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USNRCUNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARDOFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:

Louisiana Energy Services, L.P.

(National Enrichment Facility)

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Docket No. 70-3103-ML

ASLBP No. 04-826-01-ML

ANSWER OF LOUISIANA ENERGY SERVICES, L.P. TO MOTION
ON BEHALF OF NUCLEAR INFORMATION AND RESOURCE SERVICE
AND PUBLIC CITIZEN TO AMEND AND SUPPLEMENT CONTENTIONSI. INTRODUCTION

On October 20, 2004, Nuclear Information and Resource Service and Public Citizen ("NIRS/PC" or "Intervenors") filed a motion to amend and supplement certain admitted NIRS/PC contentions, purportedly based on the availability of new information¹. In accordance with the General Schedule established by the Atomic Safety and Licensing Board ("Licensing Board") by order dated August 16, 2004, LES herein responds to the NIRS/PC motion to amend and supplement contentions.² For the reasons discussed below, LES opposes the admission of all amended contentions proffered by NIRS/PC in their October 20 motion.

¹ "Motion on Behalf of Petitioners Nuclear Information and Resource Service and Public Citizen to Amend and Supplement Contentions," dated October 20, 2004 ("Motion to Amend").

² Memorandum and Order (Memorializing and Ruling on Matters Raised in Conjunction with August 3, 2004 Conference Call and Setting General Schedule for Proceeding), App. A (General Schedule – Louisiana Energy Services, L.P. Proceeding) (Aug. 16, 2004).

II. DISCUSSION

A. Legal Standards for Late-Filed Contentions

In determining whether an amended or late-filed contention should be considered, the Licensing Board must consider the following factors, as set forth in 10 C.F.R. § 2.309(c)(1)(i)-(viii):

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/petitioner's may reasonably be expected to assist in developing a sound record.

It is well-established that the first factor, good cause for lateness, carries the most weight in the balancing test. *See State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 295 (1993). Absent a showing of good cause, a petitioner must make a compelling showing that the remaining factors outweigh the lack of good cause for the untimely filing. *Id.*; *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). The petitioner, as the proponent of the admission of its late-filed contentions, bears the burden of demonstrating that a balancing of these factors weighs in favor

of their admission. *Cf. Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69 (1992).

Petitioners also must address the related criteria set forth in Section 2.309(f)(2). This provision codifies the longstanding principle that contentions must be based on documents or other information available *at the time the petition is filed*, such as the application, supporting safety analysis report, environmental report, or other supporting document filed by an applicant. *See* 10 C.F.R. § 2.309(f)(2). With respect to issues arising under the National Environmental Policy Act (“NEPA”), Section 2.309(f)(2) specifically provides that “the petitioner shall file contentions *based on the applicant’s environmental report*.” *Id.* (emphasis added). The petitioner may amend those contentions or file new contentions only “if there are data or conclusions in the NRC draft or final environmental impact statement [“EIS”], environmental assessment, or any supplements relating thereto, *that differ significantly from the data or conclusions in the applicant’s documents*.” *Id.* (emphasis added). Otherwise, Section 2.309(f)(2) further states:

[C]ontentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that:

- (i) The information upon which the amended or new contention is based was *not previously available*;
- (ii) The information upon which the amended or new contention is based is *materially different than information previously available*; and
- (iii) The amended or new contention has been submitted in a *timely fashion* based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2)(i)-(iii) (emphasis added).

Where a contention is based upon the publication of a licensing-related document (such as a final EIS), it is well established that the institutional unavailability of the document

does not alone establish good cause for filing a contention late if information was publicly available early enough to provide the basis for the timely filing of that contention. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983). Thus, it has been held that where a contention purportedly is based on the existence of a document recently made publicly available, an important consideration in assessing good cause for lateness is the extent to which the contention could have been submitted prior to the document's availability. See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n.4 (1983); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 292 (1998). A petitioner has "an ironclad obligation" to examine the application, and other publicly available documents, with sufficient care to uncover any information that could serve as the foundation for a contention. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-43, 50 NRC 306, 313.

Finally, in seeking admission of an amended or late-filed contention, a petitioner also must meet the requirements for setting forth a valid, admissible contention. In accordance with 10 C.F.R. § 2.309(f)(1), a petitioner must provide:

- (i) a specific statement of the issue of law or fact to be raised or controverted;
- (ii) a brief explanation of the basis for the contention;
- (iii) a demonstration that the issue raised in the contention is within the scope of the proceeding;
- (iv) a demonstration that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

- (v) a concise statement of the alleged facts or expert opinions which support the 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 petitioner intends to rely to support its position on the issue; and
- (vi) sufficient information to show that a genuine dispute exists with the applicant 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 C.F.R. § 2.309(f)(1). These standards, and related Commission jurisprudence, are discussed in more detail in the Licensing Board's July 19, 2004 ruling in this proceeding. *See Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC ____ (July 19, 2004), slip op. at 10-15.

B. Admissibility of Contentions as Amended by NIRS/PC

NIRS/PC seek to amend seven of their eight admitted contentions "to account for recent developments." Motion to Amend at 2. In this regard, NIRS/PC proffer new bases that are predicated, in some instances, on information gathered through the discovery process (*i.e.*, document production and depositions). In other cases, NIRS/PC claim that the issuance of new documents provides a basis for amending their contentions. These documents include (1) the Department of Energy's ("DOE") final EISs concerning proposed deconversion facilities to be constructed at Paducah, Kentucky and Portsmouth, Ohio, and (2) the NRC Staff's Draft Environmental Impact Statement for LES's proposed National Enrichment Facility ("NEF").³

³ NUREG-1790, *Environmental Impact Statement for the Proposed National Enrichment Facility – Draft Report for Comment*, Lea County, New Mexico, Docket No. 70-3103, Louisiana Energy Services L.P., NRC/NMSS (Sept. 2004) ("NUREG-1790" or "DEIS").

LES discusses the amended contentions. For the reasons set forth below, LES opposes admission of all amended contentions proposed by NIRS/PC. In short, the amended contentions fail to meet the late-filing criteria and/or the general contention-admissibility standards set forth in 10 C.F.R. §§ 2.309(c) and 2.309(f).

1. Contention NIRS/PC EC-1 – Impacts Upon Ground and Surface Water

As admitted by the Licensing Board, Contention NIRS/PC EC-1 states as follows:

Petitioners contend that the Environmental Report contained in the application does not contain a complete or adequate assessment of the potential environmental impacts of the proposed project on ground and surface water, contrary to the requirements of 10 C.F.R. 51.45.

NIRS/PC seek to amend the contention to also read as follows:

The Draft Environmental Impact Statement, NUREG-1790 (September 2004) ("DEIS") does not contain a complete or adequate assessment of the potential environmental impacts of the proposed project on ground and surface water, contrary to the requirements of 10 CFR Part 51.

Motion to Amend at 3-4. In support of the proposed amendment, NIRS/PC introduce nine new bases, A through I, which are discussed below.

a. Late-Filed Basis A

Citing the DEIS, NIRS/PC assert that "[t]here is a geologic fault about one mile east of the proposed NEF site," *i.e.*, at the neighboring Waste Control Specialists, LLC ("WCS") disposal facility site, and that the "NRC has not examined the potential effect of this fault on groundwater flow and contaminant transport." Motion to Amend at 4. NIRS/PC claim that information about this fault – which is believed to be about 135 million years old and inactive⁴ –

⁴ See NUREG-1790, at 3-26. In its DEIS, the Staff also states that the WCS fault has had no observable effect on the overlying Cretaceous Antlers Formation or the Caprock caliche." *Id.* Needless to say, any water discharged at the ground surface would have to pass through these formations before it could even reach the Triassic "red beds" in which the WCS fault is located.

emerged at the September 17, 2004, deposition of George Harper, witness for LES.” *Id.* As discussed further below, the only information presented by NIRS/PC in support of this basis are two statements extracted from the transcript of the depositions of Mr. Harper and another LES witness, Roger Peery.

