

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO MOTION ON BEHALF OF NUCLEAR
INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN
FOR STAY OF INITIAL DECISION PENDING REVIEW

INTRODUCTION

Pursuant to the Board's Order of June 13, 2006¹, the Nuclear Regulatory Commission Staff ("Staff") hereby responds to the motion filed by Nuclear Information and Resource Service and Public Citizen ("NIRS/PC")² requesting a stay of the Board's Third Partial Initial Decision (Safety-Related Contentions) issued on May 31, 2006.³ For the reasons set forth below, the Staff opposes NIRS/PC's motion.

BACKGROUND

The decision which NIRS/PC requests the Board to stay is the third partial initial decision resolving the contested issues in this proceeding to consider the application by Louisiana Energy Services, L.P. to construct and operate a uranium enrichment facility to be known as the National Enrichment Facility ("NEF"). While the first two partial initial decisions

¹ *Order* (Schedule for Responses to Stay Motion).

² Motion on Behalf of Nuclear Information and Resource Service and Public Citizen for Stay of Initial Decision Pending Review, June 12, 2006 ("NIRS/PC Motion").

³ *Louisiana Energy Services, L.P. (National Enrichment Facility)*, LBP-06-15, 63 NRC ____, May 31, 2006 ("Third PID").

resolved contested issues relating to the adequacy of the Staff's environmental review under the National Environmental Policy Act (NEPA),⁴ this decision resolved the contested safety issues. Specifically, as relevant to NIRS/PC's motion, the Board ruled on contentions challenging the plausibility of LES's strategy for private deconversion and disposal of the depleted uranium tails to be generated by the proposed uranium enrichment facility and LES's proposed funding plan for this strategy. Third PID at 2-5.

The Board's analysis of LES's private strategy for dispositioning the tails concerned two necessary elements - deconversion of the tails to a more stable form and near surface disposal. Regarding the plausibility of LES's private disposal strategy, the Board noted that the matters for consideration in this phase of the proceeding had been narrowed by the rulings in the Second PID. Specifically, the Board noted that it had, in that decision, recognized the Commission's rulings that depleted uranium was Class A low-level waste, making it eligible for near surface disposal provided that the performance objectives of Part 61, Subpart C are satisfied for the specific disposal site. Third PID at 93-94. The Board also noted that it had recognized in the earlier decision that Envirocare had been licensed by the State of Utah to accept depleted uranium in the form and quantities which would be produced by the NEF and the States licensing determination had been premised upon an analysis of its equivalent of the Part 61 Subpart C performance objectives. *Id.* at 95. Based on those earlier findings, and consideration of testimony confirming that Envirocare had no volume restrictions for accepted depleted uranium, the Board found that near-surface disposal at Envirocare was a plausible strategy. *Id.* at 96.

⁴ The First Partial Initial Decision (Environmental Contentions) was *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-05-13, 61 NRC 385; the Second Partial Initial Decision (Environmental Impacts of Disposal of Depleted Uranium) was *Louisiana Energy Services, L.P.* (National Enrichment Facility) LBP-06-08, 63 NRC ____, March 3, 2006 ("Second PID")

Regarding LES's decommissioning cost estimates, the Board rejected a proposed contention by NIRS/PC challenging the cost estimate provided by DOE for dispositioning the tails generated by the LES facility, finding that DOE has the exclusive authority to determine the amount of reimbursement required. PID at 41. NIRS/PC premises its request for stay on these rulings, claiming that they are erroneous and likely to be overturned by the Commission upon consideration of NIRS/PC's petition for Commission review. Motion at 3-8.⁵

DISCUSSION

I. Legal Standards Governing Requests for Stay

The Commission's regulations provide that party to a proceeding may file an application for a stay of the effectiveness of the decision pending the filing of and decision on a petition of review. The decision of whether to grant or deny an application for a stay is based upon consideration of the following criteria set forth in 10 C.F.R. § 2.343(e):

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

The burden of persuasion on these factors rests with the moving party. *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981). The most important factor is whether irreparable injury will be incurred absent the stay. *Id.* In order to warrant issuance of a stay the injury to the movant must be "both certain and great." *Cuomo v. NRC*, 772 F2d 972, 976 (D.C. Cir. 1985); see also *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 392-93 (2001). To meet the standard of

⁵ With the motion requesting a stay, NIRS/PC filed "Petition on Behalf of Nuclear Information and Resource Service and Public Citizen for Review of Third Partial Initial Decision on Safety-Related Contentions" June 12, 2006.

a strong showing that the movant is likely to succeed on the merits, it is not enough simply to establish possible grounds for appeal. *Id.* In addition, the Commission has held that an overwhelming case of likelihood of success on the merits is necessary when the showing on the other three factors is weak. *Id.*, citing *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1186-89 and ALAB0415, 5 NRC 1435, 1437 (1977).

