UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 11443 **DOCKETED 04/03/06**
COMMISSIONERS

SERVED 04/03/06

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

In the Matter of	)	
	)	
USEC Inc.	)	Docket No. 70-7004
	)	
(American Centrifuge Plant)	)	
	)	

CLI-06-09

MEMORANDUM AND ORDER

In LBP-05-28,[1] the Atomic Safety and Licensing Board ("Board") considered proposed contentions filed in two petitions to intervene[2] in this proceeding, which examines an application filed by USEC Inc. ("USEC"). USEC has applied for a license to construct and operate the American Centrifuge Plant (the "USEC facility" or the "project"), a proposed uranium enrichment facility using the gas centrifuge process. USEC plans to build the project at its existing Piketon, Ohio property.

The Board found that petitioner Geoffrey Sea did not submit an admissible contention and denied his petition to intervene in the proceeding.[3] Mr. Sea has appealed pursuant to 10

[1]LBP-05-28, 62 NRC 585 (2005).

[2]The Commission previously determined that both petitioners had standing. *See* CLI-05-11, 61 NRC 309, 310 (2005).

[3]The Board also found that Portsmouth/Piketon Residents for Environmental Safety and Security (PRESS) submitted no admissible contentions, and denied PRESS's intervention petition. We are addressing PRESS's appeal of LBP-05-28 in a separate decision today.

C.F.R. § 2.311.[4] Both USEC[5] and the NRC Staff[6] responded to Mr. Sea's appeal. Subsequently, Mr. Sea filed a reply brief,[7] accompanied by a motion for leave to file this reply brief.[8] USEC filed an answer to Mr. Sea's motion.[9]

We agree with the Board that Mr. Sea's contentions are inadmissible, and therefore affirm the Board's decision.

I. BACKGROUND

A. *Regulatory Framework*

To intervene in a Commission proceeding, a person must file a petition for leave to intervene in accordance with 10 C.F.R. § 2.309(a). The petition must demonstrate standing under 10 C.F.R. § 2.309(d) and must proffer at least one admissible contention as required by 10 C.F.R. §§ 2.309(f)(1)(i)-(vi). For each contention, the petition must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the

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[4]Brief of Geoffrey Sea on Appeal of LBP-05-28 (Oct. 24, 2005) ("Sea Appeal").

[5]USEC Inc. Brief in Response to Brief of Geoffrey Sea on Appeal of LBP-05-28 (Nov. 2, 2005) ("USEC Response").

[6]NRC Staff's Brief in Opposition to Geoffrey Sea Appeal of LBP-05-28 (Nov. 3, 2005) ("NRC Staff Response").

[7]Geoffrey Sea's Reply Brief on Appeal of LBP-05-28 (Nov. 8, 2005) ("Reply Brief").

[8]Geoffrey Sea's Motion for Leave to Answer the Briefs of USEC and NRC Staff on Petitioner's Appeal of LBP-05-28 (Nov. 8, 2005) ("Motion for Leave to Reply").

[9]USEC Inc. Answer to Geoffrey Sea's Motion for Leave to Answer the Briefs of USEC and NRC Staff on Petitioner's Appeal of LBP-05-28 (Nov. 10, 2005) ("Answer to Motion for Leave to Reply").

findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and

(vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.[10]

These requirements are deliberately strict,[11] and we will reject any contention that does not satisfy the requirements.[12] In NRC practice, "[m]ere 'notice pleading' does not suffice."[13] Our rules call for "a clear statement as to the basis for the contentions and the submission of . . . supporting information and references to specific documents and sources that establish the validity of the contention."[14]

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[10]10 C.F.R. §§ 2.309(f)(1)(i)-(vi).

[11]*Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied,* CLI-02-1, 55 NRC 1 (2002). *See also Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP site), CLI-05-29, 62 NRC 801, 808 (2005), citing *Millstone*, CLI-01-24, 54 NRC at 358.

[12]The Board's decision provides a brief review of NRC case law on the application of the contention requirements. *See* LBP-05-28, 62 NRC at 594-98.

[13]*Clinton*, CLI-05-29, 62 NRC at 808, citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1& 2), CLI-03-17, 58 NRC 419, 428 (2003).

[14]*Arizona Public Service Co*. (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), CLI-91-12, 34 NRC 149, 155-56 (1991). *Accord Clinton*, CLI-05-29, 62 NRC at 808.

