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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Morton B. Margulies, Chairman
Richard F. Cole
Frederick J. Shon

In the Matter of	Docket No. 70-3070-ML
Louisiana Energy Services, L.P. (Claiborne Enrichment Center)	ASLBP No. 91-641-02-ML (Special Nuclear Materials License)
	April 5, 1994

MEMORANDUM AND ORDER
RULING ON "CITIZENS AGAINST NUCLEAR TRASH'S
FIRST SUPPLEMENT TO CONTENTIONS ON THE
CONSTRUCTION PERMIT/OPERATING LICENSE APPLICATION
FOR THE CLAIBORNE ENRICHMENT CENTER"

Before us for consideration is a proffer by Intervenor Citizens Against Nuclear Trash (CANT), on January 18, 1994, of three additional contentions to those previously admitted in this proceeding. LBP-91-41, 34 NRC 332 (1991).

CANT's Contention T alleges that the design of the Claiborne Enrichment Center (CEC) is invalid because it relies for cooling purpose on trichlorofluoromethane which has been banned by the Environmental Protection Agency. Contention U alleges that the Draft Environmental Impact Statement (DEIS) is inadequate because the Nuclear Regulatory Commission (NRC) failed to consult with other appropriate federal agencies regarding the proposed project as required by the National

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Environmental Policy Act (NEPA). Contention W alleges that the DEIS is inadequate because it fails to address the impacts, costs and benefits of ultimate disposal of depleted uranium hexafluoride (DUF_6) tails, or the cumulative and generic impacts of DUF_6 disposal.

Applicant Louisiana Energy Services, L.P. (LES) filed a response, dated January 31, 1994, requesting that Contentions T and U should be rejected outright. As to Contention W Applicant believes it has merit only as a comment on the DEIS and should be incorporated in that process.

Staff filed a response, dated February 4, 1994, in which it requested that the three proffered contentions be rejected.

On February 11, 1994 CANT filed a motion for leave to file a reply to the LES and Staff responses. As part of its motion Intervenor withdrew proffered Contentions T and U. CANT's motion was accompanied by its reply of the same date.

LES did not respond to the CANT motion for leave to file a reply. Staff in an answer dated February 28, 1994 did not oppose CANT's motion for leave to reply to the responses opposing Contention W.

I. The Motion For Leave To Reply To LES' and Staff's Responses

We grant CANT's motion for leave to reply to Applicant's and Staff's responses to the proffered contentions. As stated by Staff it is well established that before any decision is

made on the admissibility of any contention in an NRC licensing proceeding, the proponent of the contention must be given the opportunity to be heard in response to any opposition to the contention. *Houston Lighting and Power Company* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 (1979); *Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), LBP-81-18, 14 NRC 71, 73 (1981).

We also approve the withdrawal of Contentions T and U and note that CANT's action relieves the Licensing Board of an unnecessary burden.

II. Contention W

A. Pertinent Regulatory Requirements

An admissible contention must meet the requirements of 10 C.F.R. § 2.714(b)(2), which provides:

> (2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:
>
> (i) A brief explanation of the bases of the contention.
>
> (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.
>
> (iii) Sufficient information (which may include information pertinent to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the 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. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

In the case of a nontimely filing, which this is, under 10 C.F.R. § 2.714(a)(1), a Licensing Board cannot entertain the contention absent a balancing of the following factors in favor of the petitioners:

> (i) Good cause, if any, for failure to file on time.
>
> (ii) The availability of other means whereby the petitioner's interest will be protected.
>
> (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
>
> (iv) The extent to which the petitioner's interest will be represented by existing parties.
>
> (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

In amending the applicable regulation on August 11, 1989 the Commission indicated that the amendments do not constitute a substantial departure from then existing practice in licensing cases. 54 Fed. Reg. 33,170-171.

Existing practice has been that the five factors are not weighed equally, nor do all of them have to be evaluated

favorably to the proponent of a late-filed contention in order for the contention to be accepted.

