

**RAS 11855**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

**DOCKETED 06/23/06**

**SERVED 06/23/06**

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman  
Dr. Paul B. Abramson  
Dr. Charles N. Kelber

In the Matter of

LOUISIANA ENERGY SERVICES, L.P.

(National Enrichment Facility)

Docket No. 70-3103-ML

ASLBP No. 04-826-01-ML

June 23, 2006

MEMORANDUM AND ORDER  
(Ruling on NIRS/PC Motion for Stay)

Pending before the Licensing Board is a June 12, 2006 motion on behalf of intervenors Nuclear Information and Resource Service and Public Citizen (NIRS/PC) for a stay of the Board's May 31, 2006 third partial initial decision in this proceeding on the pending application of Louisiana Energy Services, L.P. (LES) for a 10 C.F.R. Part 70 license to construct and operate a uranium enrichment facility, the National Enrichment Facility (NEF), at a site near Eunice, New Mexico. LES and the NRC staff filed responses to the NIRS/PC motion on June 19, 2006, each opposing that motion. For the reasons set forth below, we deny the NIRS/PC motion.

I. BACKGROUND

On May 31, 2006, the Board issued its third partial initial decision (PID) in this proceeding, finding that LES carried its burden of proof regarding the NIRS/PC safety-related

challenges<sup>1</sup> to the LES application reflected in (1) contention NIRS/PC EC-3/TC-1, which challenges the plausibility of LES's private strategy for deconversion of depleted uranium (DU) from the NEF; (2) those portions of contention NIRS/PC EC-5/TC-2 that challenge the adequacy of LES's transportation cost estimate associated with the deconversion and disposal of NEF-generated DU tails and the contingency factor applied to its overall dispositioning cost estimate; and (3) paragraph E (calcium fluoride disposal costs), paragraph G (plausibility of LES's private deconversion strategy), and paragraph I (plausibility of engineered trench disposal) of contention NIRS/PC EC-6/TC-3. See LBP-06-15, 63 NRC \_\_, \_\_ (slip op. at 2) (May 31, 2006). Regarding the challenges to (1) LES's cost estimate for private sector deconversion of DU from the NEF as set forth in contention NIRS/PC EC-5/TC-2 and paragraph G of NIRS/PC EC-6/TC-3; and (2) its cost estimate for disposal of NEF-generated DU as set forth in contention NIRS/PC EC-5/TC-2 and paragraph I of contention NIRS/PC EC-6/TC-3, however, the Board found that because LES failed to carry its burden to demonstrate the adequacy of those cost estimates, to ensure LES has in place sufficient funding mechanisms to assure facility decommissioning, the staff must utilize the cost estimates attendant to LES's alternate "plausible strategy" for dispositioning DU, namely the United States Department of Energy (DOE) providing disposition services in accordance with section 3113 of the USEC Privatization Act, 42 U.S.C. § 2297h-11. See id. at \_\_-\_\_, \_\_ (slip op. at 2-3, 122).

On June 12, 2006, NIRS/PC filed a motion with the Board pursuant to 10 C.F.R. § 2.342 requesting an order staying the effectiveness of the Board's third PID pending Commission

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<sup>1</sup> Specifically, the contentions at issue in that third PID were NIRS/PC Environmental Contention (EC)-3/Technical Contention (TC)-1 – Depleted Uranium Hexafluoride [(UF<sub>6</sub>)] Storage and Disposal; NIRS/PC EC-5/TC-2 – Decommissioning Costs; and NIRS/PC EC-6/TC-3 – Costs of Management and Disposal of Depleted UF<sub>6</sub>. See LBP-06-15, 63 NRC \_\_, \_\_ (slip op. at 1) (May 31, 2006).