Compliance with the National Historic Preservation Act ("NHPA")[15] is also at issue in this proceeding. Section 106 of the NHPA requires licensing agencies like the NRC to "take into account the effect" of the licensed undertaking on historic properties:

> [T]he head of any Federal department or independent agency having authority to license any undertaking shall, . . . prior to the issuance of any license, . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places]. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under part B of this subchapter a reasonable opportunity to comment with regard to such undertaking.[16]

Government-wide implementing regulations provide the details of the section 106 process.[17] These regulations define a project requiring a Federal license as an "undertaking."[18] An undertaking has "[a]n adverse effect [if it] may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register."[19]

An agency should coordinate the section 106 process "with the overall planning schedule for the undertaking and with any reviews required under other authorities such as the National Environmental Policy Act ["NEPA"]."[20] An agency may use information developed for such reviews to satisfy the requirements of the section 106 process.[21] If its process meets certain conditions, an agency may use the NEPA process in lieu of the procedures set forth in

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[15]16 U.S.C. § 470 *et seq*.

[16]16 U.S.C. § 470f.

[17]36 C.F.R. § 800.1 *et seq*.

[18]36 C.F.R. § 800.16(y).

[19]36 C.F.R. § 800.5(a)(1).

[20]36 U.S.C. § 800.3(b).

[21]*Id*.

36 C.F.R. §§ 800.3 through 800.6 to satisfy the NHPA requirements.[22] The NRC Staff's practice is to make this "process" substitution, using the NEPA process to identify, analyze, and document any cultural impacts of a project as part of its environmental review. The NRC Staff's environmental impact statement typically contains the Staff's documentation of its identification and analysis of cultural impacts.

B. *Board Decision*

Before the Board, Mr. Sea filed ten proposed contentions, mostly focused on claims that USEC and the NRC Staff had not adequately taken into account the project's effects on local cultural resources and historic sites.[23] The Board rejected all ten proposed contentions, chiefly on the ground that Mr. Sea had not provided sufficient factual or expert support to establish a material issue of fact or law.[24] Thus, the Board rejected Mr. Sea's claims that USEC or the NRC Staff had overlooked local cultural sites, minimized the project's adverse effects, ignored legal deficiencies in USEC's "collaborative arrangement" with the Department of Energy ("DOE"), and failed to consider alternatives to the USEC proposal. The Board also pointed out that, despite Mr. Sea's claims of "omitted" NHPA property identifications in USEC's environmental report, the NRC Staff in fact is examining these same properties, thus "curing" his "omissions" claim.[25] The Board found other contentions, centering on alleged failures by DOE to comply with the NHPA, outside the scope of this licensing proceeding.[26]

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[22] 36 U.S.C. § 800.8(c).

[23] *See* LBP-05-28, 62 NRC at 622-32.

[24] *See, e.g., id*. at 624, 625, 626, 627, 628, 630.

[25] *See id*. at 624-25 & n.149.

[26] *See id*. at 628-29, 630.

On appeal, Mr. Sea challenges the Board's disposition of six particular contentions.[27]

II. ANALYSIS

A. *Preliminary Matter – Reply Brief and Accompanying Motion*

The Commission's regulations governing appeals from the denial of intervention provide for a notice of appeal with a supporting brief, and for a brief opposing the appeal.[28] The regulations do not provide for replies; even so, Mr. Sea filed one. Mr. Sea accompanied his reply brief with a motion seeking leave to file it.

We grant Mr. Sea's motion for leave to reply, but only in part. The Commission will not permit, in a reply, the filing of new arguments or new legal theories that opposing parties have not had an opportunity to address.[29] Many of the factual and legal issues raised in Mr. Sea's reply brief are new and should have been raised in his original appeal brief. And, as USEC points out, Mr. Sea failed to comply with our procedural regulations requiring consultation with other parties prior to filing a motion.[30] The Board has already granted Mr. Sea substantial leeway in this proceeding with regard to procedural matters.[31] We will consider Mr. Sea's reply brief arguments insofar as they genuinely "reply" to arguments raised in the other participants' briefs. We will not consider the reply brief's new arguments.

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[27]Today's order does not discuss the four contentions Mr. Sea is not pursuing on appeal.

[28]10 C.F.R. § 2.311.

[29]"In Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief." *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225, *petition for reconsideration denied*, CLI-04-35, 60 NRC 619 (2004) (citing *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 261 (1996)).

[30]*See* Answer to Motion for Leave to Reply at 4, citing 10 C.F.R. § 2.323(b).

[31]For example, in reaching its decision in LBP-05-28, the Board considered the untimely second, nonidentical, petition to intervene filed by Mr. Sea because of his *pro se* status. 62 NRC at 592-93. The Board also considered late-filed exhibits to Mr. Sea's amended contentions because of his *pro se* status. *Id*. at 621-22.