Before addressing the specific information advanced by NIRS/PC in support of their basis, LES responds to the claim that information regarding the WCS fault first emerged during the September 17, 2004 depositions of Mr. Harper and Mr. Peery. This claim is untrue. To begin with, the existence of the WCS fault referenced in the DEIS was disclosed to the public as early as June 29, 2004, in an NRC meeting summary memorandum, which describes, among other things, a visit to the WCS site made by NRC Staff, LES, and WCS personnel.⁵ Notably, the NRC sent copies of this memorandum to NIRS Executive Director Michael Marriotte and NIRS/PC counsel Lindsay Lovejoy. The meeting summary attached to the memorandum specifically states that the participants viewed “the recently discovered earthquake fault located on the property operated by WCS.” July 29, 2004 NRC Memorandum, Attach. at 2. Indeed, a figure attached to the memorandum (Figure 2.0) provides pictures taken during the site visit of the fault excavation pit and the fault itself. The meeting summary further indicates that “several leading geologists and other scientists have viewed the site to determine the nature and origin of the earthquake fault,” and that upon completion of the fault mapping and photographs, a report prepared by WCS contractors would be “delivered [to the NRC] in the August 2004 time

⁵ See Memorandum from H. Graves to J. Giitter, “May 27-28, 2004, Meeting Summary: Louisiana Energy Services In-Office Review, Hobbs, New Mexico and Site Visit, Eunice, New Mexico,” dated June 29, 2004 (“July 29, 2004 NRC Memorandum”). See <http://www.nrc.gov/materials/fuel-cycle-fac/ml042040279.pdf>.

frame.”⁶ *Id.* The WCS report⁷ was, indeed, provided to the NRC on August 31, 2004, as Enclosure 2 (“Waste Control Specialists Fault Investigations”) to NEF #04-035, “Clarifying Information Related to External Hazards Analyses,” dated August 31, 2004 (ADAMS accession no. ML042540145).”⁸

Moreover, as NIRS/PC readily acknowledge, the NRC Staff’s DEIS discusses the WCS fault, (Motion to Amend at 4), and even references the June 29, 2004 meeting summary and related WCS documentation. *See* NUREG-1790, at 3-26, 3-75, 3-78. The Licensing Board and all parties, including NIRS/PC, were alerted to the on-line availability of the DEIS by Staff counsel on September 3, 2004, and received a copy of the DEIS via mail or hand delivery only days later.⁹ Contrary to the claim of NIRS/PC, information about the fault thus emerged well before the September 17, 2004, deposition of George Harper.

Finally, during the September 17, 2004 depositions, LES witnesses George Harper and Rod Krich conveyed to counsel for NIRS/PC that the WCS fault investigation report

⁶ A subsequent NRC meeting summary dated July 6, 2004, of which Mr. Marriotte and Mr. Lovejoy also received a copy, refers to “the opportunity NRC and contractor staff had for observing an earthquake fault near the [WCS] site.” *See* Memorandum from T. Johnson to J. Giitter, “June 24, 2004, Meeting Summary: Louisiana Energy Services Quarterly Management Meeting,” dated July 6, 2004, Attach. at 1 (ADAMS accession no. ML042540145). *See also* <http://www.nrc.gov/materials/fuel-cycle-fac/ml041890291.pdf>.

⁷ Section VI Geology Report, Chapter 4.0 (“Active and Inactive Geologic Processes”), Revision 0, prepared by Cook-Joyce, Inc. and Interra, Inc. for Waste Control Specialists, LLC, dated August 6, 2004 (“WCS Fault Investigation Report”).

⁸ LES identified NEF #04-035 as a publicly available document in its September 2, 2004 initial mandatory disclosures, albeit in connection with the natural gas contention, prior to its release by the NRC. *See* Letter from J. Curtiss (LES) to L. Lovejoy (NIRS/PC), dated September 2, 2004, Attach. C, at 9.

⁹ *See* E-mail from L. Clark (Counsel for NRC Staff) to Licensing Board and Counsel for all Parties, “Subject: LES Draft Environmental Impact Statement,” dated September 3, 2004.

had been submitted to the NRC at the end of August and would appear in ADAMS. Harper-Peery Dep. Tr. 91 (Sept. 17, 2004). According to ADAMS, this document was released to the public on September 20, 2004, three days after the deposition discussed above. Also, the NRC Staff included NEF #04-035 in its September 29, 2004 update of the hearing file for this proceeding.¹⁰

This chronology of events is significant, in that it suggests that NIRS/PC should have learned of the existence of the WCS fault in the early July timeframe (*i.e.*, when they presumably received the June 29 and July 6, 2004 NRC meeting summary memoranda on which they were copied). Moreover, it indicates that NIRS/PC had ready access to the WCS report (and related NRC documentation) *at least* a month before the late-filed contention deadline of October 20, 2004. It is well-established that “[h]earing petitioners have an ‘ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover *any information that could serve as the foundation for a specific contention.*’” *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002) (citing Final Rule, “Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process,” 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989)) (emphasis added). These facts call into question the timeliness of late-filed Basis A. At the very least, NIRS/PC cannot claim that they lacked access to sufficient information about the WCS fault on which to base an adequately supported late-filed contention or basis.

¹⁰ See Letter from A. Coggins (Counsel for NRC Staff) to Administrative Judges (regarding update of Hearing File), dated September 29, 2004 (served on all parties electronically via e-mail). NEF #04-035 is listed as Document No. 194 in the Hearing File Index.

Had NIRS/PC obtained and reviewed the WCS Fault Investigation Report in the late-September timeframe, when it became publicly available, they would have discovered that the WCS fault is not a “fast flow path.” Namely, fault investigators performed detailed geologic mapping “focused on geologic contacts and distinguishable geologic features, including faults, joints, slickensides, bedding planes, partings, channels, alteration and weathering zones.” WCS Fault Investigation Report, at 4-6. A detailed discussion of their findings is found in the report. Significantly, the investigators concluded:

Therefore, there are no indications that the Cretaceous-aged Antlers Formation was affected by the faulting in the Triassic red beds. There are clearly no geologic Formations present in the excavation younger than Triassic that are affected by faulting and there are no regulatory issues related to faulting at the WCS site. Additionally, there are no issues with respect to potential migration pathways resulting from the faulting at the WCS site. The uppermost faulting occurred completely within the Triassic red beds; which have great capacity for healing and closing fault planes and joints to fluid migration as indicated by the limited penetration of the alteration front in the red beds.

Id. at 4-11.

Basis A provides nothing to substantively challenge these assessments, and therefore, does not establish any genuine, litigable issue. To support this basis, NIRS/PC rely solely on two statements, made by individuals associated with LES. Specifically, NIRS/PC declare that an LES contractor “stated that the [WCS] fault passes beneath the [NEF] site,” and that “LES’s expert witness, Roger Peery, stated that a fault can constitute a fast flow path.” Motion to Amend at 4. Aside from these statements, NIRS/PC offer no other supporting information. As explained below, the two statements are wholly unrelated and taken out of context.

The first statement identified by NIRS/PC appears in an April 6, 2004 document provided to NIRS/PC during discovery.¹¹ In that document, an employee of LES contractor GL Environmental, Inc. queried whether LES needed to provide “information on the fault under NEF” in a groundwater discharge permit application to be filed with the State of New Mexico. The individual making the statement lacked expertise in geology, as well as specific, detailed knowledge of the WCS fault. In fact, when questioned about the GL Environmental statement, LES expert witness George Harper promptly clarified that, in referring to “the fault under NEF,” GL Environmental had “not properly characterized” the WCS fault. Harper-Peery Dep. Tr. 89. NIRS/PC do not acknowledge this fact. Moreover, the WCS Fault Investigation Report does not indicate that the fault passes below the NEF site.

The second statement relied upon by NIRS/PC was made in response to a hypothetical question posed by counsel for NIRS/PC. Specifically, counsel for NIRS/PC asked LES witness Roger Peery whether he would consider “a fault line to be at least *potentially* a fast-flow path.” Harper-Peery Dep. Tr. 100 (emphasis added). Mr. Peery responded: “Potentially. Faults can be – faults can create fracturing, but faults can also create gouge within the fault itself, making it a low-permeable barrier as well.” *Id.* Mr. Peery, in other words, was speaking in hypothetical terms in response to a hypothetical question – without reference to, or any specific knowledge of, the WCS fault.

¹¹ See Attachment to April 6, 2004 E-mail from D. Gallegos (GL Environmental) to G. Harper (LES), “GL Environmental, Inc. – Comments on New Mexico Groundwater Discharge Permit” (LES-0010 to LES-00123) (Harper-Peery Dep. Tr., Exhibit NIRS-HP-10).