review of that decision.<sup>2</sup> See Motion on Behalf of [NIRS/PC] for Stay of Initial Decision Pending Review (June 12, 2006) [hereinafter NIRS/PC Motion]. Citing National Environmental Policy Act (NEPA) case law, NIRS/PC claim they will suffer irreparable injury absent a stay because once LES is granted a license and NEF construction begins, LES's commitment of resources will bias the NRC in favor of continuing the license in a subsequent agency decisionmaking after the DOE cost estimates are found inadequate by the Commission on review. See id. at 8-9 (citing Massachusetts v. Watt, 716 F.2d 946, 952 (1st Cir. 1983)). According to NIRS/PC, they will suffer additional irreparable harm absent a stay if the NEF is licensed and built with inadequate financial assurance and begins generating DU before the Commission completes review of the Board's decision. See id. at 9. In their motion, NIRS/PC also argue that the third PID is likely to be overturned by the Commission on review because the Board erroneously excluded NIRS/PC challenges to the DOE dispositioning cost estimate based on the Board's misreading of section 3113 of the USEC Privatization Act. See id. at 3-6. NIRS/PC further contend that, in finding LES has shown a plausible strategy for near-surface disposal of DU, the Board erred in relying upon the determination that DU is a Class A low-level waste and in failing to conduct a 10 C.F.R. Part 61 performance review for Envirocare of Utah, Inc., as a potential disposal site. See id. at 6-8. NIRS/PC also note that if the Commission's review of

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<sup>2</sup> NIRS/PC also filed a petition for review of the third PID with the Commission on June 12, 2006. See Petition on Behalf of [NIRS/PC] for Review of Third Partial Initial Decision on Safety-Related Contentions (June 12, 2006).

Although section 2.342 indicates that a stay motion regarding a licensing board decision or action can be filed with either the Commission or the licensing board, as the Board noted in its June 13, 2006 order establishing a schedule for party responses to the NIRS/PC motion, because the wording of their motion created some ambiguity about whether the motion was being lodged with the Board or the Commission, NIRS/PC was requested to advise the Board immediately if it intended that the motion be before the Commission. See Licensing Board Order (Schedule for Stay Responses) (June 13, 2006) at 2 n.1 (unpublished). Having heard nothing from NIRS/PC in this regard, we now rule on their motion.

the third PID is brief, LES can continue with its construction preparation in the months before the Commission's decision is issued. See id. at 9-10. Finally, NIRS/PC assert that the public interest weighs in favor of a stay because it would be difficult to remedy inadequate financial assurance for the NEF, leaving federal and/or state taxpayers to bear the cost of dispositioning DU generated by the NEF. See id. at 10.

On June 19, 2006, LES and the staff each filed a response to the NIRS/PC motion opposing the requested stay of the third PID. See [LES] Answer to NIRS/PC Motion for a Stay of the Licensing Board's Third [PID] Pending Commission Review (June 19, 2006) [hereinafter LES Response]; NRC Staff Response to Motion on Behalf of [NIRS/PC] for Stay of Initial Decision Pending Review (June 19, 2006) [hereinafter Staff Response]. LES disputes the NIRS/PC claim of irreparable injury, contending that, despite NIRS/PC's assertion to the contrary, the third PID raises no NEPA issues. See LES Response at 6-7. With regard to the claim of irreparable harm based on the generation of DU and the allegedly flawed cost estimates, LES contends that DU will not be generated until at least December 2008, providing ample time for Commission review and the adjustment of any cost estimates in the unlikely event the Commission remands the Board's decision. See id. at 7-8. LES also argues NIRS/PC have not met their burden of showing a likelihood of success on the merits, which, because NIRS/PC will suffer no irreparable harm absent a stay, requires a showing that the Board's third PID is virtually certain to be reversed by the Commission. See id. at 3-4. Specifically, LES asserts that NIRS/PC have not shown that they will prevail on the merits because (1) the attack on the DOE cost estimates is based only on DOE's purported history of poor performance; (2) section 3113 of the USEC Privatization Act clearly gives DOE the exclusive authority to set costs; and (3) the challenge to the finding of near-surface disposal as a plausible strategy ignores the Commission's classification of DU as Class A waste and the

fact that the Board's third PID did not concern NEPA impacts or the licensing of a 10 C.F.R. Part 61 disposal facility. See id. at 4-6.

LES further maintains that its interests and the interests of its customers will be harmed by the grant of a stay because any delays could (1) result in termination of the NEF project; (2) add financial costs for keeping site preparation and construction workers at the ready, but unable to begin construction activities; and (3) require that LES utility customers seek enrichment services elsewhere at higher prices. See id. at 8-10. Furthermore, according to LES, a stay negatively impacts the public interest because the operation of the NEF promotes the national energy policy and national security and benefits the local community of Eunice, New Mexico. See id. at 10.

