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fax

Date: March 30, 2011

To: Cindy Bladey

6 Pages, including cover sheet

From: Cindy Owens

Re: Comments on Public Workshop

Fax no: 301.492-3446

Please see the attached letter.

Thank you,
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MAR 30 2011

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Division of Administrative Services
Office of Administration
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U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Louisiana Energy Services, LLC
NRC Docket 70-3103

Subject: Louisiana Energy Services, LLC, National Enrichment Facility
Submittal of Comments on Public Workshop and Request for Comment

Reference:

- (1) 74 Fed. Reg. 30,175 (Wednesday, June 24, 2009), "Notice of Public Workshop on a Potential Rulemaking for Safe Disposal of Unique Waste Streams Including Significant Quantities of Depleted Uranium"
- (2) Letter from Gregory OD Smith, Chief Operating Officer and Chief Nuclear Officer, Louisiana Energy Services, LLC (NEF-09-00209-NRC) to Chief, Rulemaking and Directives Branch, U.S. Nuclear Regulatory Commission dated November 2, 2009, and entitled "Submittal of Comments on Proposed Rulemaking"
- (3) 76 Fed. Reg. 10,810 (Monday, February 28, 2011), "Public Workshop to Discuss Low-Level Radioactive Waste Management"

As identified in Reference 1, the U.S. Nuclear Regulatory Commission (NRC) proposed rulemaking relative to the regulations contained in 10 C.F.R. Part 61 for the safe disposal of unique waste streams including significant quantities of depleted uranium. NRC Staff invited public comments on both the issues and the questions presented in the proposed rulemaking.

As identified in Reference 2, Louisiana Energy Services, LLC (LES) submitted its written comments on the issues and the questions identified in Reference 1. LES reiterates and hereby incorporates by reference its prior comments. In addition, LES wishes to emphasize the following points made in its prior submittal:

- In light of the Performance Objectives in Subpart C of Part 61, which already provides a performance-based approach for the disposal of low-level radioactive waste (LLW), LES does not believe that additional Part 61 rulemaking is necessary.
- Depleted uranium has been correctly classified as Type A LLW by the Commission; therefore, LES does not believe it practical or prudent to attempt to define "unique waste streams" to include depleted uranium at present or for the foreseeable future.

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- LES believes that use of the phrase "significant quantities" in the context of Part 61 regulations or the proposed rulemaking should be discontinued since there is no proposed definition for this phrase that would be sufficient to ensure consistent implementation.

Notwithstanding its comments, LES now understands that the proposed rulemaking is scheduled to be presented to the Commission for consideration in the fall of 2011. LES also understands that the proposed rulemaking would require Part 61 licensees to complete a performance assessment and intruder dose analysis prior to accepting for disposal significant quantities of depleted uranium. For the reasons discussed in Reference 2 and for the additional reasons reviewed below, LES continues to believe that the proposed rulemaking is not necessary.

As identified in Reference 3, NRC recently conducted a public workshop to discuss several options for revising, in a more comprehensive manner, the Part 61 regulations. NRC Staff posed the following three questions and encouraged the public and those participants at the workshop to provide written responses no later than March 30, 2011. LES had a representative in attendance at the public workshop, and with this submittal hereby provides its written comments on the subject questions.

Question 1. Should the NRC Staff revise the existing regulations in 10 C.F.R. Part 61?

Response:

LES continues to believe that the existing regulations in 10 C.F.R. Part 61 are sufficient and do not need to be revised to ensure continued safe LLW management or disposal. LES' position applies equally to the NRC Staff's near-term rulemaking effort to specifically address disposal of depleted uranium (Reference 1) as well as the NRC Staff's long-term plans to consider a more comprehensive change to Part 61 (Reference 3).

The regulations in Part 61 "emphasize an integrated systems approach to commercial LLW disposal." SECY-10-0165, "Staff's Approach to Comprehensive Revision to 10 CFR Part 61 (SRM M100617B)," December 27, 2010, at 2.