At bottom, NIRS/PC strive to create the *appearance* of a factual dispute by juxtaposing two unrelated statements plucked from their respective contexts. Intervenor provide no independent supporting factual information or expert opinion to support their assertion that the NRC should examine the potential effect of the WCS fault on groundwater flow and contaminant transport at the WCS site. However, “neither mere speculation nor bare assertions alleging that a matter should be considered will suffice to allow the admission of a proffered contention.” *Louisiana Energy Services.*, LBP-04-14, slip. op. at 12-13 (citing *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203) (2003)). The intervenor “must provide documents or other factual information or expert opinion that set forth the necessary technical analysis to show why the proffered bases support its contention.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 180, *aff’d on other grounds*, CLI-98-13, 48 NRC 26 (1998) (citations omitted). Though NIRS/PC claim that their new bases are “[b]ased upon studies by an expert hydrologist” (Motion to Amend at 4), they provide no such information (*e.g.*, analyses of fluid migration through fault or fault-related structures in the site vicinity or region or in comparable geologic strata). NIRS/PC thus have failed to meet their burden. In short, Basis A is illusory. NIRS/PC have furnished no credible basis for the assertion that the WCS fault could affect groundwater flow and contaminant transport at the NEF site, and therefore have not demonstrated a genuine dispute.

In sum, to the extent Basis A is not untimely, it nonetheless lacks adequate support, in the form of factual information or expert opinion, to establish a genuine dispute of material fact. This is particularly evident in view of the contrary data and conclusions expressed

in the WCS report, a document which was available to NIRS/PC before the deadline for filing late-filed contentions.

b. Late-Filed Basis B

In late-filed Basis B, NIRS/PC allege another omission from the NRC Staff's DEIS. Specifically, NIRS/PC assert that the "NRC has not investigated the potential effect of □ earthquakes on flow and transport, for example, formation of faults or fractures that may act as fast flow paths." Motion to Amend at 4. In support of this basis, NIRS/PC state that "earthquakes sometimes occur in the vicinity of the proposed NEF site" (*Id.*), and that in 1992, a magnitude 5.0 earthquake occurred, centered 11.0 miles from the site." *Id.* They provide no other supporting reasons for their belief that this issue could affect the proposed enrichment facility and should be litigated in this proceeding.

Late-filed Basis B is deficient in two respects. First, NIRS/PC make no showing that the basis is based on new information that is materially different from information that was available to them in April 2004, when they petitioned to intervene in this proceeding. Section 3.3.3.1 of Revision 0 (December 2003) of the NEF Environmental Report ("ER") contained a discussion of the seismic history of the region and vicinity. ER (Rev. 0, Dec. 2003) at 3.3-7 to 3.3-8. That version of the application included Figure 3.3-8, "Seismicity Map for 322-kilometer (200-Mile) Radius of the NEF Site," which indicates the location of earthquakes which have occurred within a 322 km (200 mi) radius of the NEF site. It also included Table 3.3-8, "Seismicity in the Immediate Vicinity of the Site" (reflecting the year and approximate magnitude of earthquakes within about 97 kilometers (60 miles) of the NEF site). In addition, Revision 0 of the application indicated that a magnitude 5.0 earthquake occurred about 10 miles southwest of the site on January 2, 1992. See ER (Rev. 0, Dec. 2003) at 3.3-9; ER Tables 3.3-3,

3.3-4, and 3.3-7. Although Revision 2 (July 2004) of the ER provides some supplemental publicly available information in Tables 3.3-3 and 3.3-4 (*e.g.*, focal depth, magnitude type, and epicentral distance), the information relied upon by NIRS/PC in late-filed Basis B (*i.e.*, the historical occurrence of earthquakes in the vicinity of the proposed NEF, including the 1992 earthquake and its magnitude and distance) was previously available. As such, Basis B is untimely.

Second, NIRS/PC provide no factual information or expert opinion to suggest, let alone establish, that there is any nexus between the historical occurrence of earthquakes “in the vicinity of the proposed NEF site” and groundwater flow at the proposed site. Intervenor, without any explanation, conclude that earthquakes that *might* occur in the site vicinity *might* cause faults or fractures, which, in turn, *might* act as “fast flow paths.” There is no technical information or analysis offered to lend credence to this highly attenuated causal chain, or to “connect the dots” (*i.e.*, to establish relevance to the facility at issue). In this regard, NIRS/PC provide no discussion of such factors as earthquake depth, distance, magnitude, or the manner in which such earthquakes could induce, in the hydrogeologically important units underlying the proposed site, faults or fractures conducive to enhanced fluid flow. As this Licensing Board has made clear, “[f]ailure to provide such an explanation regarding the bases of a proffered contention requires the contention to be rejected.” LBP-04-14, slip op. at 12 (citing *Arizona Public Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991)).

c. Late-Filed Basis C

In this basis, NIRS/PC challenge certain groundwater flow projections presented by the NRC Staff in the DEIS. According to NIRS/PC, the DEIS “correctly notes that leakage

from the stormwater detention basin and the septic leach fields will probably cause formation of perched bodies of groundwater at the alluvium/Chinle interface.” Motion to Amend at 4.¹² Characterizing the Staff’s projections as “estimates of the dimensions of such water bodies, flow rates, and discharge areas,” NIRS/PC assert that, because “NRC provides no explanation of such calculations, [] it is not possible to determine whether they are reasonable.” *Id.*

This late-filed basis fails for lack of sufficient supporting information to establish a genuine dispute. NIRS/PC neither explain why they cannot evaluate the reasonableness of the Staff’s estimates, nor offer any insights into what would constitute “reasonable estimates” in view of the information provided in the ER and DEIS. Moreover, NIRS/PC in no way attempt to controvert the Staff’s specific assertion that its estimate is “conservative” in that it “assumes all of the infiltrating water is transported downgradient,” despite the Staff’s own observation that “the water can be expected to have limited downgradient transport because of the storage capacity of the soils and the upward flux to the root zone [due to high evapotranspiration rates].” NUREG-1790 at 4-13, 4-14. Finally, NIRS/PC fail to explain why any purported deficiency in the Staff’s estimates of the “dimensions of such water bodies, flow rates, and discharge areas” would be of consequence. The DEIS states that any “stormwater” plume would not be expected to contain contaminants (any oil and grease “would readily absorb into the soil”), and that any “septic system” septic plume would comprise only sanitary wastewater meeting required levels for all contaminants stipulated in the NEF’s New Mexico groundwater discharge permit.

Thus, NIRS/PC merely *assume* that the Staff’s estimates may be unreasonable, without challenging specific substantive assumptions associated with the estimates, or explaining

¹² In reality, the DEIS states that water seeping into the ground from the Stormwater detention basin and septic systems “*would be expected* to form a perched layer on the top

why the issue raised in the late-filed basis is material to the findings the NRC must make on the application. See 10 C.F.R. § 2.309(f)(1)(iv), (iv). Such a negative contention cannot be admissible.

d. Late-Filed Basis D

In Basis D NIRS/PC assert that the DEIS should: (1) contain an estimate of the probability and frequency of leakage through the liners of the treated effluent and stormwater detention basins, and (2) show the fate of water and contaminants that leak from these basins. Motion to Amend at 4-5. NIRS/PC claim that such information is warranted given that the basins are to be lined with geosynthetic materials, and that “such liners are known to leak.” In support of this assertion, NIRS/PC cite an EPA document entitled “Hydrologic Evaluation of Landfill Performance (HELP) Model, User’s Guide for Version 3,” EPA/600/R-94/168a (Sept. 1994). LES opposes admission of late-filed Basis D on the grounds that it is untimely and lacks adequate factual or expert support.

In its December 2003 license application, LES indicated that the Treated Effluent Evaporative Basin will include a double membrane liner and an active liquid-sensor leak detection system, and explained that the Uranium Byproduct Cylinder Storage Pad Stormwater Retention Basin is designed with a single membrane lining (synthetic fiber with soil cover), and without an outfall, to preclude any infiltration into the ground. ER (Rev. 0, Dec. 2003) at 3.4-6 to 3.4-7, 4.4-4.¹³ Notwithstanding, in its original contentions NIRS/PC did not challenge the specific materials and construction methods to be used for those liners, nor did they raise any

of the highly permeable Chinle Formation clay.” NUREG-1790 at 4-13, 4-14 (emphasis added).

¹³ In their late-filed basis, NIRS/PC refer to “leakage through the liners of the treated effluent basin or the stormwater detention basin.” The latter is not a lined basin.

specific concerns relative to the integrity of the liners, *i.e.*, their susceptibility to leakage. Indeed, in its response to the NIRS/PC April 6, 2004 petition to intervene, LES correctly maintained that NIRS/PC failed to acknowledge any of the design-related information set forth in the ER, or to explain how the engineered basins will fail, leak, or otherwise be insufficient to capture facility effluents. Certainly the EPA document now cited was available in April 2004. At that time NIRS/PC simply averred, as they do again with respect to the DEIS, that the ER should show the fate of water and contaminants that leak from these basins. Accordingly, the issue of the “probability and frequency of leakage through the liners” should be rejected as untimely.