Good cause for late filing has been described as the most significant. Absent good cause, a petitioner must make a stronger showing on the other factors in order to have a contention accepted. *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 (1982).

Late-filed contentions filed on subsequent NRC environmental review documents are subject to the late-filed criteria in 10 C.F.R. § 2.714(a)(i)-(v). *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 154 (1993). *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1047 (1983); 54 Fed. Reg. 33,172.

B. Contention W

> CONTENTION W: The DEIS Is Inadequate Because It Fails to Address the Impacts, Costs, and Benefits of Ultimate Disposal of DUF6 Tails, or the Cumulative and Generic Impacts of DUF6 Tails Disposal.
>
> According to the DEIS, the 3,830 metric tons ("tonnes") of depleted uranium hexafluoride ("DUF6") tails produced annually by the CEC will be converted to triuranium oxide (U3O8). DEIS at 2-31. However, the DEIS contains no information whatsoever regarding the nature and environmental impacts of the process for converting DUF6 to U3O8, or the impacts of permanently disposing of these U3O8 tails. Given this utter lack of information, it is also impossible to determine from the DEIS the basis for the NRC's estimate that tails disposal will cost $12.6 million/year. DEIS at 2-31. In any event, the NRC does not even appear to have factored the $12.6 million estimate into its cost-benefit analysis. *See* DEIS § 4.5.

> Moreover, the NRC has failed to evaluate the cumulative and generic impacts of adding to the huge (and growing) national inventory of DUF6 tails, for which the U.S. government has yet to identify an acceptable means of disposal. The NRC, in consultation with the Department of Energy, should be required to evaluate these impacts before LES can be licensed to produce more DUF6.

As its basis for the contention CANT asserts that NEPA requires an Environmental Impact Statement (EIS) to be comprehensive and assess all reasonably foreseeable, cumulative impacts of a proposed project. It alleges that the DEIS contains virtually no information on the environmental impacts of the conversion of the DUF_6 to U_3O_8 and disposal of the enormous quantity of tails to be generated.

As examples CANT alleges that the DEIS does not identify or discuss the process by which LES plans to convert DUF_6 to U_3O_8 and what the significant adverse environmental impacts and costs would be.

Intervenor states that the DEIS also fails to identify the means for long-term storage of U_3O_8, or evaluate its environmental impacts. It also asserts that in violation of NEPA, the DEIS fails to address the cumulative or generic impacts of LES' proposal to add over 10,000 tonnes of DUF_6 tails to the existing national inventory from other uranium enrichment plants.

CANT submits that the issue should be addressed in a generic environmental impact statement by the NRC and the Department of Energy (DOE). Contention W is supported by an affidavit from Arjun Makhijani, Ph.D. Dr. Makhijani is

president of the Institute for Energy and Environmental Research and claims expertise in the fields of nuclear engineering and atmospheric protection in relation to the stratospheric ozone layer.

Intervenor states that it has satisfied the late-filed contention standard. It relies on that part of 10 C.F.R. § 2.714(b)(2)(iii) which provides that:

> On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

CANT asserts that the contention satisfies the above and the 10 C.F.R. § 2.714(a)(1)(i) good cause standard. It contends that the DEIS for the first time states that the NRC or LES has specifically identified the conversion of DUF_6 to U_3O_8 as the chosen means for the disposal of the DUF_6 tails at the CEC.

CANT stated that the DEIS differs from the data and conclusions in Applicant's document. It asserts that in the Environmental Report (ER) LES states that it is still hopeful to sell the tails but is vague as to the means of disposal if they are unmarketable. CANT quotes from the ER that "UF_6 conversion and disposal options will vary," will be "accomplished elsewhere," and will involve conversion to "a

stable, non-volatile uranium compound prior to disposal." ER 4.4.2.7 Disposal, at 4.4-11 (October 1993).

