

NUCLEAR REGULATORY COMMISSION

Title: Louisiana Energy Services
Open Session

Docket Number: 70-3103-ML; ASLBP No.: 04-826-01-ML

Location: Rockville, MD

DOCKETED
USNRC

December 21, 2005 (3:30pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Date: Monday, October 24, 2005

Work Order No.: NRC-657

Pages 1738-1826

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD
(ASLB)

+ + + + +

OPEN HEARING

In the Matter of:

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

Monday, October 24th,

Room T-B345
NRC Building 2
11454 Rockville Pike
Rockville, Maryland

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

G. PAUL BOLLWERK, III	Chair
PAUL B. ABRAMSON	Administrative Judge
CHARLES N. KELBER	Administrative Judge

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ATOMIC SAFETY LICENSING BOARD:

BETHANY ENGLE
CHERVERNE CLOYD
JONATHAN RUND
KAREN VALLOCH
JACK WHETSTINE
ANDREW WELKIE

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ALSO PRESENT: (Cont.)

LOUISIANA ENERGY SERVICES
PAUL HARDING
ROD KRICH
PAUL SCHNEIDER
LESLIE COMPTON

NUCLEAR INFORMATION & RESOURCE SERVICE AND
PUBLIC CITIZEN
ARJUN MAKHIJANI
MELISSA KEMP
BRICE SMITH

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I-N-D-E-X

APPLICANT'S OPENING STATEMENT	1750
STAFF'S OPENING STATEMENT	1756
INTERVENOR'S OPENING STATEMENT	1764

EXAMINATION

(None.)

EXHIBIT INDEX

KEY

- I-Identified
- A-Admitted into evidence
- R-Rejected
- W-Withdrawn
- TUA-Taken under advisement

Official Hearing Document	Disposition/
Exhibit #/letter Title	Page

(None.)

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P-R-O-C-E-E-D-I-N-G-S

9:30 a.m.

CHAIR BOLLWERK: Good morning, everyone.

We need to go on the record. Today this Atomic Safety and Licensing Board is here to conduct additional evidentiary hearing sessions, regarding certain of the issues regarding the Louisiana Energy Services LP proceeding.

As we noted in our Notices of September 14th, September 22nd, and October 14th, 2005, the Board will receive testimony and exhibits, and allow the cross examination of witnesses, relating to certain matters at issue in this proceeding, regarding the December 2003 application of Louisiana Energy Services, LP, or LES, for a license under 10CFR part 70, for authorization to possess and use source byproduct, and special nuclear material in order to enrich natural uranium to a maximum of five percent uranium 235, or U235, by the gas centrifuge process.

Which LES proposes to do at a facility denominated as the National enrichment facility, or NEF, to be constructed near Eunice, New Mexico.

Specifically the Board will hear evidence regarding challenges by Intervenors Nuclear Information and Resource Service, and Public Citizen,

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1 or NIRS/PC, to the remaining admitted safety related
2 contentions in this proceeding, which include NIRS/PC
3 Environmental Contention, abbreviated EC-3; technical
4 Contention abbreviated TC-1, depleted uranium
5 hexafluoride storage and disposal; NIRS/PC EC-5, TC-2,
6 which are decommissioning costs, and NIRS/PC EC-6, TC-
7 3, which are costs of management and disposal of
8 depleted UF6.

9 Due to subject matter overlap among the
10 contentions, however, evidentiary presentations will
11 be made on the following subject matter areas, rather
12 than by contention, and in the following order.

13 The first will be plausibility and
14 estimated cost of deconversion of depleted uranium,
15 referred to as DU, concerning contentions EC-3, TC-1,
16 EC-5, TC-2, and EC-6, TC-3.

17 Second, the estimated costs of
18 transportation of depleted uranium, concerning
19 Contention EC-5, TC-3, EC-2, excuse me. The third
20 will be the plausibility and estimated costs of
21 disposal of depleted uranium, concerning Contentions
22 EC-5, TC-2, and EC-6, TC-3, and the contingency factor
23 applied by LES to its overall depleted uranium
24 dispositioning cost estimate, concerning Contention
25 EC-5, TC-2.

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1 Additionally, as a result of the
2 Commission decision CLI05-20, handed down last
3 Thursday, October 20th, the Board now has before it,
4 for possible consideration, during these evidentiary
5 hearing sessions, a late filed amendment, or
6 supplement, to previously admitted Contention NIRS/PC
7 EC-4, impacts of waste disposal, that relates to the
8 adequacy of the Staff's Draft Environmental Impact
9 Statement Analysis, of the impacts of depleted uranium
10 disposal, in the wake of the Commission's January 2005
11 Decision in CL05-5, reported at 6120NRC22, declaring
12 that depleted uranium is properly considered low level
13 radioactive waste.

14 This is a matter we anticipate discussing
15 further with the parties this morning. Before we move
16 on to these matters I would like to introduce the
17 Board members.

18 To my left is Dr. Charles Kelber. Dr.
19 Kelber, a nuclear physicist, is a part-time member of
20 the Atomic Safety and Licensing Board panel. To my
21 right is Dr. Paul Abramson. Dr. Abramson, who is both
22 a nuclear physicist, and an attorney, is a full-time
23 member of the panel.

24 My name is Paul Bollwerk, I'm an attorney,
25 a full-time panel member, and the Chairman of this

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1 Licensing Board.

2 At this time I would like to have the
3 representatives, or counsel, for the parties identify
4 themselves for the record. Why don't we start with
5 the representatives for NIRS/PC, then move to counsel
6 for the Applicant LES, and finally to NRC Staff
7 counsel?

8 Mr. Lovejoy?

9 MR. LOVEJOY: Thank you, Your Honor. I'm
10 Lindsay Lovejoy, I'm the attorney here for Nuclear
11 Information and Resource Service and Public Citizen.
12 And next to me is Dr. Arjun Makhijani, who is going to
13 be testifying as an expert today. And we have Melissa
14 Kemp, from Public Citizen, and we are also assisted by
15 Dr. Brice Smith from Dr. Makhijani's office.

16 CHAIR BOLLWERK: Thank you, and thank you
17 for joining us today.

18 MR. LOVEJOY: Thank you.

19 MR. CURTISS: Mr. Chairman, my name is Jim
20 Curtiss, and I'm counsel to LES. And with me here
21 today, on my left, is Tyson Smith and on my right
22 Martin O'Neill. The General Counsel of LES is
23 present, John Lawrence, as well as Amy Roma, and Dave
24 Repka, representing the Applicant.

25 CHAIR BOLLWERK: All right, thank you.

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1 MS. CLARK: Good morning, my name is Lisa
2 Clark, I'm representing the NRC Staff, and with me
3 today is Margaret Bupp.

4 CHAIR BOLLWERK: All right, thank you very
5 much. Before we begin with the substantive matters
6 before us today, there are several other items that I
7 would like to bring to the attention of those
8 attending today's proceeding.

9 The first is the matter of public
10 attendance at the hearing sessions on these four
11 subject matter areas. This morning is an open
12 session, during which we will be hearing opening
13 statements from counsel for Applicant, LES; the NRC
14 SF, and NIRS/PC, regarding these matters.

15 Thereafter, assuming the parties can agree
16 the matter can be discussed without going into
17 possible proprietary information, we will hear
18 argument from counsel regarding a motion filed late
19 Friday afternoon, by NIRS/PC, regarding what portions
20 of the already pre-filed direct, and rebuttal
21 testimony of the parties, under disposal and
22 contingency factor issues, should or should not be
23 admitted as a result of the Commission's Thursday
24 ruling, as well as how the remanded matter should be
25 considered during these evidentiary hearings.

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1 The Board is then scheduled to hear
2 evidence regarding the plausibility and estimated cost
3 of deconversion of depleted uranium, followed by the
4 estimated costs of transportation of DU, followed by
5 the plausibility and estimated costs of the disposal
6 of DU, and concluding with the contingency factor
7 applied by LES to its overall DU dispositioning cost
8 estimate.

9 Because it is anticipated that the
10 testimony regarding the first three of these matters
11 will involve confidential proprietary business
12 information, the evidentiary presentation regarding
13 these matters will be closed to the public.

14 However, with regard to the contingency
15 factor matter, we will reconvene at an open session,
16 at the conclusion of which we anticipate holding a
17 brief discussion with LES, and the Staff, regarding
18 the mandatory hearing portion of this proceeding.

19 Updates regarding the timing of this final
20 public session will be provided to the public via
21 recorded message available by calling 800-368-5642,
22 extension 5036, or by calling 301-415-5036.

23 With regard to the mandatory hearing
24 portion of this proceeding, I would note that as part
25 of the licensing process for the proposed NEF, NRC

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1 regulations require the Board to conduct an additional
2 assessment of environmental and technical matters that
3 were not raised by intervening party challenges to the
4 LES application.

5 The Board currently expects to conduct a
6 public hearing on these matters, in Lea County, New
7 Mexico, in March of 2006, and also intends to hold one
8 or more additional limited appearance sessions, during
9 which members of the public will be able to present
10 the Board with their views on the LES license
11 application.

12 Finally, I would note, today, that we will
13 be utilizing some technology in the hearing room that
14 will, I hope, for the most part be essentially
15 transparent to the parties and the audience.

16 Having these hearings here in the agency's
17 Rockville Headquarters, has given us the opportunity
18 to test some of the technology that is being developed
19 for the potential high level waste repository
20 licensing proceeding, namely, what we call the digital
21 data management system, or DDMS.

22 The DDMS is our attempt to digitize both
23 the video and documentary record of an evidentiary
24 proceeding, and make it accessible, and usable to the
25 Board, and the litigants, in a courtroom setting.

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1 Essentially what we will be doing with the
2 DDMS, during this proceeding, is marking the exhibits
3 electronically, which may involve some interchange
4 between technicians, who are located behind that glass
5 window over there, and Bethany Engel, who is our law
6 clerk, who will be acting as the clerk for this
7 proceeding.

8 Also, although none of the parties
9 expressed a need to use display technology as part of
10 their evidentiary presentations, we have a document
11 camera, and other technology available, if they need
12 it, and can advise us when they want to use it.

13 Finally, if any of the counsel are
14 interested, we can arrange to have our DDMS project
15 manager, Andrew Wilkie, show you how the system works,
16 at a break, or at one of the lunch breaks.

17 And, again, you may see Ms. Engle, from
18 time to time, walking over to that window. I would
19 also advise the witnesses that the only folks behind
20 that window are simply technology people, there is
21 nobody there looking at them over their shoulder, they
22 are basically dealing with the marking of exhibits,
23 and things like that.

24 With all that being said, we are ready to
25 begin with the party's opening statements outlining

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1 their respective positions, concerning the admitted
2 contentions, and associated subject matter areas,
3 after which we will hear argument on the pending
4 NIRS/PC in limine motion.

5 As will be the case for the evidentiary
6 presentations, for the opening statements, let's begin
7 with LES, followed by the NRC staff, and then NIRS/PC.

8 And as we begin I would ask that if you
9 have not done so, already, all cell phones in the
10 hearing room be turned off, and we will note that that
11 will be the rule for the balance of this proceeding.
12 Mr. Curtiss?