B. *Appealed Contentions*

Mr. Sea fails to show errors of law or abuse of discretion[32] in the Board's decision rejecting his proposed contentions. Our strict contention pleading rule fosters fair and meaningful adjudicatory hearings:

> First, it focuses the hearing process on real disputes susceptible of resolution in an adjudication. . . . Second, the rule's requirement of detailed pleadings puts other parties in the proceeding on notice of the Petitioners' specific grievances and thus gives them a good idea of the claims they will be either supporting or opposing. Finally, the rule helps to ensure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions.[33]

Mr. Sea's proposed contentions lack factual and legal support; admission of his contentions would be inconsistent with our pleading requirements. We therefore affirm the Board decision, and reject all six of Mr. Sea's remaining contentions – both for the reasons given by the Board and for the additional reasons we give below.

1. Assessment of Cultural Resources

a. *Sea Contention No. 1.1:* "USEC has failed to identify cultural resources potentially impacted by the American Centrifuge Plant."

On appeal, Mr. Sea reiterates his complaint that USEC's environmental report omitted the historic and prehistoric sites he believes should have been listed.[34] Mr. Sea has not shown that USEC's environmental report was required to list the sites Mr. Sea specifies. As the Board

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[32]The Commission affirms Board decisions on the admissibility of contentions where the appellant "points to no error of law or abuse of discretion." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 637 (2004) (citing *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation),* CLI-00-21, 52 NRC 261, 265 (2000)).

[33]*Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999).

[34]Sea Appeal at 8.

correctly stated,[35] USEC's obligation arose under an NRC regulation specifying that "[t]he environmental report shall contain . . . a description of the environment *affected*,"[36] with impacts on the environment "discussed in proportion to their significance."[37] The NRC regulation does not require a discussion of *unaffected* areas or sites. Similarly, the NHPA itself does not require the evaluation of *unaffected* sites whether or not they are historic.[38] Here, the Board reasonably found that Mr. Sea had offered only "speculation," not "facts or expert opinion," to support his claim of adverse effects.[39] As the Board commented, these effects "are not obvious."[40]

In his reply brief, Mr. Sea asserts that USEC misunderstands the process for listing on the National Register of Historic Places.[41] He argues that the process does not require a formal determination of eligibility by the State historic preservation officer and that USEC was wrong in

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[35]*Id*.

[36]10 C.F.R. § 51.45(b) (emphasis added).

[37]10 C.F.R. § 51.45(b)(1).

[38]Mr. Sea's citation to 36 C.F.R. § 800.4(d)(2) (Sea Appeal at 6) is inapposite; this subsection applies when the agency official finds that historic properties may be affected by the project. That has not occurred here. Mr. Sea ignores 36 C.F.R. § 800.4(d)(1), which applies when the agency official finds that no historic properties are affected. Here, the NRC Staff considered information obtained from interested members of the public through the NRC's scoping process (Draft Environmental Impact Statement ("DEIS") at page 1-31, §1.5.6.2), defined the area of potential effects (DEIS at page 4-5, § 4.2.2), and found no effect on historic properties within or adjacent to the area of potential effects (DEIS at pages 4-5 to 4-6, § 4.2.2.1).

[39]LBP-05-28, 62 NRC at 624.

[40]*Id*. In any event the NRC Staff ultimately did issue a DEIS evaluating the sites on Mr. Sea's list adjacent to the area of potential indirect effects – even though USEC's environmental report had not listed these sites. *See, e.g.,* DEIS at page 4-6, § 4.2.2.1. Since the NRC Staff worked from a complete list of potential historic sites when it prepared its evaluation – a list that included all of the sites identified by interested members of the public, including Mr. Sea (DEIS at page 1-31, § 1.5.6.2.) – USEC's alleged "omissions" in its environmental report are moot.

[41]Reply Brief at 4-5.

disregarding sites on Mr. Sea's list simply for lack of an historic site nomination. While it is true that no nomination or formal determination of eligibility is necessary to trigger an NHPA review,[42] a site must be within the area of potential effects and the project must affect the site to trigger a review of that site, and Mr. Sea has presented no facts to show otherwise for these sites or for any others.[43]

Mr. Sea also maintains that the NRC Staff, USEC, and the Board failed to consider the "interrelatedness" of the cultural/historic sites; in essence, Mr. Sea advocates enlarging the area of potential effects to include all of the historic and prehistoric sites he identifies. In his view, students and tourists would study the sites together, not separately. As a result, he argues, categorizing sites as either "within" the area of potential effects or "outside" the area of potential effects is not a tenable distinction. The flaw in Mr. Sea's position is that he identifies no support for any impact on *any* site, however categorized. Moreover, the DEIS – which Mr. Sea has not challenged – does not find *any* of the sites Mr. Sea lists to be *within* the area of potential effects.[44] Mr. Sea's failure to identify any impacts on historic or cultural resources also undercuts his reply brief argument that the NRC Staff delineated the area of potential effects in the DEIS too narrowly.