"The intent of this regulatory approach was to give flexibility to LLW disposal facility developers, consistent with a particular geologic and/or geographic setting, in choosing advantageous siting and design features and operating practices necessary to achieve the performance objectives. The Commission chose not to include too much specificity in the technical standards as that would require considerable detailed knowledge about the spectrum of designs, techniques, and procedures for disposing of commercial LLW. Alternatively, the Commission chose to provide prospective applicants with flexibility in deciding how they would meet the performance objectives."

NUREG-1853, "History and Framework of Commercial Low-Level Radioactive Waste Management in the United States," January 2007, at 43. Although these regulations were promulgated in 1982, they continue to assure adequate protection of public health and safety.

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As reflected in this explanation, LES believes that Part 61 was originally drafted to provide the very type of flexibility needed to accommodate changing waste streams over time. Any effort to require more specificity (e.g., to address depleted uranium as one particular waste stream) would be contrary to the underlying intent of Part 61.

NRC Staff's new "two-step" approach at revising Part 61 creates yet additional concerns. Specifically, any proposed rulemaking to regulate disposal of depleted uranium in the near-term (Reference 1) appears out-of-sequence with and may be adversely impacted by future rule changes to address other issues in a more comprehensive manner (Reference 3). For example, if NRC Staff decides in the long-term to align Part 61 to be consistent with international standards, then existing licensees that generate or dispose of depleted uranium might have to change their operating practices twice (once in the near-term and then again in the long-term). In addition, a near-term Part 61 change to regulate disposal of depleted uranium could forge the path for future regulatory changes before the industry in general has an opportunity to comment upon or influence such future changes. Moreover, a near-term change to regulate disposal of depleted uranium that is not consistent with long-term plans to revise Part 61 in a more comprehensive manner would create inconsistencies and inequities. All these potential adverse impacts can be avoided either by not proposing any change to Part 61 or, at very least, deferring any near-term Part 61 rulemaking on depleted uranium disposal as part of the long-term consideration of whether a more comprehensive change to Part 61 is needed (and if so, what those changes should be).

Question 2. What recommendations do you have for specific changes to the current rule?

Response:

Consistent with its response to Question 1, LES has no specific changes to offer as regards the existing regulations in 10 C.F.R. Part 61. However, in the event that NRC Staff decides to proceed with either a near-term rulemaking to specifically address depleted uranium disposal or a long-term comprehensive change to Part 61, LES recommends that NRC Staff consider revising the term "waste" in Section 61.2 to afford the generator or owner of source, special nuclear or byproduct material the opportunity to determine whether and when such material should be classified as a waste as opposed, for example, to an asset.

In the event that NRC Staff decides to proceed with either a near-term rulemaking to specifically regulate the disposal of depleted uranium or a long-term rulemaking to make more comprehensive changes to Part 61, or both, NRC Staff should proceed first with an advanced notice of proposed rulemaking (ANOPR) – a process utilized for "especially important or controversial rules." See <http://www.nrc.gov/about-nrc/regulatory/rulemaking/rulemaking-process.html>. An ANOPR would allow affected members of the public the opportunity to more fully explain whether rulemaking is needed or not, to provide information to NRC that may not have been fully considered including the effects of rulemaking, and to directly address the specific rulemaking proposals offered by NRC. See NRR Office Instruction LIC-300, "Rulemaking Procedures," July 2001, at 4. In fact, before Part 61 was first promulgated in December 1982, NRC Staff issued both an ANOPR (see 43 Fed. Reg. 49,811 (Oct. 25, 1978)) and a preliminary draft regulation (see 45 Fed. Reg. 13,104 (Feb. 28, 1980)) prior to issuing the notice of proposed rulemaking (see 46 Fed. Reg. 38,081 (July 24, 1981)). The same process should be employed again in light of the importance of the proposed changes to Part 61. In the ANOPR, NRC Staff should provide the public with specific and detailed regulatory proposals

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that were missing from the issues presented and questions asked in Reference 1 as part of the near-term rulemaking initiative, and also missing from the brief discussion of options presented in SECY-10-0165 as part of the long-term rulemaking initiative (e.g., References 1 and 3 do not present actual changes to regulations that would be available in an ANOPR). LES appreciates and values the public workshops held by NRC Staff regarding LLW rulemaking initiatives. However, the nature of those forums does not allow for all affected entities to provide detailed comments, and thus they do not provide an effective substitute for an ANOPR.