13 MR. CURTISS: Thank you, Mr. Chairman, And
14 Drs. Kelber and Abramson. You've, I think, provided
15 a very comprehensive overview of what today, and this
16 week's hearing will focus on.

17 And I will, therefore, just be brief in my
18 remarks, so that we can move forward with this hearing
19 in the most efficient way possible.

20 As you indicated, Mr. Chairman, the focus
21 of this phase of the hearing is on the adequacy of
22 LES' cost estimates for the disposition of depleted
23 uranium hexafluoride that will be generated by the
24 National Enrichment Facility in New Mexico.

25 Estimates that the evidence will clearly

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1 establish have been provided by independent third
2 parties, and for that reason constitute the necessary
3 reasonable basis that regulations and the Guidance
4 require.

5 In two respects, as you noted, having to
6 do with disposal and deconversion, the Intervenor in
7 this proceeding has also challenged the plausibility,
8 from a technical perspective, of these two steps of
9 the process.

10 In that regard the evidence that we will
11 present will establish that these steps, deconversion
12 and disposal, are not only eminently plausible, but I
13 think it will become clear that deconversion of
14 depleted uranium hexafluoride, and the disposal of the
15 resulting uranium trioxide, are carried out today, as
16 we speak.

17 And in establishing the foregoing, that
18 the cost estimates provided by LES in its application,
19 and that are before the Board in this proceeding, as
20 a result of challenges by the Intervenors, as well as
21 the plausibility of deconversion disposal, I think it
22 will become clear, as I noted, that the relevant
23 regulations, and the relevant guidance, which require
24 that we have a reasonable basis for our cost estimate,
25 and approximation of what that cost estimate will be,

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1 have been fully satisfied.

2 And I think what you are going to hear, as
3 well, as we get into this hearing, on these issues,
4 through the testimony of the Intervenor's expert, is
5 what I think I would characterize as the ever-
6 diminishing bottom line.

7 Where the Intervenor alleged, for example,
8 that "mere discussions with Cogema, with regard to
9 deconversion, were not a sufficient basis for a
10 plausible strategy".

11 The subsequent execution of a Memorandum
12 of Understanding between LES and Areva, led the
13 Intervenor in this case, and his expert, to
14 acknowledge that the agreement with a company of the
15 expertise in deconversion that Areva has, indeed
16 satisfied the plausible strategy requirement.

17 Yet in the face of this clear evidence,
18 that we are moving forward with the plausible
19 strategy, the Intervenor then asserted in this case
20 that a siting process was required in order to
21 demonstrate that a plausible strategy for deconversion
22 has been presented.

23 And, similarly, where the Intervenor
24 alleged that LES had not initially committed to an
25 adequate 25 percent contingency factor, in its initial

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1 application for depleted uranium, LES subsequently
2 committed to exactly that.

3 And upon that commitment to a 25 percent
4 contingency factor, which will be addressed in the
5 final panel this session, the argument again shifted
6 to emphasizing that although the 25 percent
7 contingency factor was reflected in our commitment, it
8 didn't cover certain elements, it didn't cover
9 elements such as currency risk, and licensing delays,
10 and other things that have been alleged, as required
11 in a contingency factor.

12 And now the Intervenor challenges the
13 basis for the independent third party cost estimates
14 that support LES' depleted uranium dispositioning cost
15 estimate.

16 So the evidence in this proceeding, I
17 think, will demonstrate that the information presented
18 in the application, and subsequently developed as the
19 initial application indicated LES would do,
20 subsequently developed with commercial third party
21 estimates for each of the steps of DU dispositioning,
22 deconversion, disposal and transportation, that those
23 estimates do, indeed, have the reasonable basis that
24 the regulations require.

25 From the Intervenor's standpoint they

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1 really don't so much challenge the reasonableness of
2 the cost estimates, as they make a number of extreme
3 and unreasonable assumptions to inflate the projected
4 cost estimate beyond any reason.

5 Indeed, we are not talking, in this
6 proceeding, about a difference of 15 or 20 cents, the
7 kind of precision that might be encompassed in the
8 periodic update, or accounted for in the contingency
9 factor, but if you were to believe the Intervenor's
10 testimony in this proceeding, we are talking about a
11 difference of 15 or 20 dollars in the estimate that we
12 have provided.

13 Indeed, the evidence I think will show
14 that the asserted cost that the Intervenor has offered
15 up they simply, upon unreasonable assumptions that are
16 made to calculate as high a figure as possible, is so
17 far beyond the pale of what it would cost, whether
18 that was estimated by LES, or DOE, or any other party
19 that is engaged in these steps of transportation
20 deconversion and disposal, that the estimate is
21 patently unreasonable.

22 Indeed, unlike the LES cost estimates,
23 what I think will be established in this proceeding,
24 is that the Intervenor's cost figures were not
25 provided by independent third parties but, instead,

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1 derived from calculational ledger domain, where they
2 attempt to establish assumptions that are so
3 unreasonable in an effort to drive the costs up beyond
4 anybody's estimation of what is reasonable.

5 There is one final point I want to make.
6 Beyond the required legal showing in this proceeding,
7 that we demonstrate that we have a plausible strategy,
8 and a reasonable basis for our cost estimate, or a
9 reasonable approximation.

10 The fact is that LES is aggressively
11 pursuing, and is committed to pursuing, the
12 construction and operation of a private sector
13 deconversion facility, not only as reflected in the
14 Memorandum of Understanding, that was presented in the
15 February hearing, and that will be revisited here but,
16 more importantly, as reflected in the Settlement
17 Agreement that we reached with the two state parties
18 that had previously participated in this proceeding,
19 and that was approved by this Board.

20 I emphasize this point because although
21 this goes beyond the plausible strategy showing, and
22 the justification of the cost estimate, that we need
23 to demonstrate for purposes of this proceeding, LES is
24 firmly pursuing an initiative to make this
25 deconversion, disposal, and transportation plausible

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1 strategy a reality.

2 It is reflected as our preferred strategy
3 in our application, the private sector strategy, and
4 in addition to demonstrating in this proceeding its
5 plausibility and the reasonableness of the cost
6 estimate, LES is pursuing it as we speak.

7 So thank you, Mr. Chairman, I will
8 conclude my remarks.

9 CHAIR BOLLWERK: All right, thank you sir.
10 Ms. Clark?

11 MS. CLARK: Thank you. Fundamentally the
12 issues before the Board, in this part of the LES
13 proceeding, concern the decommissioning of the NEF,
14 which must be accomplished following operation.

15 Our regulations require that as part of
16 its application, for a license to construct and
17 operate this facility, LES is therefore required to
18 provide a means, to provide financial assurance, to
19 ensure that this decommissioning can be accomplished.

20 The NRC Staff has provided guidance to
21 licensees on how to provide this decommissioning
22 funding plan, as relevant to this proceeding, Staff
23 guidance states that Applicants are not permitted to
24 take credit for salvaged value in their plans, meaning
25 they cannot take credit for the potential income from

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1 the sale of materials or products.

2 Applicants are expected to account for all
3 foreseeable costs in their estimates. And, in
4 addition, the NRC guidance calls for Applicants to
5 include an additional allowance of 25 percent to the
6 cost of decommissioning, to allow for unforeseeable
7 cost increases.

8 This we refer to as the contingency
9 factor. This guidance is designed to ensure that the
10 funding estimates are conservative, meaning that they
11 account for circumstances which would result in the
12 highest foreseeable decommissioning costs.

13 LES' decommissioning cost estimate
14 accounts for all the activities necessary to
15 decontaminate, or remove all materials from the site,
16 so that it can be released for unrestricted use by the
17 public.

18 These activities include removal and
19 decontamination of plant structures. As required by
20 the regulations, LES will periodically provide updates
21 to its cost estimates, and adjust its funding amount
22 in accordance with the updated estimates.

23 These updates are designed to account for
24 all changes in the cost estimate, no matter how large,
25 or how small, and no matter what the underlying reason

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1 for the change in cost.

2 In addition, and as relevant to this
3 proceeding, LES has proposed a strategy for disposing
4 of the waste produced by the operation of the
5 enrichment facility.

6 Operation of this enrichment facility will
7 result in the production of depleted uranium in the
8 form of UF6. UF6 is a chemical that reacts with
9 water, including moisture in the air, to form hydrogen
10 fluoride, which is a corrosive chemical that can cause
11 injury if inhaled or ingested.

12 Therefore, before disposal, UF6 must be
13 converted to a non-reactive form, such as U308. LES
14 has proposed accomplishing this deconversion process,
15 in a private deconversion facility, to be built in
16 closed proximity to the proposed NEF.

17 This facility will deconvert the UF6 to a
18 more stable uranium oxide, specifically U308. This
19 will be done in collaboration with Cogema, a company
20 in France, in Europe, with extensive operating
21 experience with this type of facility.

22 In order to estimate the cost of
23 construction, and operation of the deconversion
24 facility, LES has relied on information in a business
25 study developed by Cogema, for a proposed deconversion

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1 facility to be constructed in the United Kingdom for
2 Urenco.

3 The costs in this business study were
4 adjusted to account for the differences in plant
5 operating capacities, or scale, between the United
6 Kingdom plant, and the one proposed for the NEF, and
7 also adjusted to convert the costs in euros to
8 dollars.

9 In addition LES added additional costs to
10 account for obtaining regulatory approval, and
11 converting european equipment standards to United
12 States standards.

13 The Staff, as testimony will demonstrate,
14 has determined that the adjustments and costs were
15 reasonable and appropriate. Following deconversion
16 the uranium oxide must be disposed of.

17 LES has proposed that it will be disposed
18 of in a licensed low level waste facility by means of
19 shallow land disposal. Such a facility could be
20 licensed by the NRC, or by an agreement state.

21 If licensed by the NRC, the governing
22 regulations for this type of disposal are found in
23 10CFR part 61. If licensed by an agreement state, the
24 state's regulations apply. These must be compatible
25 with those of Part 61, as well.

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1 Part 61 sets forth a classification scheme
2 in which low level waste is classified either A, B, or
3 C waste. The evidence in this proceeding will
4 establish that depleted uranium is, in fact, class A
5 waste, under the provisions of Part 61.

6 However, classification alone does not
7 settle the question of whether shallow land disposal
8 can be permitted under Part 61. This is because Part
9 61 sets forth performance requirements that apply to
10 low level waste disposal sites, and sets forth
11 standards that apply to the siting, the design, the
12 operation, the close and control after closure, of the
13 specific site, to ensure that human exposure to
14 radiation does not exceed the established limits in
15 that part.

16 The performance requirements in the
17 Regulation state releases to the general environment,
18 in groundwater, surface water, air, soil, plants or
19 animals, must not result in annual doses exceeding
20 specific limits to any member of the public.

21 Importantly the regulatory standard is set
22 forth in terms of radiation dose. Thus the question
23 to be addressed at any site-specific analysis, under
24 Part 61, is whether those dose limits would be
25 exceeded.

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1 Any challenge to that standard is not a
2 matter for this proceeding, even an implicit
3 challenge, such as the one the Intervenor raises, in
4 asking this Board to determine compliance by applying
5 a standard such as cancer risk, which is different
6 than that imposed by the regulation.