In a digression prompted by a statement in Mr. Sea's Appeal, USEC argues that Mr.

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[42]16 U.S.C. § 470f.

[43]Moreover, the NRC Staff has found that the USEC facility will *not* affect certain sites, namely the Barnes home and the Scioto Township Works (or the Bailey Chapel). DEIS at page 4-6, § 4.2.2.1.

[44]According to the DEIS, the Barnes home and the Scioto Township Works (and the Bailey Chapel) are *adjacent* to the area of potential effects for indirect effects, not *within* it. DEIS at page 4-5, § 4.2.2. Other sites included on Mr. Sea's list are even further away, and are not discussed in the DEIS.

Sea has had ample opportunity to participate in the section 106 "consultation" process.[45] Mr. Sea pursues this thread in his reply brief, arguing at length that the NRC Staff did not grant him consulting party status until the section 106 process was about to close and that the NRC Staff did not comply with the requirements applicable when NEPA processes are used for NHPA purposes.[46] These lengthy new arguments are not relevant to the contentions Mr. Sea raised before the Board, and are therefore not decided here. In any event, we understand that the NRC Staff has not disregarded Mr. Sea's input as a consulting party, and is in fact forwarding his concerns to the appropriate officials.[47]

b. *Sea Contention No. 1.2:* "USEC has failed to identify potential impacts of the American Centrifuge Plant on nearby historic and prehistoric sites."

To counter the Board's finding that his support for his proposed "impacts" contention was inadequate, Mr. Sea argues on appeal that he did more than simply provide a "list" of potential adverse impacts. Mr. Sea argues that factual evidence and expert testimony support his contention. The expert testimony that Mr. Sea relies on is a declaration (the "Hancock Declaration")[48] regarding the alleged prehistoric site at the water field, submitted after a tour of

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[45]USEC Response at 19.

[46]Reply Brief at 5-6 (referencing 36 C.F.R. § 800.8), 9-10.

[47]In a December 2005 letter, the NRC Staff informs Mr. Sea that it is "providing additional information [in an enclosure] relavant [sic] to the ongoing Section 106 consultation for USEC Inc.'s proposed American Centrifuge Plant. . . . [The NRC Staff is] in the process of forwarding your objections to both the OHPO [the Ohio State historic preservation officer] and the Advisory Council on Historic Preservation." Letter to G. Sea from B. Davis, "Continuation of the National Historic Preservation Act Section 106 Consulting Process for the Proposed American Centrifuge Plant, Pike County, Ohio: New Information Regarding the U.S. Department of Energy Well Field" (December 19, 2005) ("December 2005 Letter") at 1, available as ADAMS Accession Number ML053480179, at http://www.nrc.gov/reading-rm/adams.html.

[48]Sea Appeal at 13, referencing "Declaration by John Hancock, Frank L. Cowan, and Cathryn Long Regarding August 5, 2005 Visit to GCEP Water Field" ("Hancock Declaration"),

(continued...)

the water field site. In his reply brief, Mr. Sea contends that the water field is on the DOE property, based upon the lease agreement between DOE and USEC.[49] He complains that DOE and USEC were uncooperative in providing information and access to the water field to Mr. Sea's archaeological experts, and that the NRC Staff reached its conclusions with respect to the water field before Mr. Sea filed the Hancock Declaration. He argues that the NRC Staff's failure to consider the declaration of his experts nullifies the conclusion that the USEC facility will not affect the water field.

These arguments are unavailing. We find nothing in the Hancock Declaration describing *any impact* whatsoever to the water field or any prehistoric earthwork at the water field. In fact, the lengthy excerpts from the Hancock Declaration that Mr. Sea includes in his appeal[50] merely outline *future* research urged by Mr. Sea's experts – first, research into the identity and age of the structure, and second, *if* the structure has historic significance, research on the visual and physical impact of the project on the structure, including an evaluation by hydrology experts.[51] Mr. Sea presents no facts identifying an impact to the water field from the project.

Mr. Sea argues that "accidental radiological releases or fear of such [releases] could make the Barnes home and the . . . earthworks inaccessible for observation, enjoyment or

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[48](...continued)
attached to Motion for Leave to Supplement Replies to USEC and the NRC Staff by Geoffrey Sea ("Amended Contentions") (August 17, 2005) as Exhibit AA.