Irrespective of its timeliness, late-filed Basis D lacks adequate factual or expert support to establish a genuine dispute on a material issue of fact or law. As support for this basis, NIRS/PC merely refer to the EPA document, without providing any page citations. More importantly, they fail to explain how the document substantiates their assertion that “liners leak,” and why such leakage, given its “probability and frequency,” raises any significant environmental concerns. As the Licensing Board stated in its July 19, 2004 ruling on contention admissibility, “providing any material or document as a basis for a contention, without setting forth an explanation of its significance, is inadequate to support admission of the contention.” LBP-04-14, slip op. at 13 (citing *Fansteel*, CLI-03-13, 58 NRC at 205).

Furthermore, “any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny.” *Id.* (citation omitted). Actual examination of the EPA document cited by NIRS/PC reveals that it does not provide adequate support for Intervenor’s late-filed basis. The document is a user’s guide intended to explain how to use Version 3 of the Hydrologic Evaluation of Landfill Performance (HELP) computer program, “a quasi-two-dimensional hydrologic model of water movement

across, into, through and out of landfills.” It is “a tool for both designers and permit writers,” the “primary purpose [of which] is to assist in the comparison of design alternatives as judged by water balances.” The user’s guide discusses “data requirements, nomenclature, important assumptions and limitations, other fundamental information needed to run the program.” It also describes the procedures and options available to input data, execute the model, and obtain results. In other words, it is not a definitive study specific to the issue of leakage of geosynthetic liners.

Notably, the EPA user’s guide speaks in terms of “pinhole defects” generally resulting from manufacturing flaws such as polymerization deficiencies,” and notes that “[t]he density of pinholes and installation defects is a subject of speculation.” To the extent it provides “representative installation defect densities” for input purposes, it states that they are intended to be “reasonably conservative” so as to allow determination of “maximum probable leakage quantities.” The document also indicates that the density of installation defects is “a function of the quality of installation, testing, materials, surface preparation, equipment, and QA/QC program.”

On a related note, in now seeking to challenge the integrity of certain NEF engineered basins, NIRS/PC fail to controvert specific portions of the NEF application and DEIS that are clearly relevant to this issue. NIRS/PC make no mention of the numerous measures proposed by LES to control and monitor contaminant concentrations, to ensure liner/system integrity, and to mitigate any leaks, *assuming* they do occur. For example, LES has stated that the geosynthetic liner material will be chemically compatible with potential liquid effluents to be discharged to the TEEB, resistant to sunlight deterioration, and of sufficient thickness to have adequate tensile strength and tear and puncture resistance. See NEF #04-019, “Response to NRC

Request for Additional Information Regarding the National Enrichment Facility Environmental Report,” dated May 20, 2004, Attach. 1 at 7. Additionally, LES has committed to obtain pre-approval of liner material by a professional engineer and the New Mexico Environment Department (“NMED”), and to conduct site preparation for basin construction, both in accordance with the NMED’s “Guidelines for Liner Material and Site Preparation for Synthetically-Lined Lagoons.” *Id.* at 8. LES also has committed to implementation of a monitoring plan that consists of periodic inspections and implementation of corrective measures, if required. *Id.* at 9. Finally, LES has committed to installing two monitor wells downgradient of the site basins. *See* ER (Rev.2, July 2004) at 6.1-8. NIRS/PC conspicuously ignore these measures, resting, at bottom, on the simplistic assertion that “liners are known to leak.” In context, this is a plainly inadequate basis for a contention.

e. Late-Filed Basis E

Citing the DEIS, NIRS/PC state that there is a 100 foot-thick water-bearing sandstone layer at a depth of about 600 feet, and that the NRC has not answered basic questions about this water-bearing layer, including: (1) the extent to which it exists below the proposed site; (2) its hydraulic properties; (3) the quality of the water in the layer; and (4) its point(s) of discharge. Motion to Amend at 5.

As a pure claim of omission, this basis is insufficient. Indeed, it merely poses a series of questions, instead of presenting specific assertions that are supported by factual or expert support and which establish a genuine dispute. NIRS/PC make no effort to explain the specific relevance of the questions posed, and why these matters need to be addressed by the NRC. *See* 10 C.F.R. § 2.309(f)(1)(iv) (requiring a “demonstration that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in

the proceeding”). To the extent that NIRS/PC purport to rely on “studies by an expert hydrologist,” they fail to explain how those “studies” support this late-filed basis. An expert’s purported conclusion that the application or DEIS is deficient or inadequate in some respect is meaningless absent “a reasoned basis or explanation for the conclusion.” *Private Fuel Storage, L.L.C., supra*, 42 NRC at 181.

Furthermore, as stated in the DEIS, the water-bearing sandstone layer cited by NIRS/PC lies below hundreds of feet of low-permeability Chinle Formation clay. As the staff further explains, this clay has the effect of isolating the deep and shallow hydrologic systems below the site, which include the sandstone layer at 600 feet below ground surface. Thus, when viewed in the broader context of overall site hydrogeology and the NRC Staff’s NEPA’s analysis, the presence of the sandstone layer appears to be of little consequence.

f. Late-Filed Basis F

In late-filed Basis F, NIRS/PC assert the following:

According to the DEIS, “... no precipitation recharge (i.e., rainfall seeping deeply into the ground) occurs in thick, desert vadose zones with desert vegetation (Walvoord et al., 2002)” (DEIS at 3-35). However, cuttings from one of the borings drilled in September 2003 were “slightly moist” (ER Rev. 2 at 3.4-2). In addition, the clay at the bottom of boring B-2 was “moist” (SAR at Fig. 3.2-11). The DEIS should explain the presence of this moisture, which conflicts with its statements about lack of recharge.

Motion to Amend at 5. LES opposes admission of this late-filed basis on the grounds that it is untimely and fails to establish a genuine dispute on a material issue of fact or law. With respect to the issue of timeliness, it is clear that this basis is not drawn from previously unavailable and materially different information. In the DEIS, the NRC Staff, citing Walvoord et al., 2002, stated that “[f]ield investigations and computer modeling were used to show that no precipitation recharge (i.e., rainfall seeping deeply into the ground) occurs in thick, desert vadose zones with

desert vegetation.” NUREG-1790 at 3-35. The NRC Staff extracted this information directly from the ER, which states that: “Walvoord et al., 2002 (Walvoord, 2002) best describes the hydrologic conditions that occur in the shallow surface regime at the NEF site.” ER (Rev. O, Dec. 2003) at 3.4-4. In this regard, Revision 0 of the ER and the DEIS contain similar discussions of the analyses and conclusions presented in the Walvoord study. Significantly, NIRS/PC did not seek to challenge the validity of the ER or these conclusions. Therefore, this basis must be dismissed as untimely.

With respect to the presence of moisture in the soil borings, Revision 2 does not present “materially different” information. As reflected in their original contention, NIRS/PC were aware of “moisture” in the “B-2 boring.” As for the other boring cited by NIRS/PC in their late-filed basis, Revision 2 (July 2004) of the ER states: “Nine subsurface borings were drilled at the site in September 2003. Only one of the borings produced cuttings that were *slightly moist* at 1.8 m to 4.2 m (6 to 14 ft) below ground surface; other cuttings were very dry.” ER (Rev. 2, July 2004), at 3.4-2 (emphasis added). This disclosure of “slight” moisture in one of nine additional borings does not constitute materially different information or provide a basis for a new issue. The fact of the matter is that information was previously available on the potential presence of “slight” or residual “moisture” in the shallow site alluvium. Indeed, NIRS/PC were aware of this information, as reflected in Basis F of their original contention.¹⁴

Moreover, substantively speaking, NIRS/PC have not provided sufficient supporting information to establish a genuine dispute. They appear to equate the presence of slight moisture in shallow alluvial sediments (*i.e.*, at a depth of 6 to 14 feet below ground

¹⁴ Basis F of the original NIRS/PC contention noted that “the clay at the bottom of boring B-2 was described as “moist,” which NIRS/PC suggested “could be due to the presence of water in the alluvium.”

surface) with “recharge.” The Staff, by contrast, explicitly defines “recharge” as “rainfall seeping deeply into the ground.” NUREG-1790 at 3-35. NIRS/PC fail to explain why the sporadic presence of moisture at such shallow depths constitutes “recharge” or in any way contravenes the findings set forth in Walvoord et al., 2002, on which LES and the Staff rely in their respective environmental documents. Thus, there is not sufficient basis for a contention.

g. Late-Filed Basis G

In this basis, NIRS/PC complain that the NRC Staff’s assessment of the permeability of the Chinle Formation beneath the site is based on “extremely limited measurements.” Motion to Amend at 5. In this regard, they assert that, “where faults are present,” the Staff should “explain its reliance on such restricted data.” *Id.* Aside from this apparent allusion to the 135-million-year-old and inactive fault detected at the WCS site, NIRS/PC provide no other supporting information.