If NRC Staff proceeds with an ANOPR, it should include within the rulemaking package the required regulatory analysis and make that analysis publicly available. See <http://www.nrc.gov/about-nrc/regulatory/rulemaking/flexibility-act.html>. See also NRR Office Instruction LIC-300, "Rulemaking Procedures," July 2001, at 4. The regulatory analysis must include an "estimation and evaluation of the values and impacts for selected alternatives, including considerations of the uncertainties affecting the estimates." NUREG/BR-0058, Rev. 4, "Regulatory Analysis Guidelines of the U.S. Nuclear Regulatory Commission," September 2004, at 17. Among the impacts to be estimated are "costs anticipated from the proposed regulatory action" including "adverse effects on the efficient functioning of the economy or private markets." *Id.* at 22. In that regard, disposal costs for depleted uranium are important financial variables in business models and decommissioning cost estimates. Therefore, any added costs to dispose of depleted uranium beyond those already calculated for LLW Class A disposal must be balanced against perceived benefits. See, e.g., 10 C.F.R. Part 50, App. I. As a result of the nature of these variables, this portion of the regulatory analysis "will often be the longest and most complex portion of the document." NUREG/BR-0058, at 22. The value/impact estimate contained in the regulatory analysis also serves as the cost-benefit analysis required under the backfit rule. *Ibid.* See also NUREG-1409, "Backfitting Guidelines," July 1990, at 4-5 and 18. Since the Commission has already concluded that depleted uranium is properly classified as Class A LLW, generators of depleted uranium and operators of LLW disposal facilities already comply with the requirements of Part 61 and those requirements already provide adequate protection for public health and safety. Accordingly, a cost-benefit analysis is required to determine whether the rulemaking will provide a substantial increase in the overall protection of public health and safety and whether the direct and indirect costs of implementation of the rulemaking are justified in view of this increased protection. See NUREG/BR-0058, at 4 and 5.

Question 3. What are your suggestions for possible new approaches to commercial LLW management?

Response:

As was discussed in Reference 2, LES believes that NRC Staff should revise its existing guidance documents or issue new guidance documents in lieu of revising Part 61 (either in the near-term or in the long-term). In that regard, guidance could be provided in the following areas:

- Include scoping and assessment guidance for important attributes such as climatic, hydrological, geotechnical and geochemical conditions regarding LLW disposal, and provide for a common and systematic assessment process.

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- Conduct bounding analyses for different applications and then apply the results to particular sets of circumstances in a manner similar to a previously approved generic or programmatic environmental impact statement.
- Identify the criteria for evaluating the time period of performance and allow licensees to implement the criteria on a site-specific basis. In this specific regard, NRC Staff could consider and implement current standards that have been created for the uranium milling industry. See 40 C.F.R. Part 192.
- Provide intruder scenario bounding criteria and limitations for consideration in a manner similar to the "design basis threat" concept utilized in security planning.
- Address various stabilizing admixtures criteria for various forms of depleted uranium, including, for example, depleted uranium hexafluoride (DUF₆), depleted uranium tetrafluoride (DUF₄), depleted uranium dioxide (DUO₂), or depleted triuranium octaoxide (DU₃O₈).

The use of guidance documents would allow NRC Staff more flexibility than rulemaking to adjust to new waste streams or new waste processing and disposal techniques in the future. Given the comprehensive nature of any new or revised guidance on LLW disposal, draft guidance documents should be made available for public review and comment.

As was confirmed by the attendees at the NRC workshop held on March 4, 2011, existing LLW disposal facility licensees are already performing site-specific assessments prior to agreeing to accept for disposal specific waste streams. This approach is exactly what the current, performance-based regulatory framework contained in 10 C.F.R. Part 61, Subpart C was envisioned to accomplish. At most, NRC Staff could provide additional or revised guidance to highlight its specific preferences and identify those approaches and techniques that it considers appropriate or acceptable – rather than attempting to codify such details in a regulation that was drafted to avoid such specifics.

Should you have any questions related to this submittal, please contact Wyatt Padgett, LES Licensing Manager at 575-394-5257.

Respectfully,



Perry D. Robinson
Vice President of Compliance and General Counsel