Intervenor states that the preparation of the contention required it to obtain expert assistance from Dr. Makhijani who was not available to CANT until after the winter holidays. The contention was said to be filed as soon as possible after Dr. Makhijani became available.

CANT alleges as to factor (ii) there is no other means by which CANT's interest can be protected because it is the only proceeding in which the environmental impacts of the CEC will be considered under NEPA.

It asserts as to factor (iii) Intervenor's participation can be expected to aid in the development of a sound record with regard to this issue. It will rely on the asserted expertise of Dr. Makhijani in this area.

As to factor (iv) it states it is the only citizen intervenor group admitted in the proceeding and that there is no other party to represent its interest.

It acknowledges under factor (v) that admission of the contention may broaden the issues and delay the conclusion but it does not expect it will be in a significant manner. It points to Contention B which challenges the adequacy of LES' decommissioning cost estimates. CANT asserts that the scope of that contention necessarily includes factual issues raised by Contention W regarding the cost of the DUF_6 conversion and disposal so that the admission of the subject contention will

not broaden the factual aspects. It would introduce a new legal issue.

Intervenor contends that the factors weigh in favor of admission.

Applicant's Position

LES asserts that Contention W is a comment on the DEIS and should be incorporated in the comment process. It also claims that in light of the comment process the filing of a contention is premature. Applicant states that if Intervenor's comment is not incorporated in the Final Environmental Impact Statement (FEIS) or if it is not resolved to Intervenor's satisfaction, CANT can pursue the matter at a later time. Applicant concedes that additional discussion of environmental effects of DUF_6 disposition would be appropriate in the FEIS.

LES notes that the precise mode of decommissioning and DUF_6 disposal has not been determined by regulation and that applicant's plans on DUF_6 disposition have changed over time. It has addressed possible methodologies and costs of disposal and has revised its decommissioning cost estimates to accommodate conversion to U_3O_8 and disposal at a burial facility. Applicant has not adopted a prescriptive position and considers it to be premature to expend resources analyzing a position, until one of the many viable options is determined to be the proper course to pursue. Applicant contends that this determination may not be feasible until well after the

license is issued and in the interim only a general discussion of the environmental impact of DUF_6 disposal is reasonable and necessary.

Applicant denies the need for a generic EIS considering that the application involves the NRC licensing of a single facility.

Staff's Position

Staff states that it intends to respond to CANT's assertions in the FEIS but opposes the acceptance of the contention.

Staff asserts that contrary to CANT's position that the ER never specifically identified to the public LES' proposed method for disposal of the DUF_6 tails, the ER does so.

Staff relies on ER 4.4.4.1 Decommissioning Costs, Tails Disposal at 4.4-16. It estimates the annual tails disposal costs, which are based on converting UF_6 to U_3O_8, with subsequent disposal in a facility under cognizance of the NRC. The data regarding tails disposal first appeared in the tenth revision to the ER, dated May 1993. Staff claims that since May 1993 LES has specifically identified conversion of DUF_6 to U_3O_8 as the chosen means for disposing of the DUF_6 tails at the CEC.

Staff contends that the DEIS does not contain any data or conclusion regarding conversion and disposal of DUF_6 that differs significantly from the data or conclusions that have

been in the Applicant's environmental report since May 1993. It contends that there is no good cause for CANT's failure to raise its challenge earlier in the proceeding and that the late filed contention should be rejected pursuant to 10 C.F.R. § 2.714(a)(1).

Staff contends that the five factors to be considered weigh against entertaining the contention. It asserts as to factor (i) CANT has not shown why the information that was available much earlier in the ER could not have been acted on previously. Staff concedes that factors (ii) and (iv) may favor admitting the contention but like factor (i), factors (iii) and (v) weigh in favor of rejecting the contention. As to (iii) it argues that testimony on the inadequacy of the DEIS would be of no value because the FEIS will be the basis of Staff's environmental finding. Staff does not consider factor (v) to support CANT because it alleges that the factual matters of concern are within the scope of an already admitted contention.