7 To assess the potential doses at any
8 specific low level waste site, one must first
9 determine the pathways by which humans may receive
10 radiation.

11 The pathways are highly dependent on the
12 conditions at the site. For example, one would not
13 expect humans to receive doses from eating plants
14 grown on the site, if the site conditions are
15 unsuitable for agriculture.

16 Similarly, one would not expect humans to
17 receive doses from drinking groundwater, if there is
18 no available groundwater at the site, or if the water
19 is not suitable for consumption.

20 In evaluating the plausibility of shallow
21 land disposal, for depleted uranium, the Staff
22 considered the options that would be available to the
23 NEF, and recognized that one available site,
24 Envirocare, was licensed to accept this type of
25 material.

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1 Envirocare's license was premised upon a
2 site-specific pathway analysis performed to assess the
3 types and quantities of waste it could accept, and
4 still be in compliance with Part 61.

5 Through communications with Envirocare's
6 regulatory authority, which is the State of Utah, the
7 Staff confirmed that Envirocare is licensed to accept
8 depleted uranium without quantity limitation.

9 This is, in part, due to the fact that
10 conditions at the site, at Envirocare, are considered
11 unsuitable for agriculture, and because groundwater is
12 not suitable for consumption.

13 LES is, of course, not limited in its
14 choices for disposal, and may choose to use another
15 low level waste disposal site. However, whatever
16 facility it uses, that low level waste facility must
17 first obtain a license to accept this material by
18 demonstrating compliance with Part 61 and all its
19 requirements.

20 In light of this information the Staff
21 determined that shallow land disposal is a plausible
22 option, and a suitable basis for assessing the cost of
23 this activity in the context of decommissioning.

24 In order to estimate the cost for this
25 type of disposal, LES has provided a cost estimate

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1 from WCS, Waste Control Specialist, which is a low
2 level, it is a disposal site located in Texas, near
3 the proposed NEF.

4 WCS is currently seeking a license
5 amendment to accept this type of waste. In the
6 context of the Staff's experience, and knowledge,
7 regarding disposal costs associated with this, and
8 similar types of waste, the Staff believed that the
9 WCS cost estimate that LES relies on, for estimating
10 the cost of disposal, is conservative.

11 We also recognize that obtaining disposal
12 costs is complicated by the fact that Envirocare
13 negotiates disposal costs on a case by case basis.
14 Envirocare does not publish a list of rate sheets, or
15 disclose rates provided to other users.

16 For these reasons the Staff believes LES
17 has proposed a plausible strategy for deconverting and
18 disposing of depleted uranium produced by the proposed
19 enrichment facility, and that LES' cost estimate is
20 adequately documented and reasonable. Thank you.

21 CHAIR BOLLWERK: All right, Mr. Lovejoy,
22 before we start, just let me mention one thing. The
23 microphones in front of you are fairly directional.
24 So as long as it is in front of your mouth you should
25 be all right.

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1 You will also notice there is a green
2 light in front of it. If you press the little pad in
3 front, and the lights should go out, that means that
4 you are not being recorded or heard.

5 So if you want to have a discussion with
6 someone, off the record, you can certainly do that.
7 But as long as the green light is on, and it is on by
8 default, then you are on the air, as it were.

9 MR. LOVEJOY: Thank you for that
10 cautionary advice, Your Honor.

11 CHAIR BOLLWERK: That is all right.

12 MR. LOVEJOY: Yes, I think it is useful to
13 stand back for a minute and take a look at what the
14 case amounts to.

15 First, here is what the case looked like,
16 before the Commission's ruling of last Wednesday. As
17 Your Honor stated, there were several contentions
18 pending, and they added up to the contention by
19 NIRS/PC that LES had failed to establish a plausible
20 strategy for deconversion, transportation, and
21 disposal of depleted uranium tails, and contested the
22 cost estimates that were offered.

23 The legal requirements for plausible
24 strategy were described in the Claibourne case, by the
25 Board, in language that I think still applies. They

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1 said, in assessing the plausible tails disposal
2 strategy adopted by the Applicant, as part of its
3 decommissioning funding plan, we must first determine
4 whether the funding plan contains a reasonable, or
5 credible plan, to dispose of the DUF6 tails generated
6 at the CEC, and then determine whether the Applicant's
7 cost estimates for the components of the plan are
8 reasonable.

9 So there are two parts to it. First LES
10 must provide a reasonable or credible plan to
11 disposition the tails and, second, it must present
12 reasonable cost estimates.

13 I submit that LES has not met its
14 obligation. As background I think it is important for
15 all of us to remember that the issues raised by this
16 proposed project are long-standing and important for
17 the country.

18 Historically commercial enrichment of
19 uranium, in this country, has been done by plants
20 built by the Atomic Energy Corporation, or maybe its
21 predecessor, more than 50 years ago.

22 What might replace these plants has been
23 discussed, at length, and LES, a European based
24 partnership, proposes to build a private enrichment
25 plant.

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1 One of the big outstanding issues
2 involving the old DOE plants, now DOE, is the question
3 of their huge inventory of depleted uranium. It has
4 taken acts of Congress to move DOE towards
5 dispositioning that depleted uranium.

6 Long environmental impact statements have
7 been prepared concerning deconversion plants.
8 Deconversion plants are now in the process of
9 construction, and additional environmental studies
10 will be conducted before a disposal decision is made.

11 Against this background, what has LES'
12 presentation been on the plausible strategy
13 requirement? I could put it this way. I think it is
14 what lawyers call a thin case. About deconversion,
15 the information provided is sketchy.

16 First LES has, as has been said, a
17 Memorandum of Understanding with the French company
18 Areva. The memorandum contains, essentially, no
19 business commitments. Second, LES has a cost estimate
20 from Cogema, which is Areva's subsidiary.

21 This quotation estimates the cost of
22 building and operating a deconversion plant, and it
23 has been tweaked, some, to apply it to the United
24 States.

25 LES dearly hopes that the Board will jump

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1 to the conclusion that Areva, or Cogema, will actually
2 build a deconversion plant for the amount shown in the
3 cost estimate.

4 But no one has agreed to do any such
5 thing. The Board now will need to decide whether this
6 is a credible strategy. And, if so, the Board will
7 need to determine the cost by making major
8 adjustments, I submit, to the LES cost estimate, to
9 bring it into the real world.

10 About transportation, the case is even
11 skimpier. There are two emails with price ranges, and
12 narrative comments, about the proportion of the labor
13 costs.

14 There is no underlying calculations
15 supporting the numbers. And, inexplicably, LES has
16 quoted, as its transportation cost, the average of the
17 cost for transporting depleted uranium hexafluoride,
18 and the cost for transporting oxides. Obviously they
19 will need to do both kinds of transportation.

20 So instead of averaging they should have
21 added the two costs. As to disposal, we had another
22 thin case. LES shows us a Memorandum of Agreement
23 with Waste Control Specialists, WCS, which has no
24 license to dispose of depleted uranium waste, but is
25 happy to quote a price to do it.

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1 And LES has a one page letter from
2 Envirocare of Utah, saying that it can accept depleted
3 uranium from enrichment plants, and that is about it.

4 One would think that in asking permission
5 to create, and then to manage a major waste disposal
6 problem, LES would make a detailed presentation of how
7 it will comply with all the regulations that apply to
8 waste disposal.

9 However, LES has said that it need only
10 identify one or more sites licensed to dispose of
11 class A low level radioactive waste, and the other
12 problems can be left to the agencies administering the
13 permits.

14 And that is where the case stood last
15 Wednesday. On Wednesday the Commission held that
16 certain issues that NIRS/PC had sought to present in
17 a motion last October, and again in February, should
18 have been admitted for hearing.

19 A little background is important here. In
20 its application LES originally declared that its
21 strategy was based upon, one, discussions with Cogema
22 concerning a private deconversion facility. And, two,
23 disposal in an exhausted uranium mine, the Cotter
24 mines in Colorado.

25 LES relied on three cost estimates. The

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1 estimate they had in the Claibourne proceeding, the
2 Lawrence Livermore report that supported the DOE
3 programmatic Environmental Impact Statement, and the
4 UDS contract with DOE.

5 Then in September of last year the Staff
6 issued the Draft Environmental Impact Statement, it
7 stated among other things, that no abandoned mine
8 seems to be available for disposal, and it said, in
9 addition, that depleted U308 can be considered a class
10 A low level radioactive waste.

11 And it said the only currently available
12 viable disposal option would be disposal of the
13 depleted U308, based on its waste classification, and
14 site specific evaluation in near surface emplacement
15 in a licensed low level radioactive waste disposal
16 facility.

17 There was no environmental analysis to
18 support any of these judgements. In October 2004 LES
19 announced that it no longer relied on the cost
20 estimates contained in its application.

21 NIRS/PC then moved to add contentions
22 about the Staff's assumptions that the waste was class
23 A, and could be disposed of in a near surface
24 facility. NIRS/PC sought to contend that "The
25 Commission could not lawfully decide that such

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1 disposal is permissible without undertaking a full
2 environmental impact analysis."

3 NIRS/PC also asserted that depleted
4 uranium should be managed and disposed of under the
5 rules for greater than class C waste. The amendment
6 was denied and, in February, NIRS/PC moved again,
7 after LES had submitted new cost estimates, without
8 any supporting information.

9 NIRS/PC asked to contend "the DEIS fails
10 to discuss the environmental impacts of the
11 transportation and disposal of depleted uranium. The
12 analysis of disposal methods in the DEIS are
13 unsupported and technically deficient and such
14 proposed methods would fail to meet relevant health
15 requirements such as the Commission's standards for
16 disposal of low level radioactive waste. Thus the
17 DEIS lacks adequate information to make an informed
18 licensing judgment."

19 NIRS/PC state that "shallow land disposal
20 for these wastes is generally not appropriate, and
21 they are considered to require deep geologic disposal
22 in order to adequately protect the environment and
23 public health", and supporting data was presented.

24 Then, about then, LES began to reveal its
25 new strategy, in January of 2005 we received the

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1 Memorandum of Agreement with WCS, suggesting near
2 surface disposal, and the Memorandum of Understanding
3 with Areva, suggesting a possible path to a
4 deconversion plant.

5 Last Wednesday the Commission reversed the
6 Board's rulings excluding the NIRS/PC contentions of
7 disposal impacts. The Commission held that NIRS/PC
8 had timely challenged the environmental impacts
9 discussion in the Draft Environmental Impact
10 Statement, had timely challenged the DEIS for assuming
11 the disposal in near surface facilities is acceptable,
12 had timely complained of the DEIS classification of
13 DU, as class A low level radioactive waste without a
14 NEPA analysis.

15 Had timely claimed that depleted uranium
16 should be disposed of, similarly to greater than class
17 C waste, had timely claimed that the DEIS did not
18 account for the NRC's repeated statements that near
19 surface disposal might not meet Part 61 dose
20 limitations, and had timely challenged the DEIS
21 release calculations for deep disposal.