For its part, the staff also opposes the NIRS/PC stay motion. See Staff Response at 1. The staff disputes the NIRS/PC claim of irreparable injury, contending that NEPA-related harm cannot result from the third PID because that decision did not address NEPA issues. See id. at 7. Further, the staff asserts that any harm based on inadequate decommissioning funding can be readily remedied after the issuance of the license. See id. at 7-8. The staff avers that NIRS/PC failed to show it is likely to succeed on the merits because (1) the Commission has already addressed the NIRS/PC claim that DU was improperly classified as Class A waste and that a 10 C.F.R. Part 61 review of a disposal site is required, see id. at 4-6; and (2) its challenge to the DOE cost estimates is based solely on the assertion that DOE cost estimates are historically unreliable, see id. at 6-7. The staff also contends that the granting of a stay could harm the financial interests of LES based on its substantial commitment of construction resources, and that a stay is not necessary to protect the public interest because any potential shortfall in decommissioning funding is readily correctable after issuance of the license. See id. at 8.

## II. ANALYSIS

### A. Applicable Legal Standards

The NRC's procedural rules provide that, in determining whether to grant a stay of the effectiveness of a decision, a licensing board must consider whether (1) the moving party will be irreparably injured if a stay is not granted; (2) the moving party has made a strong showing that it is likely to prevail on the merits; (3) granting the stay would harm other parties; and (4) a stay will serve the public interest. See 10 C.F.R. § 2.342(e).<sup>3</sup> The party requesting the stay has the burden of demonstrating that these four factors are met. See Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-943, 8 NRC 253, 270 (1978).

Although no one of these four factors is dispositive, the most important factor is whether the moving party will suffer irreparable harm if a stay is not granted. See Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981). In this regard, where the moving party fails to demonstrate irreparable injury, that party must make an especially strong showing on at least one of the remaining three factors. See Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269 (1990).

Relative to the irreparable harm factor, mere allegations of irreparable harm are insufficient, as the moving party must reasonably demonstrate that it will suffer some concrete, specific injury absent a stay. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 196 (1985); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985). For example, although there

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<sup>3</sup> Prior to the January 2004 revision of the NRC's Part 2 procedural rules, 10 C.F.R. § 2.788(e) governed motions to stay the effectiveness of a decision. Although the rule regarding stays now appears in section 2.342(e), this change had no substantive impact on the standards governing such motions. See 69 Fed. Reg. 2182, 2225 (Jan. 14, 2004). Therefore, Commission and Appeal Board case law interpreting section 2.788(e) carries precedential weight in our interpretation of section 2.342(e).

may be instances when irreparable harm results from an agency's failure thoroughly to evaluate under NEPA the environmental impacts of a proposed action, given that, in the absence of a stay, the agency would be biased in favor of continuing with the action based on the irretrievable commitment of resources, see Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 258 n.62 (1990), a party seeking a stay in such a situation still must actually prove irreparable injury because merely alleging a NEPA violation is insufficient to demonstrate irreparable harm, see Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 323 & n.13 (1998). By contrast, outside of the NEPA area in which consideration of the commitment of resources and other economic factors is required, the Commission has held that the potential that the commitment of resources will bias the agency in favor of continuing a proposed action so as to prevent meaningful review does not necessarily constitute irreparable injury. See Seabrook, CLI-90-3, 31 NRC at 258-60.

In connection with the success on the merits factor, the movant is required to do more than list the possible grounds for reversal. See Farley, CLI-81-27, 14 NRC at 797. Further, if the movant fails to make a strong showing on the other factors, its showing regarding the likelihood of success on the merits must be very strong. See id. For example, when the movant has not shown irreparable harm absent a stay, the movant must show that its success on the merits is a "virtual certainty." See Kerr-McGee, ALAB-928, 31 NRC at 269.

If, however, the movant fails to make a strong showing on the irreparable harm and success on the merits factors, it is not necessary to give lengthy consideration on the remaining two factors. See Shoreham, ALAB-810, 21 NRC at 1620. Nonetheless, in considering the harm a stay presents to other participants under the third factor, it is appropriate to consider the potential economic harm to an applicant caused by staying the decision. See Philadelphia

Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1602-03 (1985).