Staff asserts that the matter of LES providing financial assurance for tails disposition has already been admitted as part of Contention B, Decommissioning Plan Deficiencies, so that there is no reason to admit the issue for litigation as a separate contention. LBP-91-41, 34 NRC at 336-37.

CANT's Reply

CANT responds to the LES argument that raising the issues by way of a contention is premature by stating that the regulations and case law mandate that contentions be filed at the earliest possible time. It cites in support *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989). Intervenor seeks consideration of the contention now and not after the issuance of the FEIS.

CANT reiterates that the ER at 4.4.2.7 Disposal makes no reference to the conversion of DUF_6 to U_3O_8, vaguely noting that DUF_6 will be converted to a stable, non-volatile uranium compound. It argues that Staff's reference to the conversion of DUF_6 to U_3O_8 elsewhere in the ER is buried in a separate section, ER 4.4.4.1 Decommissioning Costs, Tails Disposal at 4.4-16. It states that CANT cannot be expected to hunt through the application for hidden evidence that LES has chosen a specific tails disposition strategy, when LES has not stated that choice in the section where its plans for tails disposal are supposed to be identified. CANT stands by its position that the DEIS first apprised CANT of LES' selection of a disposal method that would convert DUF_6 to U_3O_8.

CANT notes that Contention W extends beyond the issue of the financial costs of tails disposal and therefore contrary to Staff's assertion Contention W is not completely embraced in the scope of admitted issues in Contention B. CANT seeks a

ruling from the Licensing Board that the broader issues in Contention W are admitted as well as a determination that the cost issue is already admitted.

Discussion And Conclusion

The DEIS dated November 1993 is the first document that unambiguously states what the disposition of the tails will be. "The removal and disposition of the depleted UF_6 (DUF_6) generated at CEC will involve the conversion of DUF_6 to triuranium octoxide (U_3O_8) prior to disposal."

Applicant's ER in the paragraph relating to disposal is noncommittal as to the method that will be employed. It speaks in terms of the possibility of the sale of the tails, by LES, that its conversion and disposal options vary and that the UF_6 will be converted to an unspecified stable non-volatile uranium compound. ER 4.4.2.7 Disposal.

The tenth change made to the ER in May 1993 as to decommissioning costs does not establish, as the DEIS does, that the UF_6 will be converted by LES to U_3O_8. Although ER at 4.4.4.1 Decommissioning Costs provides under Tails Disposal that the decommissioning costs are based on the conversion of UF_6 to U_3O_8 it does not state that LES had selected that process for disposal.

The above description of the decommissioning falls under ER 4.4.4 DECOMMISSIONING COSTS AND FUNDING, at 4.4-14. It specifies that the section provides an estimation on

decommissioning costs and is made to assure funding is available to cover the costs.

When one considers that the NRC has no regulatory requirement that there must be a concrete plan for the disposal of the depleted uranium, and that the applicable regulations only require that an applicant have a plausible strategy for the disposition of depleted uranium decommissioning,[1] it is not at all clear that in basing its estimate of decommissioning costs on the conversion to U_3O_8, LES had prescriptively selected that method for disposal as the DEIS states.

We find that the DEIS on the issue of tails disposal contains data and conclusions that differ significantly from those in the ER and that under 10 C.F.R. § 2.714(b)(2)(iii) Intervenor is authorized to file a new contention which it has done.

The right afforded under § 2.714(b)(2)(iii) to file a contention regarding the DEIS is not conditional. CANT can both file a contention and comment on the NRC impact statement. The information which underlies its contention is presently available and CANT has the regulatory authority to proceed. The argument that Intervenor should await the issuance of the FEIS before taking action is without merit. Intervenor need not waive its right to file a contention on the DEIS.

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[1] LBP-91-41, 34 NRC at 337-38.

Intervenor would be acting at its peril had it chosen to await the filing of the FEIS.

We weigh the five factors in 10 C.F.R. § 2.714(a)(1) to determine whether the contention should be entertained in Intervenor's favor.