22 The Commission allowed these contentions
23 to go forward. The Commission said, also, that the
24 Board should reach a decision on such contentions
25 without making a formal waste classification finding.

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1 I think that means that the Board ought
2 not to make a determination whether this is class A
3 waste. The Commission said that the hearing should
4 "resolve the disposal impacts contention which, at
5 bottom, goes to whether the impacts of near surface
6 disposal have been adequately estimated, or assessed,
7 for NEPA purposes."

8 The Commission said also, an assessment of
9 the estimated impacts at one or more representative or
10 referenced sites can be sufficient. In this type of
11 analysis the impacts for a range of potential
12 facilities, or locations, having common site or design
13 features, can be bounded.

14 Now, about a bounding analysis. First, a
15 bounding analysis describes the outer bounds of
16 possible consequences. For a bounding analysis I
17 submit that we should not use studies that are limited
18 as to a time period, or pathways, or other factors.

19 You can't do a bounding analysis using the
20 assumption that no one will ever live near the site,
21 so we can forget about impacts on people. And it
22 wouldn't be a bounding analysis if you cut off the
23 time period of the model at a few hundred years, or a
24 thousand years. This material is radioactive for
25 billions of years.

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1 Now, Dr. Makhijani, in reports that have
2 been marked as exhibits, and in testimony that has
3 been introduced, has analyzed two representative
4 sites. These are ones you have already heard about,
5 the Envirocare site, and the WCS site.

6 We request that the Board admit these
7 studies and that testimony. These analyses show that
8 neither such site would comply with the dose
9 limitations of 10CFR Part 61.

10 Therefore neither such site could
11 constitute a plausible disposal strategy. That is the
12 fundamental fact of this case. Some other strategy
13 will need to be found if this plant is to be licensed.
14 Thank you.

15 CHAIR BOLLWERK: Thank you, sir. Let me
16 just see if any of the Board members have any comments
17 or questions at this point.

18 JUDGE KELBER: No.

19 JUDGE ABRAMSON: No.

20 CHAIR BOLLWERK: If not then let's go
21 ahead and talk, for a couple of minutes, about the
22 motion that was filed on Friday. And in this context
23 I guess I would like to hear a discussion about two
24 things.

25 And by way of background I should mention,

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1 also, that first of all, thank you for pointing out
2 that the Commission's decision was last Wednesday,
3 rather than Thursday, as I think I said. Last week
4 kind of all moves together in terms of the days. But
5 you are correct, it was last Wednesday, the 19th of
6 October.

7 The Board and the parties, on Friday
8 afternoon, had a discussion for about, I think, 45
9 minutes on the telephone about the Commission's
10 decision and the impact on this case.

11 I don't think we reached any resolution at
12 that point in terms of the approach. But NIRS/PC did
13 advise everyone at that point, that they were going to
14 file a motion by close of business, approximately 5
15 o'clock, which they did.

16 So the parties have had that over the
17 weekend to look at. And in the context of what we are
18 going to be hearing about in this motion, I guess, in
19 addition to the merits of the motion, I would also
20 like to hear, at this point, what the parties'
21 thinking is about how we should proceed, procedurally
22 in terms of dealing with the particular issue that has
23 been sent back to the Board by the Commission.

24 And, Mr. Lovejoy, we will let you speak to
25 the matter first.

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1 MR. LOVEJOY: Thank you, Your Honor. I
2 will be quite brief because I have already, as you
3 know, touched on the points that I want to make.

4 And one is that the Commission has noted,
5 in its Decision, that there were several Contentions
6 which were timely made by NIRS/PC, and prime among
7 them was the assertion that what is required here is
8 a determination of the environmental impacts of near
9 surface disposal of depleted uranium.

10 And that the record should contain an
11 analysis of one or more representative, or referenced
12 sites. And we submit that we are prepared, and have
13 already actually submitted such analyses, and they
14 should be admitted.

15 Dr. Makhijani is here, he can be cross
16 examined on these matters, and that is one way to
17 address that requirement of the Commission's Order.

18 The other principal requirement of that
19 Order was to proceed, without making a formal waste
20 classification determination because, as has been
21 noted, NIRS/PC contended that there was no NEPA
22 analysis supporting any decision that depleted uranium
23 from an enrichment plant could be classified as Class
24 A waste.

25 Much of the presentations we have heard

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1 from LES, and from Staff, concerning the plausibility
2 of various waste disposal strategies has, essentially,
3 been to say that such and such a site is licensed, or
4 may be licensed soon to dispose of class A waste, so
5 that is the answer.

6 Well, that can no longer be the answer,
7 after the Commission's ruling. And so we move to
8 strike that testimony.

9 CHAIR BOLLWERK: Any questions?

10 JUDGE ABRAMSON: Yes, I have. Mr.
11 Lovejoy, I refer you to page 18 of the Commission's
12 ruling from last week.

13 MR. LOVEJOY: My version is paginated a
14 little different.

15 JUDGE ABRAMSON: Well, it is near the end,
16 it is the first paragraph, it is a paragraph that
17 starts: Here section 6155A6 makes no exception. Can
18 you find that paragraph, please?

19 MR. LOVEJOY: Yes.

20 JUDGE ABRAMSON: Would you help me
21 understand your interpretation of the final sentence
22 of that paragraph, which reads as follows, despite
23 section 61505A, we are permitting the NIRS/PC waste
24 impacts contention to go forward because a formal
25 waste clarification finding is not necessary to

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1 resolve the disposal impact contention, which at
2 bottom goes to whether the impact in here, surface
3 disposal, have been adequately estimated or assessed
4 for NEPA purposes.

5 Now, you mentioned that we were instructed
6 that we are not to make a waste clarification finding.
7 Is that the sentence you are relying on for that
8 position?

9 MR. LOVEJOY: That is.

10 JUDGE ABRAMSON: How do you view what this
11 sentence says regarding what we are to be addressing
12 here? Is it we are to be addressing only NEPA
13 disposal impacts?

14 MR. LOVEJOY: I'm not quite sure what NEPA
15 disposal impacts are?

16 JUDGE ABRAMSON: Well, disposal impacts
17 underneath. We are to be looking at NEPA compliance
18 by the agency?

19 MR. LOVEJOY: We are. What's been
20 remanded is a NEPA contention.

21 JUDGE ABRAMSON: Okay. Thank you. That's
22 the only question I have here.

23 CHAIR BOLLWERK: All right. If you have
24 nothing further at this point, I'm going to turn to
25 Mr. Curtiss.

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1 MR. CURTISS: Thank you, Mr. Chairman.
2 Let me state at the outset that we oppose the motion
3 that was filed on late Friday afternoon following the
4 Board conference call and approximately 48 hours
5 before this hearing began.

6 I think there are several points that I'd
7 emphasize about the Commission confusion of last
8 Wednesday. And indeed I think the decision speaks for
9 itself.

10 Unfortunately, it doesn't speak the same
11 language that Counsel for NIRS/PC would have you
12 interpret this decision in. I'll emphasize a couple
13 of points here that I think are central to the
14 Commission's decision.

15 On pages one and two of this decision,
16 it's clear where the Commission says the issues and
17 allegations on near-surface disposal of depleted
18 uranium that NIRS/PC raised in its, quote, Impacts
19 Contention substantially overlap those now before the
20 Board as part of NIRS/PC's contentions challenging
21 LES's estimate of depleted uranium disposal costs.

22 Those contentions will be considered in
23 the upcoming board hearing scheduled to begin today.
24 And it's noteworthy that this order issued by the
25 Commission did in fact, as is reflected here,

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1 undertake a thorough review the issues in this
2 proceeding, including the pre-filed testimony that
3 identified the issues that were going to be considered
4 here today and this week.

5 And the Commission came to a clear
6 conclusion that those issues that had been raised and
7 are of concern substantially overlap this proceeding.

8 For that reason alone, I think it's
9 inappropriate to proceed to strike testimony of the
10 Staff and of the Applicant 48 hours before the
11 proceeding.

12 Secondly, I think the reference, Dr.
13 Abramson, that you made is consistent with exactly how
14 we look at the clarification question. The language
15 here is important because the phraseology that's
16 ignored in the discussion of this order is the
17 language that appears on page 16.

18 And we may not have the same pagination,
19 so I'll just repeat the language. Depleted uranium
20 does not contain the radionuclides listed in the
21 specified part 61 tables.

22 And therefore, under a plain reading of
23 the regulation, depleted uranium is class A waste. I
24 would submit that that question is not an issue for
25 this proceeding because the Commission has resolved

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1 the issue.

2 They firmly and squarely discussed in this
3 order the fact that it's CLI05-5, they concluded.
4 Contrary to the argument that interveners in this case
5 have made, the depleted uranium is low level
6 radioactive waste.

7 And now they have taken the next step and
8 said, what type of low level radioactive waste is it?
9 And it's clear, as I read the language on page 16 of
10 this order, that the Commission has unequivocally
11 stated that.

12 It's not intended to preclude you from
13 doing anything here or to say a finding is not
14 necessary. The important thing is a finding has been
15 made and that advances the discussion and can focus on
16 the contentions that are here in this proceeding.

17 Now, as my old constitutional law
18 professor used to say, all the important law is in the
19 footnotes. And I say that here because the footnotes
20 really describe what is and isn't litigable here and
21 importantly what isn't litigable.

22 As I said with respect to the discussion
23 at the outset of this order, the Commission, upon
24 review of the detailed testimony filed, has said the
25 issues that have already been raised substantially

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1 overlap the issues that we're litigating this week.

2 Well, let's just briefly review those
3 important footnotes because it's clear when that's
4 done that the broad-ranging inquiry that Counsel for
5 NIRS/PC is suggesting simply isn't supported by the
6 language in this decision.

7 And I'll refer here to three footnotes in
8 particular. I'll begin with footnote 38. And then
9 I'd like to move to footnote 52 and then footnote 48.

10 The relevant language in footnote 38
11 addresses the issue of groundwater, intruder dose,
12 dose methodology, and the adequacy of generic site
13 analyses.

14 And I will read it. Many of the claims
15 referring to NIRS/PC's February 2nd, 2005 motion,
16 appear to be late attempts to challenge the
17 radiological dose analysis provided in the LES
18 environmental report.

19 Arguments challenging the specific
20 groundwater or intruder dose conclusions set forth in
21 the LES environmental report, the methodology upon
22 which the dose calculations were made, and the
23 adequacy of generic wet site and dry site dose
24 analyses should have been raised earlier.

25 We -- referring to the Commission in this

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1 order -- we agree with the Board in so far as it rules
2 these aspects of NIRS/PC's contentions were untimely.

3 Footnote 38 defines in a significant and
4 important respect what's off the table in this
5 proceeding because the Commission itself,
6 notwithstanding the overly broad interpretation that
7 you've heard today about how the Commission reversed
8 the Board, the Commission in footnote 38 importantly
9 addresses a number of the significant aspects that
10 NIRS/PC seeks to raise in this proceeding, which were
11 raised in an untimely way.

12 And the Commission agreed with the Board.
13 The Commission did not reverse the Board on that.
14 Turning to footnote 52, excuse me. NIRS/PC's
15 intervention petition did not challenge the
16 radiological dose estimates referenced in the LES
17 environmental report.