[49]Whether the water field is, or is not, on the leased DOE property is not relevant to our decision. Mr. Sea has presented no basis for redefining the area of potential effects, which is effectively what he seeks through this argument.

[50]Sea Appeal at 13-14, Hancock Declaration ¶¶ 15-17.

[51]In contrast, the DEIS addresses Mr. Sea's hydrology concerns directly: water drawn from the water field lowers the water level of the Scioto River instead of causing subsidence on the water field. DEIS at page 4-7, § 4.2.2.2.

study by humans for the foreseeable future."[52] Mr. Sea does not identify facts to show the potential for accidental releases or to explain how or why these sites could become inaccessible. Mr. Sea asserts that the Barnes home is in the direction of prevailing winds and in the direction previously subject to emissions, and that he is the "maximally exposed individual."[53] USEC counters that the prevailing winds flow in the opposite direction from the Barnes home,[54] and states that its environmental report defines the "maximally exposed individual" as "a calculation based upon the potential dose to a hypothetical individual at the ACP [USEC facility] fence[-]line."[55] In reply, Mr. Sea accuses USEC of trying to confuse the Commission regarding prevailing winds and potential exposure at the Barnes home. Mr. Sea argues that the topography of the valley can cause winds to blow to the southwest. According to Mr. Sea, because no nearby homes are situated to the northeast of the USEC facility, his home, as the closest, is in the direction of maximum wind-born contamination.

While Mr. Sea's proximity to the site had bearing when we considered his standing to intervene in this matter,[56] it is not relevant here. Regardless of the definition of the maximally exposed individual or the direction of the prevailing winds, Mr. Sea presents no facts to show that the USEC facility will cause significant wind-born contamination in *any* direction. Additionally, according to USEC's environmental report and the DEIS, effects from plausible

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[52]Sea Appeal at 5.

[53]*Id*.

[54]USEC Response at 4-5, citing to its Environmental Report for the American Centrifuge Plant in Piketon, Ohio, ("Environmental Report") Revision 5 (Oct. 21, 2005) at pages 3-47 through 3-50.

[55]USEC Response at 5, citing Revision 5 of its Environmental Report at page 4-110.

[56]CLI-05-11, 61 NRC at 310.

accidents are at acceptably low risk levels.[57] Mr. Sea provides no facts or expert testimony to controvert the environmental report or the DEIS.

Further, Mr. Sea criticizes USEC for referring to the DEIS in its brief, asserting that he has not yet had the opportunity to address the DEIS. Our regulations provide that for issues arising under NEPA, a petitioner must file contentions based on the applicant's environmental report.[58] The petitioner may amend those contentions or file new contentions if the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, differ significantly from the data or conclusions in the applicant's documents.[59] The DEIS was released in August 2005,[60] and Mr. Sea participated in a public meeting on it in September 2005.[61] The Board expressly advised Mr. Sea of his right to frame new contentions based on the DEIS.[62] He did not do so.

It is well-recognized that where a contention based on an applicant's environmental report is "superseded by the subsequent issuance of licensing-related documents" – whether an

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[57]The NRC Staff's analysis evaluates the radiological impacts on offsite personnel as small. *See* DEIS at page 4-60, § 4.2.12.2. Under the NRC Staff's analysis, the fence-line dose is well below regulatory standards. DEIS at page 4-65, § 4.2.12.3. Additionally, as USEC notes, unsubstantiated fear of an effect is not a sufficient basis for an admissible contention. USEC Response at 4 n.16, citing *Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 776-78 (1983).

[58]*See* 10 CFR § 2.309(f)(2).

[59]*Id.*

[60]S*ee* ADAMS Accession Number ML052440433, dated August 31, 2005; *see also* Letter from B. Davis to Geoffrey Sea, "Transmittal of Draft Environmental Impact Statement for the Proposed American Centrifuge Plant, Pike County, Ohio and Request for Consulting Party Comments" (Sept. 6, 1005), ADAMS Accession Number ML052440425.

[61]S*ee* e-mail from Geoffrey Sea to M. Blevins, "Re: USEC DEIS and 106 Comments" (November 23, 2005), ADAMS Accession Number ML053340475; Transcript, "American Centrifuge Plant Draft EIS [Environmental Impact Statement] Public Meeting," at 80-89 (Sept. 29, 2005), ADAMS Accession Number ML053010374; *see also* USEC Response at 19 n.21.