B. Ruling on NIRS/PC Motion for Stay

1. Irreparable Injury

In the motion before the Board, NIRS/PC insist that licensing and constructing the NEF before the Commission has reviewed the third PID will cause irreparable harm by creating an agency bias supporting the NEF project based on the significant financial commitment LES will make in beginning construction. See NIRS/PC Motion at 8-9. NIRS/PC are concerned that this bias will prevent an objective assessment of decommissioning costs should the Commission find the DOE cost estimates inadequate on review. See id. NIRS/PC further assert that, absent a stay, the project will move forward based on the faulty financial assurance resulting from the inadequate DOE disposal cost estimate, which alone will cause irreparable harm. See id. at 9; Declaration of Arjun Makhijani.

Both of these arguments fall short of demonstrating that irreparable harm will result absent a stay. First, to the extent that NIRS/PC's assertion regarding agency bias attempts to raise NEPA issues, those arguments are irrelevant because the Board's first and second partial initial decisions -- not the third PID -- addressed environmental issues. Compare LBP-06-8, 63 NRC 241, 258-60 (2006) and LBP-05-13, 61 NRC 385, 403-05 (2005), with LBP-06-15, 63 NRC at \_\_\_ n.1 (slip op. at 2 n.1). The third PID dealt primarily with LES's decommissioning cost estimates and associated financial assurance, which unlike a NEPA-related impacts analysis, are continually reviewed and adjusted, essentially removing the basis for the Commission to hold a bias against changing an initial decision. See Seabrook, CLI-90-3,

31 NRC at 258-59.<sup>4</sup> Moreover, even if the third PID did address NEPA issues, without more, a NEPA violation is insufficient to establish irreparable injury, as the movant must still prove it will suffer irreparable harm if a stay is not granted. See HRI, CLI-98-8, 47 NRC at 323 & n.13. NIRS/PC have not demonstrated that any harm will result absent a stay. As both LES and the staff discuss, it will be at least eighteen months before LES begins enriching uranium and generating DU waste, leaving ample time for the Commission to review the third PID and for the correction of any cost estimate errors relating to DU deconversion and disposal. See LES Response 7-8; Staff Response at 7-8.

2. Success on the Merits

Given that NIRS/PC have failed to show irreparable injury -- the most significant of the section 2.342(e) factors -- for their stay request to be granted, NIRS/PC must show that their success on the merits is a "virtual certainty." See Farley, CLI-81-27, 14 NRC at 797; Kerr-McGee, ALAB-928, 31 NRC at 269. NIRS/PC maintain the third PID is likely to be overturned because the Board (1) prevented a challenge to the DOE cost estimates based on its misinterpretation of section 3113 of the USEC Privatization Act; and (2) mistakenly classified DU as Class A waste and then failed to conduct a 10 C.F.R. Part 61 performance review for Envirocare as a potential DU disposal site. See NIRS/PC Motion at 3-8.

Nothing in their motion demonstrates that NIRS/PC have a strong likelihood of success on these issues before the Commission. The NIRS/PC challenge to the DOE cost estimates is

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<sup>4</sup> The Seabrook case, in which the Commission held that initial licensing commitments regarding emergency planning resources do not bias the NRC against making subsequent changes, see CLI-90-3, 31 NRC at 258-60 & n.62, can be analogized to the instant circumstance in that an applicant/licensee's decommissioning cost estimates and related financial assurance, like emergency planning matters, are continually re-evaluated and updated to accommodate changed conditions. This continual review process reduces the likelihood of agency bias in that it does not involve an irretrievable or unchangeable commitment of resources.

based in large part on the assertion that DOE has a history of poor performance and cost overruns, see id. at 5, arguments which the Board has repeatedly rejected as immaterial, see, e.g., LBP-04-14, 60 NRC 40, 64 (2004). With regard to NIRS/PC's position concerning the applicability of section 3113, the Board has already presented its interpretation of that statute. See, e.g., Licensing Board Memorandum and Order (Ruling on Motion to Admit Late-Filed Amended and Supplemental Contentions) (Aug. 4, 2005) at 21-22 (unpublished). The Commission may eventually find that the USEC Privatization Act does not, in fact, prohibit adjudication of DOE cost determinations, but, based on the reasoning of our August 4, 2005 ruling, the Board does not find that outcome to be a "virtual certainty." See Kerr-McGee, ALAB-928, 31 NRC at 269.