18 And therefore, the Board should consider
19 whether they have waived the opportunity to challenge
20 the adequacy of the dose estimates for wet and dry
21 disposal sites.

22 And, at the appropriate point, if it's
23 appropriate to bring that procedural point to the
24 Board, I'm prepared to move that they have, as the
25 Committee has suggested here, waive their opportunity.

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1 And finally, in footnote 48, relative to
2 what the Commission refers to as the geologic or mine
3 disposal option, if NIRS/PC actually meant to
4 challenge the dose estimates used in the Claibourne
5 proceeding, such a challenge appears untimely given
6 that the LES environmental report said that it was
7 relying on the Claibourne dose estimates.

8 And I think it's clear here, as it goes on
9 here in footnote 48, NIRS/PC's support for their
10 challenge to the DEIS estimate of doses from a
11 geological repository is more sparse.

12 They question whether the DEIS used the
13 same models used in the earlier Claibourne proceeding
14 because they say it is not clear how the DEIS used
15 earlier Claibourne dose estimates to calculate new
16 estimates.

17 Given corrections made in the FEIS by the
18 Staff, this issue appears amenable to summary
19 disposition. And, at the appropriate point, I'd defer
20 to Staff or LES is prepared to make an oral summary
21 disposition motion based upon footnote 48.

22 So, in sum, what's clear here as I refer
23 back to the language at the beginning of this order is
24 that the issues and allegations that NIRS seeks to
25 raise, are substantially addressed in this proceeding,

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1 including the question of whether it's more
2 appropriate to view depleted uranium as transuranic
3 waste.

4 Our witnesses are prepared to testify
5 about that. They're also prepared to review the
6 generic analyses, if those are in order, that Counsel
7 for NIRS/PC referred to.

8 But, as I say, footnotes 38, 52 and 48
9 where all the important law is in this decision, and
10 it's law that's been ignored in the discussion to date
11 and in the motion in limine that's been filed, clearly
12 circumscribed issues that are litigable in this
13 proceeding and limit this proceeding to the issues
14 that the Commission carefully reviewed in reviewing
15 the testimony and that are currently pending before
16 the Board.

17 So LES's position is, let's move on with
18 this proceeding. As the testimony is being presented,
19 we'll litigate the issues. And we think that fully
20 satisfies the Commission's expectation as reflected in
21 both the beginning of this order where the Commission
22 clearly said no free-standing hearing is required, and
23 at the end of this order where they said we ought to
24 endeavor to achieve with all the powers of the Board
25 the schedule for this proceeding.

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1 So LES is prepared to move forward with
2 the presentation of testimony on the issues that are
3 in this proceeding and that the Commission has
4 acknowledged addresses their concern relative to the
5 order of last Wednesday.

6 CHAIR BOLLWERK: By the way, Mr. Lovejoy,
7 you'll get an opportunity to respond after we've heard
8 from the Staff as well.

9 MR. LOVEJOY: Thank you.

10 JUDGE ABRAMSON: Mr. Curtiss, let me ask
11 you just a short question referring to the quote from
12 general 52 about not challenging the radiological dose
13 estimates in the ER.

14 As I understood the late contention that
15 we didn't admit, that was a challenge to the DEIS.
16 And the DEIS has since been modified and embodied in
17 the FEIS.

18 Is the substantive presentation in the
19 FEIS on radiological dose estimates the same or
20 substantively the same as that in the ER and
21 therefore, is that the basis of the argument that
22 they've already raised this challenge or should have
23 raised it earlier?

24 MR. CURTISS: I believe it is. The
25 opportunity to raise an issue --

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1 JUDGE ABRAMSON: I understand that
2 question. The question is whether --

3 MR. CURTISS: They are substantially the
4 same. We can confirm that. I'd defer to the Staff as
5 well, but that's my understanding.

6 JUDGE ABRAMSON: Okay. That's the basis
7 of your argument that that's dealt with?

8 MR. CURTISS: Yes, sir.

9 JUDGE ABRAMSON: Okay. Thank you.

10 CHAIR BOLLWERK: Just procedurally, you
11 mentioned as I understood it -- or maybe I
12 misunderstood it -- testimony, additional testimony.
13 Do you anticipate putting on a separate set of --
14 using your witnesses and having them testify
15 additionally?

16 Are you going to stand on the testimony
17 you have? Do you think it addresses the issues? Or
18 how exactly procedurally do you --

19 MR. CURTISS: I think the Commission has
20 said, and we certainly agree, that the issues that are
21 in this proceeding substantially, we think almost
22 entirely, address the concerns that they're raising
23 when one considers what's circumscribed in the
24 footnotes.

25 It would be our intent, and this Board has

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1 admitted the two expert reports of Dr. Makhijani which
2 purport to present a generic analysis of a site.

3 It would be our intent to elicit the
4 assumptions upon which those analyses were undertaken
5 and establish for the record that that analysis is an
6 unreasonable analysis for a variety of reasons.

7 And we're prepared to do that in this
8 proceeding taking the opportunity that I believe the
9 Board has extended, following the testimony, following
10 cross examination to recall our witness for
11 surrebuttal on the impacts of the analysis undertaken
12 in those two reports.

13 The only remaining question in my mind is
14 whether it's essential given the decision that the
15 Commission has made to spend any substantial amount of
16 time on the conclusion in reading the regulations, the
17 depleted uranium is Class A waste.

18 The testimony of the intervener in this
19 proceeding has taken the position that that decision
20 hasn't been made. Well, it has been, last Wednesday
21 in this decision.

22 It cannot be made or should not be made,
23 the latter two of which I would submit are direct
24 challenges to the decision that the Commission made in
25 reading its own regulation.

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1 So, that's a long way around, Mr.
2 Chairman, to saying with respect to the testimony on
3 the classification issue. We believe that issue has
4 been resolved.

5 I would submit the motion in limine
6 proposes not only not to eliminate the classification
7 testimony in the interveners, but to go way beyond the
8 classification testimony in the strike that he's
9 proposing in the Staff and LES testimony.

10 So that's an issue that in my mind the
11 Commission has spoken to in concluding that depleted
12 uranium is class A waste. And we can move on now and
13 establish that there are facilities that can in fact
14 accept class A waste.

15 And we believe, as Counsel for the Staff
16 has indicated this morning, that thorough evaluations
17 were conductive, the Envirocare site will be of the
18 WCS site, and that there's an adequate analysis of
19 that in the ER and in the FEIS, and that the analysis
20 presented by the expert for NIRS/PC is based upon
21 flawed assumptions.

22 CHAIR BOLLWERK: Okay.

23 JUDGE ABRAMSON: Do you believe that
24 what's -- sorry, Counsel Curtiss. Do you think that
25 what's been remanded to us encompasses anything more

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1 than review of an allegation that the DEIS is
2 inadequate in its treatment of the impacts of waste
3 disposal?

4 Is there more to what's been remanded to
5 us than that?

6 MR. CURTISS: I don't think there is.
7 This is clearly what the Commission calls an
8 environmental impacts discussion. But in terms of,
9 importantly, the scope of what can be addressed in
10 looking at the impacts, there is testimony in this
11 proceeding the Commission reviewed that covers exactly
12 that.

13 And the Commission, not only in adverting
14 to that testimony in saying that substantially
15 addresses their concern, but additionally in the
16 footnotes that I've referred to, taking off the table
17 certain issues, I think, has made it very clear that
18 the issues that they're looking to be analyzing in the
19 context of the EC part of the contention are before
20 this proceeding.

21 CHAIR BOLLWERK: All right. So, just if
22 I can summarize in terms of my original question, it
23 sounds like what you're telling us is that you believe
24 through cross examination of Dr. Makhijani and through
25 surrebuttal testimony you can address the issues the

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1 Commission has remanded to the Board?

2 MR. CURTISS: Yes, sir.

3 CHAIR BOLLWERK: All right. Let me turn.

4 Any questions from the Board members then?

5 JUDGE KELBER: No.

6 CHAIR BOLLWERK: All right. Then we'll
7 turn to the Staff then.

8 MS. CLARK: Thank you. First of all, I
9 would like to say that the Staff also objects to the
10 relief that NIRS/PC is seeking in this motion. I
11 think that there are fundamentally two issues that
12 we'd like to address.

13 The first concerns the classification
14 under part 61. And the second concerns more generally
15 the scope of what the Commission has asked this Board
16 to do. And I'd like to start by discussing the
17 classification issue.

18 Essentially, we agree with what Counsel
19 for LES has said regarding the interpretation of the
20 Commission decision. Fundamentally, we read that
21 decision as a statement by the Commission that a clear
22 reading of 61.55 is that depleted uranium is class A
23 waste.

24 And I note that in the decision the
25 Commission makes the statement that 61.55 A6 makes no

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1 exception for depleted uranium from enrichment
2 facilities, hence NIRS/PC's effort to use this
3 adjudicatory proceeding to modify the rule to include
4 such an exception is misdirected.

5 Therefore, what the Commission is saying
6 is a clear reading of the rule shows that depleted
7 uranium is class A waste and that this proceeding is
8 not the appropriate forum for NIRS/PC to raise the
9 issue that the rule is somehow inappropriate.

10 Now, the Commission also discussed the
11 environmental analysis that was involved in the rule
12 making involved with part 61. As NIRS has pointed
13 out, and as the Commission noted, when that
14 environmental analysis was done, large quantities of
15 depleted uranium were not considered in the pathway
16 analysis for the environmental review.

17 For that reason, the Commission has
18 directed the Staff to look back at that rule and to
19 consider whether perhaps additional environmental
20 analysis should be done.

21 Importantly, the Commission said that that
22 should be done outside this adjudication. That is
23 because reconsideration of a Commission rule, or the
24 environmental analysis for Commission rule, is not a
25 matter for this Board.

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1 It is not at issue in this adjudicatory
2 proceeding. Therefore, NIRS is fundamentally
3 misrepresenting the direction of the Commission. The
4 Commission is not directing this Board to have the
5 Staff conduct additional environmental analysis on the
6 NEF.

7 The Commission is directing the Staff to
8 look at this issue on a generic basis in the
9 connection with part 61. The only issue that has been
10 remanded to this Board is consideration of NIRS/PC
11 contentions.

12 And those go to the contention of whether
13 our NEPA analysis involved in the NEF application is
14 adequate. And the Staff will take the position that
15 our NEPA analysis is sufficient and our final
16 Environmental Impact Statement does contain a
17 sufficient and adequate evaluation of the
18 environmental impacts of the proposed facility.

19 JUDGE ABRAMSON: Does that mean that
20 you're prepared, Counselor, to argue this during this
21 hearing?

22 MS. CLARK: We are willing certainly to
23 argue this to the extent we can in this proceeding and
24 to the extent that our experts can certainly be
25 questioned on this issue.

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1 However, I'm not prepared to say that we
2 can provide a complete evidentiary basis for you to
3 determine this issue in these three days. I think
4 that the record should be kept open following the
5 close of these hearings.

6 And, for one thing, we'll need to
7 supplement the exhibit presentations. Currently, the
8 final Environmental Impact Statement is not in record
9 in -- of record in this proceeding.