II. NIRS/PC Has Failed to Show it is Likely to Succeed on the Merits

NIRS/PC claims that the Board's ruling regarding the plausibility of LES's strategy for dispositioning the tails is likely to be overturned based on two errors. First, NIRS/PC claims that the Board improperly premised this decision upon a determination that depleted uranium is Class A waste and therefore suitable for near surface disposal under the applicable regulations, found in 10 C.F.R. § 61.55. Motion at 6-7. Secondly, NIRS/PC claims that the Board failed to conduct a detailed examination of whether disposal of the tails at Envirocare, a potential disposal site for the tails from the NEF, would satisfy the regulatory performance requirements in 10 C.F.R. § 61.55 despite being directed to do so by the Commission. Motion at 7-8.

Neither of NIRS/PC's alleged errors present potential grounds for the Commission to overturn the ruling by the Board. In fact, both relate to issues that have already been addressed by the Board in its earlier decisions concerning the environmental contentions and addressed by the Commission on consideration of NIRS/PC's petitions for review. NIRS/PC's claim that the Board erred in predicating its decision upon a finding that depleted uranium tails are Class A low level waste, Motion at 19, has been repeatedly raised throughout this proceeding and addressed by the Board and Commission. The issue of whether depleted uranium is Class A waste under the Commission's regulations was most recently addressed in the Board's second Partial Initial Decision ("Second PID") addressing environmental

contentions.⁶ As the Board noted in that ruling, the issue of the proper classification of the depleted uranium tails had already been settled by the Commission which had ruled that under a plain reading of 10 C.F.R. § 61.55(a), depleted uranium is Class A waste. *Id.*, slip op. at 26-27, citing *Louisiana Energy Services* (National Enrichment Facility) CLI-05-20, 62 NRC 536, 535 (2006).

NIRS/PC's other alleged error is that the Board failed to conduct a 10 C.F.R. Part 61 performance review for Envirocare as a potential disposal site for the depleted uranium tails despite having been directed to do so by the Commission. Motion at 7-8. The question of whether the 10 C.F.R. Part 61 performance objectives for shallow land disposal could be satisfied at Envirocare site for the tails generated by the NEF was also addressed in the Second PID, and specifically the claim by NIRS/PC that the dose received by an intruder over the long term would exceed the dose limits in Subpart C of Part 61. Second PID at 45. The Board's ruling that the Staff's reliance on Envirocare as a reference site, representing an example of a disposal facility which could accept the NEF depleted uranium tails, in its NEPA review was reasonable, *Id.* at 51-52, was affirmed by the Commission on appeal in *Louisiana Energy Services, L.P.* (National Enrichment Facility) CLI-06-15, 63 NRC ____, June 2, 2006. In its decision the Commission emphasized:

This is a proceeding to license a uranium enrichment facility, *not* a proceeding to license a near-surface waste disposal facility. NIRS/PC raise many arguments attacking the suitability of the Envirocare site for near-surface disposal of LES's depleted uranium. But in no respect will this proceeding authorize LES to dispose of depleted uranium at Envirocare or any particular disposal facility, or by any particular method.

CLI-06-15, slip op. At 3. Therefore, the Commission declined to perform a Part 61 compliance review noting that this would be performed by the pertinent regulatory authority (for Envirocare

⁶ *Louisiana Energy Services, L.P.* (National Enrichment Facility) LBP-06-08, 63 NRC ____, March 3, 2006.

the State of Utah) prior to a final determination on disposal. *Id.* at 3, 16. The Commission went on to stress that this licensing proceeding will not determine where the depleted uranium will ultimately be disposed, and it is therefore not appropriate for NIRS/PC to seek a final disposal authorization review in the context of this proceeding. *Id.* at 15. Given this clear guidance from the Commission, NIRS/PC's claim that the Commission "has demanded a *detailed examination* of whether the disposal plan would meet the dose limits of 10 C.F.R. Part 61, before deeming it a plausible strategy" is simply incorrect.⁷

NIRS/PC also argues that the Board erred in rejecting its contention challenging the adequacy of the DOE cost estimate. Motion at 3-6. As NIRS/PC observes, however, the Staff undertook a detailed review of the DOE cost estimate to determine whether all appropriate costs were considered and the information was adequately documented and reasonable. Motion at 5. The Staff's review is documented in a safety evaluation report supplement admitted as Staff Exhibit 77-M. Thus, to prevail on any such challenge, NIRS/PC must be able to show that the DOE cost estimate, as approved by the Staff, is flawed. However, NIRS/PC has failed to point to any alleged errors in the DOE cost estimate or the Staff's analysis of those estimates. Instead, NIRS/PC has argued that DOE cost estimates have historically been inaccurate and are unreliable. Motion at 5. However, the past performance of DOE - which is the primary focus of the declaration of Arjun Makhijani - is simply not a matter which is relevant to the licensing of the proposed NEF. The only dispute Dr. Makhijani espouses with the current DOE cost estimate is DOE's reliance on disposal at Envirocare as Class A low-level waste