This basis also should be rejected for two reasons. First, it is not based on previously unavailable and materially different information. See 10 C.F.R. § 2.309(f)(2). This basis is essentially a restatement of a basis presented by NIRS/PC in their April 2004 intervention petition. There, citing the permeability measurements presented in ER Table 3.3-2, NIRS/PC posited that “[l]aboratory measurements often underestimate the bulk permeability of a rock body because they do not account for fractures and other features that act as fast flow paths.” NIRS/PC Petition to Intervene, at 23. The permeability issue hence is not a new one.

Second, NIRS/PC provide no factual or expert support whatsoever for the assumption that “faults are present” at the NEF site (and in the Chile Formation in particular). Nor do they seek to explain why such faults, assuming they are present at the site, would occur within the Chinle Formation and enhance the permeability of that formation. Like Basis B

above, which also speaks of “faults” and “fractures,” this basis strains credulity by relying on a chain of unsubstantiated assumptions. For that reason too, it must be rejected.

h. Late-Filed Basis H

In late-filed Basis H, NIRS/PC state, without providing any reference to the relevant section(s) of the DEIS, that the “DEIS does not state whether the perched zones at the alluvium/Chinle interface will be monitored, if at all.” Motion to Amend at 6. This statement constitutes the entirety of the basis. In other words, NIRS/PC make no attempt to explain why such monitoring is necessary, or where and how it should be conducted, or what specific support will be offered. The Licensing Board has reminded the parties to this proceeding that “neither speculation nor bare assertions alleging that a matter should be considered will suffice to allow the admission of a proffered contention.” LBP-04-14, slip op. at 12-13. Moreover, “if a petitioner neglects to provide the requisite support to its contentions, it is not within the Board’s power to make assumptions of fact that favor the petitioner, nor may the Board supply information that is lacking.” *Id.* at 13 (citations omitted). Furthermore, LES has specifically committed to conduct, at one well location, monitoring “in both the shallow sand and gravel layer on the top of the red bed and in the 70-m (230-ft.) groundwater zone.” ER (Rev. 2, July 2004), at 6.1-8. In view of foregoing, Basis H clearly fails to pass muster and should be rejected.

i. Late-Filed Basis I

In this basis, NIRS/PC allege that the DEIS neither adequately identifies “numerous contaminants” potentially present in discharges from the site stormwater detention basin, nor adequately explains the monitoring of such contaminants. Motion to Amend at 6. NIRS/PC add that, while LES has stated that the runoff will contain small amounts of oil and

grease typically found in runoff from paved roadways and parking areas, other contaminants may be present, such as PAHs, other organics such as aliphatic hydrocarbons and alcohols, and other contaminants from spills and accidents. *See id.* They support this assertion with references to two studies related to runoff from parking lots, highways, and construction sites. *See id.*

This late-filed basis can be rejected on two grounds. First and foremost, it is untimely insofar as NIRS/PC fail to make the showing required by Section 2.309(f)(2). The only arguably new piece of information at issue is a May 20, 2004 response of LES to an NRC request for additional information that asked LES to “provide any impacts to the surrounding land if the site stormwater retention basin overflows.” In its response, LES stated, among other things, that “[e]xcept for small amounts of oil and grease typically found in runoff from paved roadways and parking areas, the discharge is not expected to contain contaminants.” *See* NEF #04-019, “Response to NRC Request for Additional Information Regarding the National Enrichment Facility Environmental Report,” dated May 20, 2004, Attach. 1. This is the statement that NIRS/PC refers to in their late-filed basis. Obviously, this has been available since at least May 20, 2004.

Additionally, even the RAI response now relied upon by NIRS/PC contains no information previously unavailable or materially different from that contained in LES’s December 2003 application. Namely, ER Table 6.2-2, “Stormwater Monitoring Program for Detention and Retention Basins,” sets forth the various parameters to be monitored by LES (as well as the monitoring frequency, sample type, and lower limit of detection) with respect to stormwater detention basin discharges. These parameters include oil and grease, total suspended solids, 5-day biological oxygen demand, chemical oxygen demand, total phosphorus, total Kjeldahl nitrogen, pH, nitrate plus nitrite nitrogen, and metals. Despite having prior access to

this information, NIRS/PC failed to question the monitoring parameters, frequencies, and methods set forth by LES in its application. NIRS/PC cannot now seek to recapture this lost opportunity by alleging such deficiencies in the DEIS.

Late-filed Basis I also should be rejected for a lack of sufficient factual/legal support and for its failure to controvert relevant portions of the application. *See* 10 C.F.R. § 2.309(f)(1)(vi). LES has provided detailed information regarding its planned measures to prevent contamination of site stormwater runoff (*e.g.*, through the use of Best Management Practices and a Spill Prevention Control and Countermeasure Plan) and to monitor the stormwater for any potential contamination, none of which NIRS/PC calls into question. *See* ER § 4.4.7, “Control of Impacts to Water Quality.” Furthermore, the ER states that the “monitoring program will be refined to reflect applicable requirements as determined during the National Pollutant Discharge Elimination System (NPDES) process,” and that “the Site Stormwater Detention Basin will adhere to the requirements of the Groundwater Discharge Permit/Plan from the [New Mexico Water Quality Board].” ER (Rev. 2, July 2004) at 6.2-3. NIRS/PC do not engage any of this material, much less establish a genuine dispute regarding its adequacy. Furthermore, NIRS/PC have provided no regulatory basis for the assertion that LES must identify and monitor for the “numerous” or “other” contaminants mentioned by NIRS/PC. In any event, such monitoring is clearly governed by federal and state requirements that are beyond the scope of this proceeding. *See, e.g., Fansteel Inc.* (Muskogee, Oklahoma Facility), LBP-03-22, 58 NRC 363, 366-67, 370 (2003) (dismissing an area of concern regarding regulation of non-radiological material as beyond the scope of the proceeding). In sum, there is no admissible issue.

2. *Contention NIRS/PC EC-2 – Impacts Upon Ground and Surface Water*

In seeking to amend this contention, NIRS/PC complain that the “NRC has not shown in the DEIS how pumpage [from the Lea County Underground Water Basin] would affect water levels and the long-term productivity of the Hobbs well field or the Lea County Underground Water Basin.” Motion to Amend at 7. In support of this basis, NIRS/PC allege that the NRC Staff relies on “irrelevant” ratios, such as the ratio between the projected water needs of the NEF and the current quantity of water reserves in the New Mexico portion of the Ogallala Aquifer, and the ratio between NEF water requirements and municipal system capacities. *Id.* Instead, NIRS/PC maintain, the NRC must “account for the impact of the NEF on the water supply in the area,” insofar as the ratios “do not relate to the hydrology of the area.” *Id.* They add that the NRC should project the impact of the NEF on water supply over the entire operating life of the NEF and state the actual effect of operation upon aquifer level and other water users. *Id.* This late-filed basis also should be rejected for its untimeliness and lack of adequate supporting information.

First, the contention, as originally admitted, makes reference to the need to consider the “potential environmental impacts of the proposed project upon water supplies *in the area of the project.*” Therefore, to the extent NIRS/PC are asserting only that “certain concerns that were not dealt with in the ER have additionally not been dealt with in the DEIS,” their late-filed basis adds nothing new of substance. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 223 (2000). Moreover, Intervenor’s concerns regarding the impacts of NEF water usage (1) over the entire operating life of the NEF, (2) on aquifer water levels, and (3) on other water users, could have been identified based solely

on the information provided by LES in its original application. As the Commission has stated, “[a]n amended NEPA contention is not an occasion to raise additional arguments that could have been raised previously.” *Catawba*, CLI-02-28, 56 NRC 385-86.