The NIRS/PC argument regarding the proper classification of DU appears even less likely to succeed on merits because the Commission has in this very proceeding already ruled that DU is, under a plain reading of 10 C.F.R. § 61.55, Class A low-level waste, see CLI-05-20, 62 NRC 523, 535-36 (2005), and the Board, in making its disposal plausibility-related findings, has merely followed that Commission precedent, see, e.g., LBP-06-8, 63 NRC at 267. Nothing in the NIRS/PC motion suggests that the Commission is likely to reverse course on its statement that, under the current 10 C.F.R. Part 61 regulations, DU is Class A waste. NIRS/PC's discussion of the Claiborne decisions is also inapposite to the likelihood of success on appeal. See NIRS/PC Motion at 7-8. In that case, the Commission did not require that the Board analyze whether the proposed disposal method met 10 C.F.R. Part 61 dose limits before deeming it a plausible strategy as NIRS/PC has asserted is necessary, see id. at 8, but merely remanded a portion of the decision and requested clarification. See Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-11, 46 NRC 49 (1997). Because no particular disposal site had been selected or identified, the site-specific characteristics necessary to

project doses from groundwater contamination were not available, see id. at 50, and, therefore, it would have been impossible to conduct the type of detailed, site-specific evaluation of radiological doses NIRS/PC claim the Commission sanctioned in Claiborne and will eventually demand in the instant proceeding with regard to near-surface disposal.

3. Harm to Other Participants

Given that NIRS/PC have failed to demonstrate that the first two factors weigh in favor of granting the requested stay, a lengthy consideration of the remaining two factors is unnecessary. See Shoreham, ALAB-810, 21 NRC at 1620. Staying the effectiveness of the third PID could potentially harm economic interests of LES by delaying its construction schedule. See LES Response at 8-9; Affidavit of E. James Ferland ¶¶ 6-8. NIRS/PC recognize that LES may suffer some economic detriment should the stay be granted, but assume that the Commission can review the third PID within three months, during which time LES can proceed with its preconstruction preparation activities. See NIRS/PC Motion at 9-10. Nonetheless, given that a stay will cause LES at least some economic harm, we find NIRS/PC have failed to establish that this factor weighs in favor of its stay request. See Limerick, ALAB-808, 21 NRC at 1602-03.

4. Public Interest

Regarding the public interest factor, LES asserts a stay could force LES utility customers to seek higher cost enrichment services, which undoubtedly would be passed on to the consumers. See LES Response at 9-10; Affidavit of Kerry L. Basehore ¶¶ 4-6. Additionally, LES notes that staying the effectiveness of the third PID potentially delays the positive socioeconomic impacts that the NEF will have on the local community of Eunice, New Mexico. See LES Response at 10. We find both of these considerations weigh against granting the stay. On the other hand, the Board acknowledges the concern expressed by

NIRS/PC regarding the potential harm to the public should the decommissioning funding later be found inadequate to properly dispose of DU. See NIRS/PC Motion at 10. This risk, however, is attenuated by the periodic updates of the decommissioning cost estimate that are required by 10 C.F.R. § 70.25(e), and to which LES has committed as a condition to its license. See, e.g., Staff Response at 8. Therefore, as was the case with the other three factors, we conclude that NIRS/PC have failed to establish this factor weighs in their favor so as to support the requested delay.

III. CONCLUSION

The Board finds that, NIRS/PC having failed to demonstrate that any of the four factors set forth in 10 C.F.R. § 2.342(e) weigh in favor of a stay pending Commission review of our third PID, its motion to stay the effectiveness of that decision must be denied.

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For the foregoing reasons, it is this twenty-third day of June 2006, ORDERED, that the June 12, 2006 motion of NIRS/PC to stay the effectiveness of the Board's May 31, 2006 third partial initial decision pending Commission review is denied.

THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>5</sup>

*/RA/*

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G. Paul Bollwerk, III  
ADMINISTRATIVE JUDGE

*/RA by G. Paul Bollwerk for:/*

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Paul B. Abramson  
ADMINISTRATIVE JUDGE

*/RA/*

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Charles N. Kelber  
ADMINISTRATIVE JUDGE

Rockville, Maryland

June 23, 2006

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<sup>5</sup> Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant LES; (2) intervenors NIRS/PC; and (3) the staff.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON NIRS/PC MOTION FOR STAY) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Docket No. 70-3103-ML  
LB MEMORANDUM AND ORDER  
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[Original signed by Adria T. Byrdsong]  
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Dated at Rockville, Maryland,  
this 23<sup>rd</sup> day of June 2006