10 And, of course, since we have issued a
11 final Environmental Impact Statement, the ultimate
12 issue that has to be decided is not whether our draft
13 was adequate.

14 That issue is now moot. The issue before
15 this Board has to be whether the final Environmental
16 Impact Statement is adequate. And, as the Commission
17 noted, there has been a change between the draft and
18 the final relative to the impacts of mine disposal and
19 one of the issues that NIRS has raised.

20 We would like the opportunity to put those
21 into the record and have the option of requesting some
22 redisposition of that issue. In addition, we would
23 like the opportunity to be able to provide additional
24 testimony.

25 It is true that the issues overlap. NIRS

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1 in many ways is raising the same issues. However,
2 there's a very fundamental difference in the
3 application of these contentions because we're talking
4 about the adequacy of the NEPA analysis.

5 The Staff has the burden of proof on its
6 NEPA evaluation. LES in this proceeding has the
7 burden of proof. And so, I want to be certain that we
8 have the opportunity to give you sufficient
9 documentation for you to make a decision and for us to
10 sufficiently support our NEPA review.

11 JUDGE ABRAMSON: Let me ask Mr. Lovejoy,
12 have you and your expert had time to review the FEIS?

13 MR. LOVEJOY: Yes.

14 JUDGE ABRAMSON: Are you prepared to go
15 forward and discuss that?

16 MR. LOVEJOY: We have reviewed the FEIS.
17 The deep disposal analysis in the FEIS is very similar
18 to what was in the DEIS. I think there were some
19 mathematical errors that were probably fixed in the
20 FEIS.

21 JUDGE ABRAMSON: We don't need to go into
22 the substance now. I guess my question really is, are
23 you prepared to go forward and discuss the DEIS at
24 this point.

25 MR. LOVEJOY: Yes.

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1 JUDGE ABRAMSON: The FEIS, sorry.

2 MR. LOVEJOY: Yes.

3 CHAIR BOLLWERK: All right. Ms. Clark, do
4 you have anything further?

5 MS. CLARK: Nothing further.

6 CHAIR BOLLWERK: All right. Any further
7 questions from the Board? All right, Mr. Lovejoy?

8 MR. LOVEJOY: Thank you, Your Honor. I
9 recognize that there is overlap of issues here. I
10 don't think it's total overlap. And I think the
11 Commission was phrasing its decision carefully when it
12 -- and consciously getting it out before the hearing
13 started so that it could be taken account of in the
14 hearing.

15 And it does change the nature of the
16 hearing. And I think we all recognize that. Both NRC
17 Staff and LES have pointed to the language saying
18 depleted uranium is a class A waste.

19 And, of course, in the next paragraph, the
20 Commission in its decision points out, as lawyers
21 would put it, that there's no NEPA coverage for that
22 decision.

23 And as, again, lawyers might put it, I've
24 heard folks say if you don't have NEPA, you don't have
25 a reg. You can't use your regulation. It's not a

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1 challenge to the validity of the regulation.

2 It's a challenge to the NEPA analysis and
3 just saying that under the law that part can't be
4 applied unless there's a NEPA analysis. And that's
5 where we are.

6 So, you know, I don't think classification
7 can be part of this Board's decision. If there's a
8 decision that this material is class A, it's just
9 going to go up to the Commission again and we'll be
10 back because they've directed that this proceeding go
11 forward without a formal waste classification
12 determination.

13 Mr. Curtiss said that it's too late to
14 talk about deep disposal or the CEC EIS. I looked at
15 the passages in the environmental report concerning
16 deep disposal analysis in the ER.

17 The ER does not contain data. It just
18 mentions the fact that there was, in the CEC case, an
19 analysis of deep disposal. When the draft EIS came
20 out, that was when data first showed up in table, I
21 think it was 4-19.

22 And we challenged that. And there were
23 some math errors. And they may have been fixed. But
24 the challenge goes to the data in that deep disposal
25 analysis.

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1 And that was timely. And I think the
2 Commission recognizes that. Whether we've waived
3 complaints about the wet and dry disposal site issues
4 was also brought up.

5 I think it's clear from one of the
6 footnotes that Mr. Curtiss was concentrating on that
7 the Commission has left that for the Board to address.

8 I think there's a couple of things to bear
9 in mind in connection with that. One is that, at the
10 time the petition was filed, and for months
11 thereafter, the proposal was to put the material in
12 the Carter mine or the equivalent.

13 In other words, there was no near surface
14 disposal proposal. So, it was kind of hard to be
15 raising NEPA challenges to that. But, later we did
16 get the proposal.

17 And the Commission is clear that we are
18 timely challenging the NEPA analysis of near surface
19 disposal. The other point that should be obvious to
20 all of us is that there is a contention pending
21 alleging that engineer trench disposal is not a
22 plausible strategy because it's not environmentally in
23 compliance.

24 That contention is clearly timely. And
25 that's pending. And that's in this hearing before

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1 Wednesday. So, I thought I heard Mr. Curtiss offer to
2 litigate the issues of assessment of near surface
3 disposal and its environmental impacts in this
4 proceeding.

5 If he is ready, we're ready. So we think
6 that they should all be included.

7 CHAIR BOLLWERK: You look like you want to
8 say something, Mr. Curtiss.

9 MR. CURTISS: Well, I'm always --

10 CHAIR BOLLWERK: With the understanding
11 that Mr. Lovejoy always gets the last --

12 MR. CURTISS: My good colleague on the
13 left says that these issues all ought to be included.
14 And, of course, all I guess is in the eye of the
15 beholder between Lindsay and myself.

16 But the fact of the matter is that the
17 Commission has very clearly stated what's not in this
18 proceeding. It is important to review the footnotes.

19 And, as much as this might appear to be an
20 effort in our way to overlook that fact, I would
21 encourage the Board to do that. That's the first
22 point.

23 I have two additional points. And I will
24 be quick.

25 CHAIR BOLLWERK: All right.

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1 MR. CURTISS: The footnote 52 also speaks
2 to the adequacy of the record in this proceeding.
3 Where it says the record already contains additional
4 information on the estimated rad doses, so forth, and
5 so on -- you can read it -- of wet disposal sites,
6 representative of wet disposal sites and the humid
7 southeast from the estimates.

8 And they refer to two things in there. In
9 addition to acknowledging that the Staff has an FEIS
10 in this proceeding, the environmental report and
11 Appendix I of Department of Energy's programmatic
12 Environmental Impact Statement, which we would submit,
13 which was actually introduced in the context of the
14 February hearing on contention EC4 and which we will
15 rely on again in this proceeding.

16 But the Commission in this note, relative
17 to the issues in this proceeding, has, I think,
18 adverted to the adequacy of the record here by
19 referencing those exhibits.

20 I, like my Counsel for NIRS, believe that
21 we can have an informed discussion based upon the
22 contentions that are in. It will require, I think,
23 some restraint from this Board to ensure that we don't
24 drift into those things that the footnotes explicitly
25 address.

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1 My final point, relative to the adequacy
2 of part 61 and the FEIS, this decision has moved us
3 beyond the numerous and varied arguments that had been
4 made in this proceeding that a decision hasn't been
5 made or can't be made, or shouldn't be made that
6 depleted uranium is class A, that's clear.

7 And it seems to me we don't need to spend
8 a lot of time arguing about that. In fact, while we
9 would establish that here, that's exactly the position
10 that the expert in this proceeding took in the CEC
11 proceeding.

12 We were prepared to introduce exhibits to
13 that effect that had been identified here that a fair
14 reading of part 61 is that this is class A waste.

15 I will also say that it's unclear to me
16 whether in looking at all of these issues Counsel for
17 NIRS envision some sort of collateral challenge to the
18 underlying rule making record for part 61.

19 In this regard I couldn't agree more with
20 Counsel for the Staff that that's not an issue in this
21 proceeding. But if and when we get to the point of
22 examining NIRS/PC's Exhibit 182, I think it's going to
23 be clear that that's exactly what NIRS/PC wants to use
24 this proceeding for, is a challenge to part 61 and the
25 underlying analysis in the FEIS.

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1 And I would submit that's not the issue
2 for this proceeding, that NEF is the facility that's
3 been analyzed in the FEIS with the supplemental
4 reference in part 52.

5 And I think we are prepared to go forward
6 on that basis.

7 CHAIR BOLLWERK: All right. Let me just
8 see if Ms. Clark has any other comments and I'll turn
9 back to you, Mr. Lovejoy.

10 MS. CLARK: Nothing further for me.

11 CHAIR BOLLWERK: I do have a question for
12 you. What do you see is different about what the
13 Staff is going to be doing in terms of the direction
14 it's going to receive from the Commission to look
15 again at the question of whether the -- consider
16 whether the quantities of depleted uranium at issue in
17 the waste stream warrant amending section 61.55 A6 or
18 61.55 A waste classification tables and what we're
19 being asked to look at here in terms of the evidence.

20 MS. CLARK: I think that what the
21 Commission is charging the Staff to do is to consider
22 whether additional NEPA analysis might be conducted in
23 the context of large quantities of depleted uranium or
24 reconsideration of the regulation as it is because
25 61.55 as written provides that uranium is class A

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1 regardless of quantity.

2 So, perhaps what the Commission is -- one
3 of the things the Staff may determine is, depending on
4 the outcome of NEPA analysis, perhaps there may be
5 some exception or some limitation.

6 But that is a matter that is really within
7 the purview of the Commission because it deals with
8 the Commission's regulations. And this Board and this
9 adjudication is bound by the Commission's regulation
10 as written.

11 And it is not the purview of this
12 adjudicatory body to determine whether that regulation
13 could be changed or might accommodate other issues
14 that the Commission maybe didn't consider when they
15 first promulgated it.

16 CHAIR BOLLWERK: John?

17 JUDGE ABRAMSON: I would like to ask all
18 three of you the following question because I would
19 like to try to see if we can focus what it is we're
20 adding to this hearing.

21 I'll put in the form of how it might be --
22 what might be added. Is what we're being asked to
23 consider whether the Environmental Impact Statement,
24 in this case the final Environmental Impact
25 Statement's, analysis of the disposal options is

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1 insufficient in that it focuses on shallow land
2 disposal and should have focused on something more
3 stringent. Is that what we're going to hear, Mr.
4 Lovejoy?

5 MR. LOVEJOY: I would say it is a NEPA
6 issue that's been added. And the question is really
7 as to what would be the environmental impact of
8 shallow land disposal, you know, assuming that is the
9 proposal.

10 As the Commission said, the Board can make
11 findings and they could be added to the record of
12 decision and in effect become part of the NEPA
13 process.

14 JUDGE ABRAMSON: So, in your view, we
15 would focus only on the environmental impacts of
16 shallow land disposal. We're not looking at anything
17 broader than that?

18 MR. LOVEJOY: Well, if that's the proposal
19 --

20 JUDGE ABRAMSON: No, I'm asking you what
21 you see this Commission ruling telling us to do.

22 MR. LOVEJOY: I see you looking at that.
23 There are other issues that -- I have a list of other
24 issues that the Commission saw in the motions to amend
25 contentions as timely made such as that the NRC has

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1 historically said that shallow land disposal is
2 inappropriate and has no analysis to support a change
3 in that policy, that kind of contention, they can come
4 in.