Reduced to its essence, the basis alleges that, although the NEF would use only a minuscule portion of the Eunice and Hobbs water capacities, and an even more minuscule portion of the Ogallala reserves in the State of New Mexico, this usage may *somehow* impact water supplies and usage in the area. Significantly, however, NIRS/PC provide no additional information (*i.e.*, in addition to their original reference to *Lea County Regional Water Plan*) regarding the “hydrology of the area” or the effect of pumpage on water levels in, or the long-term productivity of, the Hobbs well field or Lea County Underground Water Basin. Thus, while NIRS/PC assert that certain additional matters should be considered, they provide no additional supporting factual information or expert opinions to bolster their claims. The basis must be rejected for lack of a showing of a genuine, material issue. *See* LBP-04-14, slip op. at 12-13.

3. Contention NIRS/PC EC-3/TC-1 – Depleted Uranium Hexafluoride Storage and Disposal

As admitted by the Licensing Board, this contention alleges that “[LES] does not have a sound, reliable, or plausible strategy for private sector disposal of the large amounts of radioactive and hazardous Depleted Uranium Hexafluoride (“DUF₆”) waste that the operation of the plant would produce.” The focus of the contention, therefore, is on the *plausibility* of the *private sector* deconversion and disposal option discussed by LES in its ER — not on the costs of such deconversion and disposal or other disposition options (*i.e.*, Section 3113). As discussed below, however, NIRS/PC seek to add two new bases — Bases D and E — that raise issues which are clearly beyond the scope of the contention previously admitted by the Licensing

Board. Moreover, they have not adequately demonstrated why these bases could not have been raised previously based upon the application itself.

In late-filed Basis D, NIRS/PC contend that, “[t]o show that it has a plausible strategy for disposal of depleted uranium, LES must set forth its strategy in sufficient detail *so that the cost of pursuing the strategy can be estimated.*” Motion to Amend at 8 (emphasis added). In support of this assertion, NIRS/PC quote two statements made by the Licensing Board in the *Claiborne* proceeding regarding the relationship between an applicant’s depleted tails disposition strategy and the its estimate of the costs attendant to that strategy. *Id.* at 9. In short, NIRS/PC reason, that because LES purportedly relies “exclusively” upon “ill-explained commercial information” from Urenco in estimating disposition costs, its private sector deconversion and disposal strategy is not plausible.

In raising the issue of cost, this basis plainly raises an issue beyond the scope of the admitted contention. Plausibility and cost represent two different concepts or inquiries. This is evident from the Board’s admission of separate “plausibility and “cost” contentions in this proceeding. While a plausible strategy may be a necessary precursor to the development of a reasonable cost estimate, the converse is not true. The *Claiborne* Licensing Board recognized this much when it stated “we must *first* determine whether the funding plan contains a reasonable or credible plan to dispose of the DUF₆ tails generated at the CEC, and *then* determine whether the Applicant’s cost estimates for the components of the plan are reasonable.” Louisiana Energy Services, L.P. (*Claiborne Enrichment Center*, 45 NRC 99, 105 (1997), *vacated by* CLI-98-5, 47 NRC 113 (1998). Contention NIRS/PC EC-3/TC-1 is concerned solely with the first half of this determination. NIRS/PC turn this inquiry on its head in an attempt to broaden the scope of the contention to include cost issues. Accordingly, late-filed Basis D must be dismissed.

In late-filed Basis E, NIRS/PC claim that “it is not a plausible strategy for LES to propose to transfer DU to DOE under Sec. 3113 of the USEC Privatization Act,” maintaining that deconversion of NEF-generated depleted uranium hexafluoride at the DOE plants would not occur for several decades. Motion to Amend at 9. They further assert that the cost of such conversion therefore cannot be determined. As noted above, the admitted contention is concerned with the plausibility of LES’s proposed *private sector* option, *not* the Section 3113 alternative referred to by NIRS/PC in its late-filed basis. Because late-filed Basis E seeks to challenge the plausibility of the Section 3113 option, as well as LES’s ability to estimate the associated costs, it exceeds the scope of the admitted contention. Moreover, this Licensing Board has previously rejected, as an impermissible challenge to the Commission’s hearing order for this proceeding, the notion that the size of DOE’s existing inventory of depleted uranium calls into question the plausibility of the Section 3113 option. *See* LBP-04-14, slip op. at 23. Therefore, late-filed Basis E must also be rejected.

4. Contention NIRS/PC EC-4 – Impacts of Waste Storage and Disposal

As admitted by the Licensing Board, Contention NIRS/PC EC-4 alleges that “the [ER] lacks adequate information to make an informed licensing judgment, contrary to the requirements of 10 C.F.R. Part 51,” in that it “fails to discuss the environmental impacts of *construction and lifetime operation of a conversion plant* for the [DUF₆] waste that is required in conjunction with the proposed enrichment plant.” Thus, despite its title, this contention has nothing to do with the *disposal* of depleted uranium. This is a critical point in view of three of the new bases proffered by NIRS/PC in connection with this contention.

As an initial matter, Contention NIRS/PC EC-4, as admitted by the Licensing Board, should be dismissed as moot. Simply stated, the contention alleges that the ER omits

discussion of the environmental impacts of construction and lifetime operation of a deconversion plant for NEF-generated depleted uranium. Revision 2 of the ER cures this omission:

The environmental impact of a UF₆ conversion facility was previously evaluated generically for the Claiborne Enrichment Center (CEC) and is documented in Section 4.2.2.8 of the NRC Final Environmental Impact Statement (FEIS) (NRC, 1994a). After scaling to account for the increased capacity of the NEF compared to the CEC, this evaluation remains valid for NEF. In addition, the Department of Energy has recently issued FEISs (DOE, 2004a; DOE, 2004b) for the UF₆ conversion facilities to be constructed and operated at Paducah, KY and Portsmouth, OH. These FEISs consider the construction, operation, maintenance, and decontamination and decommissioning of the conversion facilities and are also valid for the NEF.

ER (Rev. 2, July 2004) at 4.13-3. The DEIS likewise incorporates by reference the FEISs for the Portsmouth and Paducah deconversion facilities and discusses their applicability to NEF-related deconversion activities. NUREG-1790 at 4-52 to 4-58. Thus, “[w]here 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 staff in a draft EIS, the contention is moot.” This is clearly the case with respect to Contention NIRS/PC EC-4. *Catawba*, CLI-02-28, 56 NRC 383 (citations omitted).

Of course, an intervenor may raise specific challenges regarding the new information. In this case, NIRS/PC seek to amend Contention NIRS/PC EC-4 to include the following text:

The DEIS fails to discuss the environmental impacts of the construction and operation of a conversion plant for the depleted uranium hexafluoride waste. The DEIS entirely relies upon final EISs issued in connection with the construction of two conversion plants at Paducah, Kentucky, and Portsmouth, Ohio, that will convert the Department of Energy’s inventory of depleted uranium (DEIS at 2-28, 2-30, 4-53, 4-54). Such reliance is erroneous, because the DOE plants are unlike the private conversion plant contemplated by LES.

The DEIS contains an incorrect analysis of the environmental impacts of the disposal of depleted uranium hexafluoride waste. The DEIS assumes that depleted uranium may be disposed of as low-level waste, which is incorrect. The DEIS fails to recognize the Commission's stated position that depleted uranium is not appropriate for near-surface disposal. The DEIS fails to support or explain the modeling of disposal of depleted uranium.

Motion to Amend at 12-13. As discussed below, none of the bases offered by NIRS/PC in support of this amendment is sufficient to support further litigation of Contention NIRS/PC EC-4. The proposed amendment should be rejected, and the previously admitted contention of omission should be dismissed as moot.

The first basis submitted in support of the proposed amendment alleges that the facilities and processes analyzed in the DOE conversion plant FEISs do not fully correspond to the configuration proposed for construction by LES, insofar as "LES has chosen to focus its planning for a private conversion facility on a process different from the process to be used in the DOE plants." Motion to Amend at 13. Specifically, NIRS/PC assert that "LES will adopt a process that generates anhydrous hydrofluoric acid ("AHF")," whereas the process discussed in the EISs for the Paducah and Portsmouth conversion plants is one that generates aqueous HF. *Id.* NIRS/PC further claim that LES will "use a distillation process to upgrade the HF resulting from the conversion process to AHF," a process they claim "is not considered in the EIS for either the Paducah or Portsmouth facilities." *Id.*

This basis is insufficient to support admission of the amended contention. First and foremost, LES has neither focused its planning on nor decided to adopt a deconversion process that generates AHF. NIRS/PC can point to no place in the NEF license application which states LES has opted to use such a process. Moreover, during depositions on this issue,

LES witnesses uniformly indicated that LES has yet to select a specific deconversion process. *See, e.g., Pratt Dep. Tr. 86-87 (Oct. 4, 2004).*

To advance their argument, NIRS/PC instead mischaracterize a statement made by LES in its May 3, 2004 response to the NIRS/PC intervention petition. In its response, LES stated only that it had “focused on the \$2.64 per kgU conversion cost estimate for the *AHF deconversion alternative* (as opposed to the \$3.39 per kgU figure for the aqueous HF neutralization alternative)” for purposes of extracting cost-related information from the so-called LLNL Report. LES Answer to Petitions of NIRS/PC and New Mexico Attorney General, dated May 3, 2004 at 72. On this point, LES noted that both the LLNL Report and the DOE’s Programmatic EIS characterized deconversion with AHF production as being superior in terms of waste avoidance and byproduct value. *See id.* at 72 n.42. LES in no way made a determination or commitment to pursue the “AHF” deconversion option. Accordingly, the first NIRS/PC basis rests on a false premise.