[62]*See* LBP-05-28, 62 NRC at 627.

environmental impact statement or an applicant's response to a request for additional information – the contention must be "disposed of or modified."[63] Thus, where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the NRC Staff in an environmental impact statement, the contention "is moot."[64]

In such cases in which an earlier contention based upon an applicant's environmental report is rendered moot by the NRC's environmental impact statement, resolution of the mooted contention requires no more than a finding by the presiding officer that the matter has become moot. While this might be accomplished through a motion for summary disposition, it also may be accomplished as part of the contention admission phase of the proceeding.[65] Mr. Sea also complains that the Board impermissibly weighed the evidence and made a judgment on the merits regarding his photograph of modifications to the Southwest Access Road.[66] The Board

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[63]*Duke Energy Corp*. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002), citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1050 (1983).

[64]*McGuire,* CLI-02-28, 56 NRC at 383.

[65]In this respect, we agree with the Board that admitting such a contention likely would have led to the submittal of "a curing [license application] amendment . . . which thereupon would be appropriate for summary disposition. The net result of such a process would add no additional information, but would simply create unnecessary additional work for the parties and unnecessary delay – both of which the Commission has continuously encouraged licensing boards to avoid." LBP-05-28, 62 NRC at 625. We consider it prudent, however, for the Board to have had some documentation in hand from the applicant (in the form of a response to a request for additional information or a revision to the application) or from the NRC Staff, in the form of an environmental impact statement, prior to considering the environmental report omission to have been cured. Nevertheless, we note that the Board had other separate, acceptable bases for the rejection of Petitioner's contentions.

[66]Photograph identified as taken on August 14, 2005, showing part of the entrance to the new Southwest Access Road, with the Barnes home, as viewed from the north, Amended Contentions at 5, attached to Amended Contentions as Exhibit BB.

did comment that the photograph did not match Mr. Sea's description.[67] In our view, however, the key issue is that Mr. Sea identified no link between the USEC facility and the modifications to the road. As the Board noted, USEC has stated that modifications to the road were unrelated to the project and has explained that under its proposal the road will be closed.[68] In light of Mr. Sea's failure to provide sufficient facts and/or expert opinion linking the USEC facility and modifications to the road, and because the road will be closed, the photograph is simply not relevant and cannot serve as factual support for Mr. Sea's proposed contention.

Mr. Sea also asserts, without support, that a defoliant applied around the perimeter of the Piketon property is "in preparation" for the USEC facility.[69] As USEC suggests in its brief,[70] however, Mr. Sea's assertion that defoliant application began in 2003[71] – well before USEC applied for an NRC license – undermines his argument that the defoliant application is "in preparation" for the proposed USEC facility. In any event, Mr. Sea does not identify any impact, positive or negative, of the defoliant application on the historic sites on his list.

As additional support for this proposed contention, Mr. Sea includes an extended excerpt from arguments he made before the Board.[72] In this excerpt, Mr. Sea asserts that the proposed USEC facility will have an impact on the historic properties at the facility's boundaries. He argues that the effects on these properties are "physical, aesthetic and economic and are

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[67] *See* LBP-05-28, 62 NRC at 626.

[68] *Id*.

[69] Sea Appeal at 5.

[70] *See* USEC Response at 5 n.22.

[71] Sea Appeal at 5.

[72] The excerpt is taken from "Geoffrey Sea's Reply to Answer of USEC and Response of NRC Staff to Filings of August 17" (September 6, 2005).

precisely those sorts of impacts that the [NHPA] was enacted to prevent and modify."[73] But Mr. Sea nowhere describes the nature of these effects: For example, how will the USEC facility physically affect the Barnes home? How will the USEC facility affect the aesthetics of the Barnes home? What economic impact will the USEC facility have on the Barnes home? What facts support the likelihood of any effects? Mr. Sea gives no answers to these questions. As a result, we agree with the Board that the contention lacks adequate factual or expert support to meet our strict contention pleading rules.[74] Were we to proceed to hearing on this proposed contention, it is not at all clear what, beyond rhetoric, Mr. Sea would be able to present.

2. *Compliance with Federal Historic Preservation Laws*

a. *Sea Contention No. 2.1:* "The USEC-DOE collaborative arrangement is out of compliance with the National Historic Preservation Act and related legislation."

Mr. Sea argues that the Board erred in finding his "USEC-DOE" contention beyond the scope of the proceeding and lacking adequate support. Mr. Sea argues that this proceeding

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[73]Sea Appeal at 14. Mr. Sea also complains that the Board ignored two expert statements of Dr. Thomas King, which Mr. Sea asserts show the essential difference between qualitative analysis under the NHPA and quantitative analysis under NEPA of the impact of a project. Sea Appeal at 5. Mr. Sea does not identify these two statements in his appeal, but he may be referring to Exhibit Q to Petition to Intervene by Geoffrey Sea (February 28, 2005) and Exhibit V to Reply by Geoffrey Sea to Answer of NRC Staff (April 1, 2005). Neither of these two statements provides specific facts or details, as required under 10 C.F.R. § 2.309(f)(1)(v) for an admissible contention.