5 They kind of are in orbit around the
6 general issue of the impacts of shallow land disposal.
7 Now, saying that, I am aware or I fully anticipate
8 that, if this Board explores the question of the
9 environmental impacts of shallow land disposal,
10 especially with regard to reference sites, it will be
11 required to find that it's not going to comply with
12 the dose limitations that apply to that kind of
13 disposal.

14 And so, I'm not quite sure what the
15 Environmental Impact Statement is going to look like.
16 And I see you reaching a determination that a
17 plausible strategy has not been presented.

18 That may then lead us to other proposals.
19 But it's not my burden of proof to present those.

20 JUDGE ABRAMSON: I'm only asking -- I'm
21 trying to focus us on what it is we're adding to the
22 discussion that this hearing is going to be expanded.

23 So thank you. Mr. Curtiss, do you see
24 more than that?

25 MR. CURTISS: Well, let me speak in the

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1 following way. First the question was, if shallow
2 land burial is the proposal, I will just for the sake
3 of the record emphasize that near surface disposal
4 facility has been the proposal from the initial
5 application submitted in December of 2003.

6 So it's unclear why there's any
7 uncertainty about whether that's being proposed. I do
8 think the issue that the Commission has raised is a
9 NEPA impacts issue and also acknowledging that there
10 are EC or environmental contentions in this
11 proceeding.

12 It is a NEPA impacts issue, point number
13 one. Point number two, again, I think it is important
14 in a very careful way when we talk about what's going
15 to be analyzed relative to the evidence that's in the
16 record or the expert reports that might be offered in
17 this proceeding as exhibits, that it's not -- the
18 Commission is clearly not contemplating an open-ended
19 inquiry into that discussion.

20 One has to look at exactly what they've
21 said in the three footnotes that I've referenced for
22 purposes of circumscribing the issues. It's not an
23 opportunity or an opening to engage in a wide-ranging
24 inquiry from scratch as if we were drafting
25 contentions today.

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1 Indeed the Commission has said that the
2 relevant point of reference is the October 20th, 2004
3 late filed contentions. My final point is on the dose
4 analysis.

5 This is not a licensing proceeding for a
6 facility. It is not a proceeding to determine whether
7 a particular site meets the dose requirements of part
8 61.

9 And indeed I believe, under deposition and
10 in testimony, NIRS' expert has said exactly that in
11 the past. NEPA doesn't require a determination that
12 particular site or representative site or a
13 representative site meets a part 61 dose limitation.

14 What NEPA requires -- and I'll defer to
15 the Staff to correct me if I'm wrong. NEPA requires
16 that a hard look be taken at issues and analyze
17 environmental impacts.

18 It doesn't require a licensing
19 determination under --

20 JUDGE ABRAMSON: We understand that,
21 Counselor. What I'm trying to get from you is what
22 are we looking at? And do you agree, as I think Mr.
23 Lovejoy said, although I think he also said there are
24 some other issues, that the principal issue we're
25 looking at here is whether the EIS took a sufficiently

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1 hard look at the environmental impacts of shallow land
2 disposal.

3 MR. CURTISS: Yes, I think that's with the
4 qualification of part 52 clearly references other
5 information on the record that the Commission
6 contemplates can be considered, including
7 environmental report and the DOE Appendix I of the
8 PEIS.

9 JUDGE ABRAMSON: Ms. Clark, anything to
10 add?

11 MS. CLARK: Yes. I'm looking at the
12 Commission decision. And I know our pagination is
13 different. I'm looking at page 10 to 11. Because
14 it's that part of the Commission decision where they
15 talk about what contentions NIRS has raised that are
16 now admitted into this proceeding.

17 Because, as always is the case, the scope
18 of this Board's review is limited to the specific
19 intentions that NIRS has raised. So, any implication
20 that this Board has been directed to take some kind of
21 wide-ranging review of the Staff's NEPA analysis is
22 simply misplaced.

23 We have to look at the specific intentions
24 and see whether NIRS has alleged any deficiency in the
25 Staff's NEPA evaluation of the proposal. Now,

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1 summarizing from what the Commission has discussed
2 there, NIRS first raises the issue, which they've
3 raised and we will be discussing in this proceeding,
4 whether it is feasible that shallow land disposal can
5 be accomplished for this material.

6 I read this contention to allege that the
7 Staff's NEPA analysis was not adequate because we did
8 not look at options sufficiently that would be
9 involved if the depleted uranium could not be disposed
10 of as shallow land disposal.

11 So, in other words, NIRS is alleging that
12 we should have broadened our NEPA scope to consider,
13 for example, geological repository of this material.
14 I do not read this contention, and I don't think an
15 issue has been raised before this Board as to whether
16 our evaluation of shallow land disposal was adequate.

17 I don't see that in these contentions.
18 The next contention that NIRS raises, and again I'm
19 looking at page ten of the Commission decision, is the
20 claim that the radiological doses expected from deep
21 disposal which were taken from the Claibourne
22 estimates and placed into the draft Environmental
23 Impact Statement are inaccurate.

24 So I see those as the two issues that NIRS
25 has raised. And those are the issues that are subject

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1 to this proceeding.

2 CHAIR BOLLWERK: One of the other things
3 the Commission says at the conclusion of the opinion
4 is that the LES facility will generate large new
5 quantities of depleted uranium for disposal, and
6 therefore it's appropriate for the NRC in its impacts
7 analysis to assess whether the impacts of disposing
8 the LES depleted uranium were expected to be small,
9 moderate, or otherwise.

10 Now, obviously, otherwise could be the
11 opposite of small, which is large.

12 MS. CLARK: Correct.

13 CHAIR BOLLWERK: If there were evidence
14 that would lead us to conclude that the impacts are
15 large in terms of the shallow waste disposal, would
16 that then -- that determination, what that then push
17 you to look at making those, if you wanted to make
18 those impacts small, going to deep disposal?

19 MS. CLARK: The draft and final
20 Environmental Impact Statements determine that the
21 impacts of shallow land disposal would be small. And
22 it did consider the large amounts of depleted uranium
23 that would be generated by the NEF.

24 CHAIR BOLLWERK: What is that? 133,000
25 metric tons, if I have the right number?

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1 MS. CLARK: That sounds right. So this
2 now --

3 CHAIR BOLLWERK: Isn't that fundamentally
4 what the Commission says hasn't been analyzed? Is a
5 large quantity?

6 MS. CLARK: I think that again we are
7 confusing what they're discussing in the context of
8 rulemaking and what they're discussing in the context
9 of the Staff's neap evaluation.

10 It is true that the Staff did not make
11 that assessment. Or I should say the Commission did
12 not make that assessment with the part 61 rulemaking.

13 I think that the Commission is not making
14 a decision in this case with regard to the adequacy of
15 the Staff's environmental analysis of the NEF. And
16 the fact is that the Staff did analyze the potential
17 environmental impacts of the entire amount of depleted
18 uranium that will be generated by the NEF in our
19 Environmental Impact Statement.

20 (Pause.)

21 CHAIR BOLLWERK: All right, any other
22 questions from any of the other Board members? That
23 may be Mr. Lovejoy's opportunity at this point. I
24 think there's been several statements made by a number
25 of different people.

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1 If you would like to address any or all of
2 those at this point, you can certainly do that.

3 MR. LOVEJOY: Okay, just briefly. Of
4 course the Commission could have ordered this hearing
5 staid while additional analyses are undertaken by
6 Staff under NEPA concerning the impacts of classifying
7 depleted uranium as class A waste under part 61.

8 They recognize that a NEPA analysis is
9 necessary to support rulemaking. And they could have
10 staid this proceeding while that rule obtains its NEPA
11 support.

12 But they did not. What they did, I
13 believe, is direct that this proceeding go forward
14 without making a formal waste classification
15 determination because they knew that such a
16 determination would be vulnerable.

17 There isn't NEPA support. They said that.
18 So, as for whether there can be a class A waste
19 classification determination in this proceeding as
20 support for any of the Board's conclusions, I think
21 the answer is no.

22 As for the primary issues that have been
23 remanded, I must disagree with Counsel for the Staff.
24 I think the Commission kind of summed it up. They said
25 that the hearing should, quote, resolve the disposal

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1 impacts contention, which at bottom goes to whether
2 the impacts of near surface disposal have been
3 adequately estimated or assessed for NEPA purposes.

4 And they said an assessment of the
5 estimated impacts at one or more representative or
6 referenced sites can be sufficient in this type of
7 analysis.

8 The impacts for a range of potential
9 facilities or locations having common site or design
10 features can be founded. So that's our task. And I
11 really have nothing more to add.

12 JUDGE KELBER: Mr. Lovejoy, I think you've
13 summarized the matter, at least in part. And I
14 believe that Mr. Curtiss has agreed that they are
15 prepared to debate these impacts at the appropriate
16 stage.

17 Is it your understanding, or let me put it
18 this way, is my understanding correct that that part
19 of the record would then be used by the Commission,
20 and its Staff, in any subsequent work involving
21 further NEPA evaluations for 61.55?

22 MR. LOVEJOY: Your Honor, I'm not quite
23 sure. I think it quite feasibly could be. I believe
24 they would be useful.

25 JUDGE KELBER: Our decision will be in the

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1 record of decision, is that correct?

2 MR. LOVEJOY: As for NEPA findings made by
3 this Board to fill in the blanks where the EIS was not
4 complete. I believe what the Commission was saying
5 was that they could be put into a record of decision,
6 and become part of the NEPA record of this proceeding.

7 I'm not quite sure --

8 JUDGE KELBER: I thought they meant the
9 record leading to any subsequent work by the Staff on
10 61.55.

11 MR. LOVEJOY: I may be mistaken but I
12 thought that they were referring to this licensing
13 proceeding, although I'm sure --

14 JUDGE KELBER: I think we had better both
15 go back and look at that part of it.

16 MR. LOVEJOY: An excellent idea.

17 JUDGE KELBER: I think I'm correct.

18 MR. LOVEJOY: Okay.

19 CHAIR BOLLWERK: Are there other comments,
20 from any of the parties, on this particular motion,
21 then, or this matter?

22 (No response.)

23 CHAIR BOLLWERK: At this point the Board
24 is going to take a five minute break and discuss this.
25 If possible we ought to have a determination, it is

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1 possible we might want to take an additional break.

2 We want to talk among ourselves at this
3 point. So why don't we plan on taking a five minute
4 break? It is about almost 5 after 11, let's come back
5 at approximately 10 after 11. At that point we will
6 let you know if we are ready to make a decision, or if
7 we are going to need additional time, and maybe we
8 will take an early lunch break.

9 (Whereupon, the above-entitled matter
10 went off the record at 11:05 a.m. and
11 went back on the record at 11:10 a.m.)

12 CHAIR BOLLWERK: Back on the record. This
13 is going to be very quick. I think what the Board
14 would like to do at this point is to take an extended
15 break for lunch.

16 We feel that the decision here is an
17 important one to all the parties, and it affects the
18 scope of the proceeding. We want to make sure that we
19 have crafted what we want to put together carefully.