Regardless, even if one *assumes* NIRS/PC were correct in asserting that LES will generate AHF, the basis is still deficient. NIRS/PC claim that FEISs for the DOE deconversion plants “do not consider the impacts of the distillation process chosen by LES to generate AHF, nor the safety aspects of such operation, nor the impacts of sale, transportation, and use of AHF.” Motion to Amend at 14. This alleged omission, however, is unaccompanied by any factual support or expert opinion sufficient to establish a genuine dispute. For example, no basis is provided for asserting that deconversion impacts would be significantly affected by the deconversion process adopted. While NIRS/PC question the commercial viability of the “distillation” process, they make no attempt to explain how its use would result in environmental

impacts different from those associated with any other deconversion process (*i.e.*, one that produces aqueous HF instead of anhydrous HF).

The second basis alleges that, because any plant built to deconvert NEF-generated DUF₆ “would have much smaller scale than the DOE plants,” it would have “different economics of operation and needed rates of return.” Motion to Amend at 14. This issue, however, relates to the *economics* of the prospective facility, not to its *environmental impacts*. It therefore falls outside the scope of Contention NIRS/PC EC-4. (Environmental impacts clearly would be bounded by the environmental impacts of a larger facility.) NIRS/PC purport to establish an environmental nexus by asserting that “[t]he prospect of a high-cost facility raises the question what cost reductions will be attempted, and at what price to safety and the environment.” *Id.* This statement, however, is pure conjecture, unsubstantiated by any factual information or expert opinion.

The three other bases submitted by NIRS/PC in support of amended Contention NIRS/PC EC-4 all relate to the NRC Staff’s analysis of “the impacts of waste *disposal*” in the DEIS. In particular, NIRS/PC assert that the DEIS: (1) erroneously concludes that depleted uranium may be disposed of as Class A low-level waste, (2) fails to recognize the Commission’s repeatedly stated position that depleted uranium is not appropriate for near-surface disposal, and (3) fails to appropriately model the impacts of depleted uranium disposal (*i.e.*, by failing to “disclose the models used or the parameter values” and to “examine any actual location of disposal”).¹⁵ Motion to Amend at 15-16. Although LES disagrees with each of these claims, it

¹⁵ This is a factually incorrect statement insofar as the *Claiborne* final EIS presents the models and parameter values used. See NUREG-1484, *Final Environmental Impact Statement for the Construction and Operation of Claiborne Enrichment Center, Homer Louisiana*, Docket No. 70-3070, Louisiana Energy Services L.P., NRC/NMSS (Aug. 1994), Vol. 1., §§ 2.3.4.5, 4.2.2.8 & App. A.

suffices to say that these *disposal-related* issues are clearly not within the scope of the admitted contention, which is confined to “the environmental impacts of construction and lifetime operation of a [de]conversion plant.” The first two issues have also been previously raised and are presently the subject of a referral to the Commission. In total, none of the bases supports admission of the contention as amended by NIRS/PC and should be rejected accordingly.

5. ***Contention NIRS/PC EC-5/TC-2; AGNM TC-I – Decommissioning Costs***

NIRS/PC seek to amend this contention to add the following:

The DEIS similarly states that the depleted uranium will be low-level radioactive waste, which is incorrect, and results in an incorrect and low estimate of disposal costs. (DEIS at 2-27, 2-31).

Motion to Amend at 16. The purported justification for this amendment is to “update the contention,” insofar as the DEIS “likewise assumes that the [depleted uranium] would be low-level radioactive waste.” *Id.* at 17.

The contention cannot be amended on this basis. The issue of the proper waste classification of depleted uranium is not new to this proceeding. The issue has been referred by the Licensing Board to the Commission, and accepted for review by the Commission. See LBP-04-14, slip op. at 27; CLI-04-24, slip op. at 5. The basis must therefore be rejected absent any showing of new or different data or conclusions.

6. ***Contention NIRS/PC EC-6/TC-3 – Costs of Management and Disposal of Depleted UF₆***

NIRS/PC seek to amend the contention to include Basis J, which reads as follows:

In fact, LES does not have any relevant estimate for the cost of converting and disposing of depleted uranium, because it does not rely upon the three examples cited in the application, i.e., the CEC estimate from 1993, the LLNL Report, or the UDS contract. LES would not supply any estimate for dispositioning costs based on commercial contacts. LES refers only to the Urenco data from 2003 for its decommissioning and disposal cost

estimate, and Urenco data are not relevant to establishment of costs in the United States.

Motion to Amend at 19. NIRS/PC state that they “wish to contend that the costs of management and disposal of depleted UF₆ contained in the application have no support,¹⁶ since there is no credible cost information about a deconversion facility or a disposal facility that LES could actually use.” *Id.* at 20.

NIRS/PC base the proposed amendment to the contention solely on deposition testimony given by LES witness Rod Krich. Based on Mr. Krich’s testimony, NIRS/PC state that “LES does not rely upon the examples of DUF₆ dispositioning cost estimates contained in its application to support its estimate of the cost of converting and disposing of depleted uranium.” *Id.* at 19. According to NIRS/PC, “Mr. Krich explained that LES had only cited the three items – the CEC estimate, the LLNL Report, and the UDS contract – as examples to look at in observing the reasonableness of the estimate on which LES actually relies: the \$5.50 estimate.” *Id.*

LES opposes admission of the amended contention. Basis J improperly seeks to introduce an issue — the reasonableness of LES’s use of Urenco-supplied cost information — that could have been raised previously. In fact, this very issue was raised by the New Mexico Attorney General in her April 6, 2004 intervention petition and admitted by the Licensing Board for litigation in this proceeding in the form of Contention AGNM TC-ii.¹⁶ NIRS/PC do not cite any new data or conclusions in revised versions of the NEF license application, or in the NRC Staff’s DEIS for that matter. The fact that Mr. Krich testified in a deposition in the context of an

¹⁶ Contention AGNM TC-ii states:

The bases for Louisiana Energy Services, L.P.’s (LES) cost estimates are suspect and the actual cost of disposing of tails will exceed the \$5.50 per kilogram uranium (kgU) estimated by LES utilizing information relating to (1) *the Urenco contract*; and (2) LES cost estimates developed in connection with its Louisiana application.

admitted contention does not justify late-filing. The contention and supporting bases, as framed by the Licensing Board, govern. Otherwise, any deposition invariably could be used as an event to spawn new contentions. *Cf. Catawba*, CLI-02-28, 56 NRC at 387 (citations omitted) (stating that “[a] petitioner is not permitted to ‘file a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery.’”)

With respect to the prior publicly available information, Section 4.13.3.1.6 of the ER discusses the costs associated with the disposition of depleted uranium and states explicitly that “[t]his section is based on an analysis of reports and literature in the public domain *as well as information provided by Urenco* and the experience of expert consultants.” This section further states that the costs in the table [*i.e.*, Table 4.13-7, which specifically lists Urenco as a source of cost information] indicate that \$5.50 per kgU (\$2.50 per lb U) is a conservative and, therefore, prudent estimate of total depleted UF₆ disposition cost for the LES NEF. Urenco has reviewed this estimate and, *based on its current cost* for [Uranium Byproduct Cylinder] disposal, finds this figure to be prudent.” Thus, like the New Mexico Attorney General, NIRS/PC could have submitted a contention or supporting basis that specifically challenged LES’s reliance on Urenco as source of cost information. NIRS/PC failed to proffer such a challenge, however, and cannot now seek to do so based on the testimony of an LES witness. As the Commission recently emphasized, an intervenor may not use an amended contention “to insert numerous discrete new claims that arguably might have been raised earlier.”¹⁷

To the extent NIRS/PC might argue that the use of Urenco cost information falls within the scope of admitted contention NIRS/PC EC-6/TC-3, they are wrong. Although the

¹⁷ In this case, the NIRS/PC amendment amounts to an untimely attempt to adopt the admitted AGNM issue.

contention itself refers broadly to “the costs and the feasibility of managing and disposing of the [DUF6],” none of the supporting bases refers to LES’s use of Urenco cost information. According to the Commission, “[w]here an issue arises over the scope of an admitted contention, NRC opinions have long referred back to the bases set forth in support of the contention.” In this case, the supporting bases relate exclusively to LES’s use of cost data from the LLNL report and on the feasibility of private sector deconversion and disposal of depleted uranium. It is well-established that “[a]n intervenor may not freely ‘change the focus of an admitted contention at will as litigation progresses, but it is bound by the terms of the contention.’”