[74]We reject Mr. Sea's argument that our granting him standing last year, CLI-05-11, 61 NRC 309 (2005), requires us now to be lenient regarding the quality of the support he provides for his contentions. *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 215-16, *petition for reconsideration denied*, CLI-03-18, 58 NRC 433 (2003) ("A threshold finding of standing does not render contentions admissible. While a petitioner may have a sufficient 'interest' in a proceeding for standing, he or she may have no genuine material dispute to adjudicate, or no specific factual or legal support to bring an issue to hearing."); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 26 (2001) ("[Petitioner] seems to believe that simply because the Licensing Board found he had standing, he automatically should also be allowed to intervene as a party in the proceeding. . . . To gain admission as a party, however, a petitioner must proffer at least one valid contention for litigation.").

must include a discussion of DOE's and USEC's *past* compliance with the NHPA because the proposed project is a continuation of USEC's earlier Gas Centrifuge Enrichment Project. Mr. Sea argues that the site has not complied with the NHPA since the beginning of the earlier project. As support for this "no compliance" argument, Mr. Sea again turns to the Hancock Declaration, which he asserts shows the lack of an NHPA compliance program dating back to 1983. The Hancock Declaration does not support this asserted showing. To the contrary, Mr. Sea's experts reveal their lack of knowledge about the status of NHPA compliance since 1983 by requesting access to previous reports of cultural resource investigations. Mr. Sea provides no factual or expert support for his allegation of prior project non-compliance, and, more importantly, prior projects at the Piketon site are not before us in this proceeding. This proceeding is concerned with USEC's new proposal, not its prior Gas Centrifuge Enrichment Project. We agree with the Board that reconsideration of that project's compliance with the NHPA is outside the scope of this proceeding.

Mr. Sea argues that USEC and DOE cannot be separated because they have merged their activities at Piketon. He further argues that, because of the merged activities, DOE's activities are within the scope of the proceeding even though the NRC would not regulate DOE in this instance. Mr. Sea cites an audit report of the DOE Office of Inspector General[75] to support his argument that DOE and USEC have merged their activities at Piketon. But, contrary to Mr. Sea's interpretation, the audit report did not conclude that DOE and USEC had done so. Instead, the audit report found an unclear division of costs[76] and recommended

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[75]Amended Contentions, attached to Exhibit FF as "Exhibit A" ("IG Report") (the audit report itself is actually placed within Exhibit A after a three-page introductory Memorandum).

[76]IG Report at 3.

corrective action.[77]

In his reply brief, Mr. Sea argues that the lease agreement between USEC and DOE is not beyond the scope of this proceeding. He maintains that the lease agreement relates to the proceeding because it provides evidence that USEC assumed responsibility for complying with NHPA requirements for the leased property, including the water field site. He argues, therefore, that consideration of the terms of the lease agreement is properly part of considering the present condition of the site. We disagree. The agency granting the license, here the NRC, has the obligation to comply with the NHPA. Any contractual provision that purports to shift NHPA compliance responsibility from DOE to USEC cannot affect the NRC's statutory obligation to comply with the NHPA with respect to the licensing of the proposed project.

In short, we agree with the Board that Mr. Sea's proposed "USEC-DOE" contention is inadmissible.

b. *Sea Contention No. 2.2:* "Noncompliance with federal preservation law has undermined the legitimacy and legal basis of the USEC-DOE agreement."

Mr. Sea repeats his argument that the Commission cannot review the USEC facility's compliance with the NHPA without assessing the compliance of the earlier project. As support, he refers to his arguments for admitting Contention No. 2.1. For the reasons given in the immediately preceding section of today's decision, there is no substance to Mr. Sea's argument, and we affirm the Board's rejection of this proposed contention.

3. *Consideration of Action Alternatives*

a. *Sea Contention No. 3.1:* "USEC has failed to consider a broad range of alternatives to the proposed action."

On appeal, Mr. Sea argues that the Board considered only the NEPA concept of "consideration of alternatives" and failed to consider the differing NHPA concept of

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[77] *Id*. at 4-5.