(i) CANT had good cause for failure to file on time. The information that forms the basis of the contention first became available in the DEIS, dated November 1993. CANT stated that it needed to employ the expertise of Dr. Makhijani to prepare the contention and was not available during the winter holidays. The contention was filed on January 18, 1993. The time taken from when the document became available to the time of filing was not unreasonable. We find that it was a prompt submittal.

(ii) We weigh factor (ii) in CANT's favor. There are no assured other means whereby Intervenor's interest will be protected. Commenting on the DEIS is an alternative but the determination of the matters raised would be in the hands of another party to this proceeding.

(iii) Petitioner's participation may reasonably be expected to assist in developing a sound record. CANT will rely on a witness it considers to have expertise on the issue it has raised on the DEIS. Intervenor has acted knowledgeably and responsibly in the time that this proceeding has been underway and it is expected it will continue to do so on the subject issue.

(iv) This factor must also be weighed in favor of CANT. CANT is the only intervenor in opposition to the application and there is no other party that will represent its interest.

(v) Petitioner's participation may somewhat broaden the issues and delay the proceeding but not in any material way. Staff asserts that it will respond to CANT's concerns in the FEIS and if that satisfies the Intervenor there will be a negligible effect on the proceeding.

There is an area common to Contention W where CANT questions the basis for NRC's cost estimate for tails disposal and admitted Contention B where CANT's objection is that LES provides no details on how its decommissioning costs were determined. The data developed to respond to Contention B might also apply to Contention W and that would limit the broadening effect of admitting Contention W.

Contention W does raise the issue of the environmental impacts of the conversion of DUF_6 to U_3O_8 which has a broadening effect. However, the hearing on environmental issues is not due to start until December 27, 1994. The issue should not delay the start of the hearing nor should it significantly extend the hearing itself. Factor (v) does not present any real negative to accepting the contention for consideration.

The weight of the five factors requires entertaining the contention as provided under 10 C.F.R. § 2.714(a)(1).

We find that Contention W satisfies the requirements of 10 C.F.R. § 2.714(b)(2) except to the extent the contention asserts "the NRC, in consultation with the Department of Energy, should be required to evaluate those impacts [of adding to the national inventory of DUF_6 tails] before LES can be licensed to produce more DUF_6."

As its basis for the foregoing CANT asserts the LES proposal would add 10,000 tonnes of DUF_6 tails to an existing inventory of 500,000 tonnes. CANT submits that the issue should be addressed in a generic environmental impact statement by the NRC and the DOE.

In its answer LES asserts that the effect will be nil. CANT does not respond to this in its response.

While the environmental effects of adding 10,000 tonnes of DUF_6 to the national inventory are a legitimate area of concern, our mandate in hearing this license application is not to solve any problem that the national inventory of DUF_6 tails may present. The request for a generic environmental impact statement is without merit and will not be considered. What is required is an environmental impact statement that is specific to CEC. It is the responsibility of the NRC to prepare the statement. The Licensing Board knows of no requirement that it prepare its statement with any other governmental entity. It is expected that Staff will have complied with 10 C.F.R. §§ 51.26 and 51.74 for exchanging comments with other federal agencies.

Order

Based upon the foregoing it is hereby Ordered that Contention W is admitted to the extent described.

THE ATOMIC SAFETY AND
LICENSING BOARD

Morton B. Margulies, Chairman
CHIEF ADMINISTRATIVE LAW JUDGE

Richard F. Cole
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Bethesda, Maryland

April 5, 1994

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

LOUISIANA ENERGY SERVICES, L.P.

(Claiborne Enrichment Center
SNM License)

Docket No.(s) 70-3070-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O (LBP-94-11) DTD 4/5/94 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Docket No.(s)70-3070-ML
LB M&O (LBP-94-11) DTD 4/5/94

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Dated at Rockville, Md. this
6 day of April 1994

Office of the Secretary of the Commission