20 So why don't we plan on -- it is about
21 11:15 at this point, and my understanding is that the
22 cafeteria is open downstairs. Why don't we plan on
23 reconvening at 12:30, that will give us a little bit
24 over an hour for lunch.

25 I should apologize, anyone that is here,

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1 you should be aware that after we make the ruling,
2 when we reconvene, at that point we will likely be
3 closing the hearing at that point, because we will
4 moving into closed session.

5 So I hate to send someone off and bring
6 them back for five to ten minutes, while we make a
7 ruling. But, nonetheless, I think that is what is
8 appropriate in this instance. So with our apologies,
9 that is what we are going to do.

10 So we are going to take an adjournment
11 right now, and we will start, again, at approximately
12 12:30. Thank you.

13 (Whereupon, at 11:12 a.m. the above-
14 entitled matter was adjourned for lunch.)

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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

12:30 p.m.

1
2
3 CHAIR BOLLWERK: Back on the record. In
4 looking at this matter I think it is best for the
5 Board to begin with what the Commission recognized in
6 CL05-20, has been admitted in terms of the Contention
7 that it remanded to the Board, which it denominated as
8 covering three items.

9 And, again, the pagination sometimes is
10 difficult, but it is pages 6 and 7 on the copy I have,
11 really notes 15 through 18, if you look at the
12 footnotes.

13 First the NIRS/PC challenge to the DEIS
14 conclusion that the depleted uranium may be disposed
15 of as class A waste did not account for the fact that
16 the Commission's adoption of Part 61, waste
17 classification rules, including the definition of
18 class A waste, did not include an environmental
19 analysis of disposal depleted uranium in large
20 quantities, so as to require additional environmental
21 analysis in this instance, to ensure the proposed
22 near-surface disposal was appropriate.

23 That was the first matter that the
24 Commission indicated that NIRS had raised. Second,
25 the DEIS failed to acknowledge or account for earlier

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1 NRC statements expressing concern or doubt about
2 whether depleted uranium would meet Part 61
3 performance standards for land disposal, but simply
4 assumed disposal may occur at near-surface disposal
5 sites.

6 Third, the DEIS did not specify the models
7 used for its estimated radiological releases from
8 postulated geologic disposal sites. So those are the
9 three basic matters that the Commission felt that they
10 had properly framed.

11 Also, as we look at these, we think it is
12 important, in the context, to look at them in the
13 context of the Commission's earlier decision in CLI05-
14 5, back in January of 2005, which indicated that while
15 DU was considered low level waste, it was yet to be
16 determined, and it appeared to be part of the admitted
17 litigation in this proceeding, as to whether the LES
18 material, in the volumes and concentrations proposed,
19 would meet the Part 61 requirements for near-surface
20 disposal.

21 So we have those two things that we are
22 looking at. In looking at each of the items that the
23 Commission outlined as being appropriately under
24 consideration, we agree with the Commission's
25 observation in footnote 48 of CLI05-20, that the third

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1 matter likely can be relegated to summary disposition.

2 That is the matter of whether the models
3 were used in estimated radiological disposal -- the
4 models used for the DEIS estimated radiological
5 releases had been sufficiently specified.

6 JUDGE ABRAMSON: For the geologic?

7 MR. LOVEJOY: Right, for the postulated
8 geological disposal sites.

9 As to the second point, with respect to
10 the question of whether the DEIS failed to
11 acknowledge, or deal with the doubts about whether the
12 DU can meet the Part 61 performance standard for land
13 disposal, this seems to us to be the NEPA analog, to
14 what the testimony in this proceeding already attempts
15 to address in the cost or safety side of the house.

16 So we think in a significant part what is
17 already before us will, in fact, address much of what
18 is there, in terms of the NEPA concerns.

19 As to the first point, it seems to the
20 Board an offshoot of number 2, but it really goes to
21 the specific question of large quantities of material.
22 The Commission probably used those words, at least
23 three, four, half a dozen times.

24 The lack of analysis of the fact that
25 there are, at least, the purported lack of analysis of

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1 the fact that large quantities of material are
2 involved.

3 And what are the NEPA impacts of such a
4 large volume of material which, in turn, may suggest
5 the need for a disposal method, other than near-
6 surface disposal.

7 In our estimation what we would like to
8 hear from the parties is an analysis of is the DEIS
9 sufficient, given the large quantities at issue here.
10 That is the central issue, in the Board's estimation.

11 Also in addressing that issue we think
12 that it may be necessary to have additional argument,
13 or testimony, on whether the referenced studies
14 adequately bound what can be expected from the
15 quantity of DU anticipated under the LES application.

16 Now, the Commission has suggested that, in
17 part, there may be a waiver here. I guess we would
18 like, at some point, and the parties can tell us when
19 they think it is appropriate to have an argument on
20 the question of whether there has, indeed, been a
21 waiver in terms of the wet versus dry site, and the
22 bounding question.

23 You look like you have a question.

24 MR. LOVEJOY: Well, I certainly want to
25 give the Board a chance to complete.

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1 CHAIR BOLLWERK: With regard to the motion
2 in limine, I was getting to that, actually. There are
3 two portions of the testimony, the rebuttal testimony
4 of Dr. Makhijani, that we think should be put back
5 into the record.

6 And I understand that this will cause you
7 to have to do some redrafting. But the first part is
8 on page 16, and I have to say that this is on the
9 testimony filed on October 18th, 2005, I recognize at
10 least one other version.

11 This was the original rebuttal testimony,
12 on page 16, and the end of the first partial paragraph
13 on that page, there is a sentence, the limit of ten
14 nanocurie per gram for radium 226, and the current
15 Utah state regulations governing class A waste,
16 support this conclusion as well. We think that
17 sentence should come back in.

18 We also think that on page 17, there is a
19 paragraph that begins: The likely unacceptability of
20 the Envirocare site for disposal is further
21 strengthened by considering. That paragraph should
22 come back in as well.

23 And with respect to that, there is one
24 footnote, which is footnote 28, which I believe you
25 all have subsequently moved, actually, into the next

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1 paragraph, at the end of the sentence it reads:
2 worker doses below five ram per year.

3 It looked to us, there was a bracket that
4 you put in to denote that that footnote had been
5 inserted there, in the revised prefiled testimony. It
6 is there, I mean, I don't think I'm making this up.
7 So take a look at it.

8 The question would be whether you wish to
9 keep the footnote where it originally was, or leave it
10 where it is now.

11 MR. LOVEJOY: Footnote 28?

12 CHAIR BOLLWERK: It was 28 in this
13 testimony, which is the October 18th, in the revised
14 rebuttal, it was denoted as footnote 24.

15 And, again, the testimonies you presented
16 at the time we deal with disposal matters should
17 include those items.

18 JUDGE ABRAMSON: That is the entirety of
19 what --

20 CHAIR BOLLWERK: That is the entirety of
21 what we are putting back into the record.

22 In terms of the testimony that you wish to
23 strike, from the Staff and Applicant testimony, we
24 understand that the -- as we understand it, the
25 Commission is saying that as the current regulations

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1 currently read, DU is class A waste, that is very
2 true, on its face, that is what it says.

3 As the Commission's ruling also reflected,
4 however, there is a "legislative history" if you will,
5 to this matter. And that further analysis is
6 required. And they have told the Staff that on their
7 side they need to do the analysis, and the Board on
8 our side we need to do that analysis, with respect to
9 the NEPA side of the house.

10 And, therefore, that is what we will do,
11 within the confines that we just talked about. And,
12 again, a central concern to us seems to be, and it was
13 to the Commission, the question of large quantities of
14 this waste, and how that has impact in terms of NEPA,
15 what are the NEPA impacts of that.

16 All right, let me see if there are any
17 questions.

18 MS. CLARK: Yes, I have just a
19 classification. When you talk about the rebuttal
20 testimony are you referring to the rebuttal testimony
21 on disposal?

22 CHAIR BOLLWERK: Yes, I am, I'm sorry.
23 Yes, that was the main testimony, yes. All right, any
24 other questions?

25 (No response.)

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1 CHAIR BOLLWERK: Okay, with that, then, we
2 will move forward. And, again, you all -- we would
3 appreciate letting us know when you believe it would
4 be appropriate to talk about bounding in this case,
5 and any waiver, questions of waiver, or any questions
6 dealing with how the bounding --

7 JUDGE ABRAMSON: Whether they bound.

8 CHAIR BOLLWERK: Whether they bound, I
9 guess that is as simple as it is. Well the summary
10 disposition matter, again, can be handled at an
11 appropriate time. That goes to the question of number
12 3, which was the use of the calculations, if I
13 remember correctly, the use of the models, the
14 specificity as to the models that were used for
15 radiological, estimating radiological releases.

16 All right, there being no questions, at
17 this point then --

18 MR. LOVEJOY: May I just enquire?

19 CHAIR BOLLWERK: Yes.

20 MR. LOVEJOY: Whether the Board is going
21 to put its decision in writing, make an order, or
22 something?

23 CHAIR BOLLWERK: I think this will
24 probaBly be it. I may ask you something that reflects
25 -- it is in the record, this is a part of the public

1 process. And unless the parties see any need to, I
2 would prefer just to leave it at this and move
3 forward.

4 So, again, it is part of the public
5 record, so it will be in ADDAMS, anywhere else that
6 anyone wants to read it.

7 JUDGE ABRAMSON: And we are using my
8 discretion to keep it moving?

9 CHAIR BOLLWERK: That is correct.

10 JUDGE ABRAMSON: Not increasing paperwork.

11 CHAIR BOLLWERK: Right. At this point,
12 then, if there are no other questions, in terms of the
13 public side of this proceeding, we are going to close
14 this hearing. It may well take, since everyone wasn't
15 checked in, as it were, I take it people were not
16 checked in?

17 This is going to seem a little extreme,
18 perhaps. But, nonetheless, we need to have a baseline
19 to work from. So I'm going to ask that we have
20 everyone leave the room, we will take a short break.

21 We have a list of everyone who, in theory,
22 is authorized to be here. We will check everyone on
23 the list. I would appreciate everyone to work with us
24 on this. I understand it is a bit of an
25 inconvenience.

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1 Hopefully it will go along somewhat more
2 smoothly, once we've done this several times. But we
3 want to make sure that we do this properly, and
4 protect the information that needs to be protected.

5 So if you could, then, if everyone could
6 sort of excuse yourselves, and come back in when they
7 check the list? And, again, I appreciate your
8 interest.

9 I should also mention, again, that the
10 possibility exists -- well, we will be opening
11 portions of this hearing in several days, potentially.
12 You should check our phone number when that will be.
13 Thank you. Let's go off the record, please.

14 (Whereupon, at 12:45 p.m., the above-
15 entitled open hearing was concluded.)

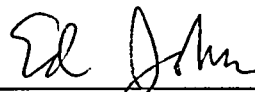
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CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: Louisiana Energy Service, LP
Open Session
Docket Number: 70-3103-ML
ASLBP No. 04-826-01-ML
Location: teleconference

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.



Ed Johns
Official Reporter
Neal R. Gross & Co., Inc.

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