's numbers came from. Staff have made disclosure slowly. The trail to the CEC results is now clear, but at that point it meets a dead end. No credence should be given to arguments that would reward the slow pace of Staff's disclosure and prevent scientific criticism of analyses that, ultimately, have no defensible basis. Such arguments would allow inadequate NEPA compliance to persist in the public record and deserve no credit in this proceeding. The Board has already rejected such arguments once, and it should do so again. Summary disposition should be granted to NIRS/PC.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to 10 CFR § 2.305 the undersigned attorney of record certifies that on December 8, 2005, the foregoing Reply on behalf of Intervenors Nuclear Information and Resource Service and Public Citizen to LES Response to Motions for Summary Disposition was served by electronic mail and first class mail upon the following:

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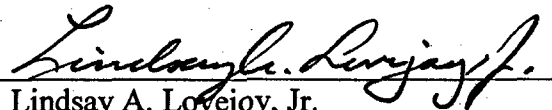
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