⁷ NIRS/PC's claim is also not supported by the Claiborne decisions cited in its motion. Motion at 7-8. The Commission in the remand cited by NIRS/PC was simply requesting clarification of a Board decision, not directing the Board to analyze whether the proposed disposal method - in that case deep mine disposal - met regulatory dose limits. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center) CLI-97-11, 46 NRC 49 (1977). As the Commission noted, no particular mine had been selected or identified and therefore the site specific characteristics necessary to project doses from groundwater contamination were not available. *Id.* at 50. Since an available mine had not yet been identified, it would not have been possible to conduct the type of detailed, site specific evaluation of radiological doses NIRS/PC claims that the Commission demanded in that case and should be required for the NEF.

because of the possibility that the Commission may, upon review of 10 C.F.R. § 61.55, change the waste classification scheme. Makhijani Declaration at 12-14. However, the Board must follow the regulations as they are currently in effect, and the Commission has definitively ruled that under the current regulations depleted uranium is Class A waste. *Louisiana Energy Services*, CLI-05-20, 62 NRC 536, 535. Therefore, even if NIRS/PC were permitted to challenge the DOE cost estimate, it has not advanced any admissible grounds on which it could prevail.

III. NIRS/PC Has Not Shown it Will Suffer Irreparable Injury.

NIRS/PC argues that when an agency has not correctly analyzed the impacts of a project under NEPA, courts have found that irreparable harm may occur if a project is allowed to proceed before new information, and a new NEPA analysis, are performed. Motion at 8-9. This line of reasoning, however, is not applicable to the circumstances in this case. First and foremost, the third PID did not resolve any NEPA issues but instead was limited to discrete safety related questions. Thus, the outcome of the Board's review is to assess specific issues related to the safe operation and decommissioning of the facility, not the type of broad review required by NEPA which may be the predicate for a decision as to whether to proceed with the project under review or to pursue other options.

Further, NIRS/PC has failed to show that allowing the licensing process to proceed would in any way irreparably impair eventual full decommissioning funding.⁸ Even if the Commission were to find that NIRS/PC should have been afforded the opportunity to challenge the DOE cost estimate, that error can be remedied at any time, either before or after a license

⁸ In addition, NIRS/PC's concern that the NEF will be licensed and built prior to review of the LBP-06-15 by the Commission is unfounded given the nature of the construction and other preparations LES will undertake after licensing but before beginning operations at the NEF. LES has indicated that it intends to bring uranium on-site approximately one year after licensing and that operations are not to begin until late 2008 or early 2009. Thus, the Commission will have ample time to review LBP-06-15 prior to any activities at the NEF site requiring decommissioning.

is issued. Should the Board revisit this issue and determine that the DOE cost estimate is inadequate, LES would be required to provide additional funding to cover the shortfall in the decommissioning fund. This would be required regardless of the status of the proposed facility, as LES is required to update the decommissioning cost estimate and decommissioning funding throughout the life of the facility regardless of the of the size of the change. Third PID at 120. Because funding may fluctuate throughout the life of the facility, NIRS/PC would not suffer any irreparable harm even if the Board were to authorize issuance of a license before all challenges to the amount of funding were fully resolved.

IV. Granting the Stay Will Harm LES.

_____As NIRS/PC has observed, LES is prepared to begin construction of the NEF promptly after licensing. The preparation for construction involves a substantial commitment of resources that must be scheduled well in advance of the beginning of construction activities. Any action that would delay the expected time of licensing would therefore cause substantial financial harm to LES.

V. The Public Interest is Not Served by Granting a Stay.

NIRS/PC argues that the public interest requires the issuance of a stay because a license with inadequate financial assurance would be difficult to change. Motion at 10. However, NIRS/PC is not correct that decommissioning funding is difficult to change. By regulation and license condition LES would be required to periodically update its cost estimate. See 10 C.F.R. § 70.259(e), Staff Exhibit 77-M at 5. Any shortfall in funding identified in these updates or by this Board in the hearing process would be remedied by increasing the amount of funding in the appropriate amount. For these reasons, NIRS/PC's has failed to show that the public interest requires the issuance of a stay of the Board's decision.

CONCLUSION

For the reasons stated above, NIRS/PC's motion to stay the third partial initial decision pending review by the Commission should be denied.

Respectfully submitted,

/RA/

Lisa B. Clark
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Dated at Rockville, Maryland
this 19th day of June, 2006

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO MOTION ON BEHALF OF NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN FOR STAY OF INITIAL DECISION PENDING REVIEW" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 19th day of June, 2005.

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