NIRS/PC seek to change the focus of the admitted contention by referring to the information gleaned from the discovery process. They wrongly construe Mr. Krich’s testimony to mean that the other sources of cost information discussed in the application (the CEC estimate, the LLNL Report, and the UDS contract) are now devoid of any use, purpose, or relevance. This is simply not the case. For example, in response to a question from NIRS/PC counsel regarding use of the LLNL Report, Mr. Krich stated: “The purpose of the Lawrence Livermore report was the same as it is was for the CEC cost estimate and the UDS cost estimate, which is to inform our cost estimate.” Krich Dep. Tr. 125 (Oct. 4, 2004). Moments later, Mr. Krich elaborated further, stating specifically that the LLNL Report, UDS, and CEC estimates “*had to be considered* in informing our estimate,” but “what was more important [in] developing our estimate, was to use a recent commercial number, a number that was actually in use [*i.e.*, the Urenco cost information], and so these estimates are *important*, but were used to inform our final cost estimate, not create it.” Krich Dep. Tr. 126 (Oct. 4, 2004) (emphasis added). Stated another way, LES’s estimated unit cost for depleted tails disposition of \$5.50 per kgU is a nominal figure,

one which takes into account a reasonable range of inputs and assumptions – as reflected in the CEC estimate, the LLNL Report, and the UDS contract – as well as actual Urenco experience.

Regardless of whatever amplification or clarification Mr. Krich sought to provide in regard to LES's use of the Urenco cost information, he clearly did not intend to disavow LES's use of the CEC, LLNL Report, and UDS data. More importantly, to the extent NIRS/PC wish to challenge LES's use of the Urenco cost information, they had ample opportunity to do so when they filed their intervention petition last April. The New Mexico Attorney General's admitted contention on this very issue is testament to that fact. NIRS/PC cannot resurrect that opportunity in the absence of genuinely new data or conclusions sufficient to support admission of their amended late-filed contention.

7. Contention NIRS/PC EC-7 – Need for the Facility

NIRS/PC seek to amend the contention to add the following:

The DEIS likewise omits to discuss the impact of the proposed NEF, in particular upon the market for enrichment services, by failing to consider the effect of the addition of the NEF to the existing range of suppliers and other forthcoming suppliers, the nature of competition that will occur, and the impacts upon market participants and consumers.

Motion to Amend at 21. NIRS/PC further explain, as a purported justification for this amendment, that under the amended issue it will show that LES's treatment of "need" for the NEF "fails to grapple with the question of the existence of a demand, at a price level, for the product of the NEF and the impact that addition of the NEF to the existing and anticipated roster of competitors will have upon the enrichment market." *Id.* Further, NIRS/PC argue that the contention does *not* involve "the profitability or business success" of the NEF. *Id.* Yet, paradoxically, NIRS/PC argues that the "issue here is the sufficiency of the EIS analysis of the

costs and benefits of introducing the NEF into the market for enrichment services and all who are affected by it — competitors, utilities, and consumers.” *Id.*

The amended contention should not be admitted. It is simply another attempt to introduce profitability, market, or business issues into the “need” analysis required under the National Environmental Policy Act (“NEPA”). As the Licensing Board recognized in narrowing the original proposed Contention NIRS/PC EC-7, the issues of the NEF “business case” and profitability exceed the scope of litigable NEPA issues. LBP-04-14, slip op. at 29-30. In rejecting original proposed bases D, E, and G, the Licensing Board specifically recognized that “the applicant is under no obligation to present either a ‘business case’ or to demonstrate the profitability of the proposed facility.” LBP-04-14, slip op. at 30. Likewise, there is no obligation to analyze and address market impacts of the facility. As LES has previously argued in response to prior NIRS/PC motions to compel discovery on these issues, neither NEPA nor the Commission’s NEPA-implementing regulations (10 C.F.R. Part 51) require a license applicant to demonstrate “economic viability” of a proposed facility, including the effect on the relevant market. *See, e.g., Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 48 (2001) (“[t]he NRC ... is not in the business of regulating the market strategies of licensees.”). The Licensing Board itself denied two motions to compel seeking information on these very same issues.¹⁸ Accordingly, the amended contention does not establish a genuine dispute on an issue material to a finding the NRC must make. *See* 10 C.F.R. § 2.309(f)(1)(iv).

As LES has previously explained, relative to NEPA, the primary basis for the “need” for the NEF involves national energy and security policy considerations. Additionally,

the Licensing Board recognized in the most recent discovery ruling of November 3, 2004, “LES has proposed to demonstrate [“need”] with binding contracts for a substantial portion of the plant’s output.”¹⁹ Indeed, the ability to secure such contracts provides the requisite evidence of LES’s ability to enter the market for uranium enrichment services. As such, the NEF can fulfill the “need” asserted; *i.e.*, the need for an additional domestic supplier to support national policy objectives of a secure and diverse enrichment supply. The amended contention, despite the purported justification, clearly relates to business matters that exceed the scope of the need justification and the scope of a legitimate NEPA inquiry.

NIRS/PC attempt to link the amended contention to the “need” showing. They argue that the contention addresses whether the NEF will result in diversity and security of supply, or whether it will simply result in “the path of [market] dominance by a few large producers” [citing the Sheehan Declaration previously used to support the motion to compel of October 8, 2004]. Motion to Amend at 21. However, the justification is, transparently, nothing more than window dressing to disguise the same old business case argument. An additional enrichment facility, with binding contracts for a substantial portion of the plant’s output, will clearly provide a diverse domestic source of enrichment services. A NEPA “need” showing does not require a showing that the facility will not have undue market power or lead to a “path of market dominance by a few large producers.” Motion to Amend at 21. Such economic inquiries exceed the scope of a NEPA environmental analysis.²⁰

¹⁸ Memorandum and Order (Discovery Rulings), dated October 20, 2004; Memorandum and Order (Additional Discovery Ruling), dated November 3, 2004.

¹⁹ Memorandum and Order (Additional Discovery Ruling), dated November 3, 2004, slip op. at 2.

²⁰ See, e.g., *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC __ (Aug. 17, 2004), slip op. at 23-24; *Mountain States Legal Found. v.*


Finally, as with the other proposed amended contentions, there is no legitimate showing to support a late-filed contention on this amended issue, as is required by 10 C.F.R. § 2.309(c). The amended contention does not introduce or rely on any newly available information. Rather, it is based on nothing more than the issuance of the NRC Staff's DEIS. Given that "need" for the NEF was fully addressed in LES's application, this contention could have been proposed (and essentially was proposed) in the original contentions. The Licensing Board at that time narrowed the issues to those it believed to be admissible under NEPA and the Commission's regulations. There is no basis to revisit that determination at the present time based only on the issuance of the DEIS.

Glickman, 92 F.3d 1228, 1235-36 (D.C. Cir. 1996) (stating that despite NEPA's "rather sweeping list of interests intended to be served, . . . they do not include purely monetary interests, such as the competitive effect that a construction project might have on [a competitor's] commercial enterprise."

III. CONCLUSION

For the reasons set forth above, the amended contentions of NIRS/PC should not be admitted by the Licensing Board.

Respectfully submitted,



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Dated at Washington, District of Columbia
this 5th day of November 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	Docket No. 70-3103-ML
)	
Louisiana Energy Services, L.P.)	ASLBP No. 04-826-01-ML
)	
(National Enrichment Facility))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "ANSWER OF LOUISIANA ENERGY SERVICES, L.P. TO MOTION ON BEHALF OF NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN TO AMEND AND SUPPLEMENT CONTENTIONS" in the captioned proceeding have been served on the following by e-mail service, designated by **, on November 5, 2004 as shown below. Additional service has been made by deposit in the United States mail, first class, this 5th day of November 2004.

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