"consideration of alternatives." From Mr. Sea's perspective, the NHPA requires a different set of alternatives to be considered: instead of alternatives that further the goals of the proposed project, the Commission should examine alternatives that "do a better job of preserving and protecting threatened cultural resources."[78]

We agree that the consideration of alternatives under the NHPA differs from NEPA requirements, but the difference is one of timing and of prerequisites. The Board's focus on limiting the identification required in the environmental report to feasible, nonspeculative alternatives, reasonably related to the goals of the proposed project, arguably misses this difference. NEPA requires the applicant and the NRC Staff to conduct a rigorous and objective evaluation of all reasonable, non-speculative alternatives in relation to the objectives of the proposed project.[79] Thus, under NEPA, the consideration of alternatives is an integral part of the application process from the outset, with no preconditions. NHPA also requires the NRC Staff to examine alternatives. But unlike the NEPA requirement, the NHPA requirement comes into play *only if* the project will have an adverse effect to historic properties, and *only after* that determination is made.[80] Mr. Sea's analysis misses this difference. In short, an adverse effect[81] is a required precondition,[82] not met here, to the consideration of alternatives under the NHPA. Here, as we have reiterated throughout today's decision, no proposed contention specifies *any* effect on the historic properties listed by Mr. Sea, much less an adverse effect.

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[78]Sea Appeal at 18.

[79]*See Concerned Citizens Coalition v. Federal Highway Administration*, 330 F.Supp.2d 787, 796 (W.D. La. 2004). *See also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 551 (1978).

[80]*See Concerned Citizens*, 330 F.Supp.2d at 798. *Also Navajo Nation v. U.S. Forest Service*, __ F.Supp.2d __, __, 2006 WL 62565 at 11 (D. Ariz. Jan. 11, 2006).

[81]*See* 36 C.F.R. § 800.5(a)(1).

[82]36 C.F.R. §§ 800.5(d)(2), 800.6.

In his reply brief, Mr. Sea repeats his argument that proper identification of the historic sites would have created an obligation to assess allegedly benign alternatives to the project, such as moving it to Paducah, Kentucky. Again, this argument misses the mark. Under the NHPA, there *must be an adverse effect* upon the historic property; absent an adverse effect, no alternatives need be considered.

In sum, the Board reached the correct result when it rejected Mr. Sea's "alternatives" contention.

b. *Sea Contention No. 3.2:* "USEC stated action alternatives should be seriously evaluated."

Mr. Sea argues on appeal that USEC had an obligation to compare the relative cultural effects of the project on alternative sites (Piketon, Ohio versus Paducah, Kentucky). Mr. Sea provides no legal support for his position. We discern no NHPA requirement to compare a project's cultural impact on alternatives to the proposed site. To the contrary, courts have found that the NHPA and its implementing regulations do not impose an obligation to consider alternative sites.[83] We agree with the Board that this proposed contention is inadmissible.

CONCLUSION

For the foregoing reasons and for the reasons given by the Board, we affirm the Board's rejection of Mr. Sea's contentions. We grant Mr. Sea's motion for leave to reply, but only in part, limiting our consideration of Mr. Sea's reply brief to issues that genuinely "reply" to the other participants' responses to his appeal.

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[83] *See Wicker Park Historic District Preservation Fund v. Pierce*, 565 F.Supp. 1066, 1075-76 (N.D. Ill. 1982). *Accord Lesser v. City of Cape May*, 110 F.Supp.2d 303, 328 (D. N.J. 2000).

IT IS SO ORDERED.

For the Commission,

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 3rd day of April, 2006.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
USEC Inc.	)	Docket No. 70-7004-ML
	)	
	)	
(American Centrifuge Plant)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-06-09) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, on April 4, 2006.

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Administrative Judge
Lawrence G. McDade, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: lgm1@nrc.gov

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

Administrative Judge
Richard E. Wardwell
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: rew@nrc.gov

Lisa B. Clark, Esq.
Margaret J. Bupp, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: lbc@nrc.gov
E-mail: mjb5@nrc.gov

Donald J. Silverman, Esq.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20005
E-mail: dsilverman@morganlewis.com

Dennis J. Scott, Esq.
USEC Inc.
6903 Rockledge Drive
Bethesda, MD 20817
E-mail: scottd@usec.com

Geoffrey Sea
1832 Wakefield Mound Road
Piketon, OH 45661
E-mail: SargentsPigeon@aol.com

Vina K. Colley
Portmouth/Piketon Residents for
Environmental Safety and Security (PRESS)
3706 McDermott Pond Creek
McDermott, OH 45652
E-mail: vcolley@earthlink.net

Ewan Todd
403 E. Oakland Avenue
Columbus, OH 43202
Email: ewan@mathcode.net

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 3rd day of April 2006