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NUCLEAR REGULATORY COMMISSION

October 26, 2005 (7:37am)

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

**MOTION ON BEHALF OF LOUISIANA ENERGY SERVICES, L.P. TO DISMISS
CERTAIN BASES PROFFERED IN SUPPORT OF AMENDED CONTENTION
NIRS/PC EC-4 REGARDING DEPLETED URANIUM ("DU") DISPOSAL IMPACTS****I. INTRODUCTION**

On October 19, 2005, the Nuclear Regulatory Commission (the "Commission"), in CLI-05-20,¹ remanded to the Licensing Board ("Board") "for further consideration and appropriate action" Contention NIRS/PC EC-4, as amended by Nuclear Information and Resource Service and Public Citizen ("NIRS/PC") on October 20, 2004 (referred to hereinafter as "Amended Contention NIRS/PC EC-4").² Among the "appropriate actions" contemplated by the Commission is the possible dismissal of certain arguments proffered by NIRS/PC in support of the amended contention as moot and untimely. Specifically, the Commission indicated that any NIRS/PC challenge to the NRC Staff's discussion of the radiological impacts of the disposal of depleted U₃O₈ in a geologic disposal site, as presented in the Staff's draft environmental

¹ *Louisiana Energy Servs., L.P. (National Enrichment Facility)*, CLI-05-20, 62 NRC __ (2005) (slip op.) (Oct. 19, 2005).

² See "Motion on Behalf of [NIRS/PC] to Amend and Supplement Contentions" (Oct. 20, 2004) [hereinafter "October 2004 Motion"]. As the Commission explained in CLI-05-20, NIRS/PC effectively renewed their October 2004 motion to amend Contention NIRS/PC EC-4 via a late-filed motion dated February 2, 2005. See "Motion on Behalf of [NIRS/PC] for Admission of Late-Filed Contentions" (Feb. 2, 2005) [hereinafter "February 2005 Motion"].

impact statement ("DEIS") for the proposed National Enrichment Facility (NEF"), "appears amenable to summary disposition."³ Similarly, the Commission directed the Board to "consider whether NIRS/PC have waived the opportunity to challenge the dose estimates for 'wet' and 'dry' disposal sites," as derived from the Department of Energy's ("DOE") April 1999 programmatic EIS ("PEIS") for the long-term management of depleted uranium hexafluoride ("DUF₆"), and as presented in LES's December 2003 NEF Environmental Report ("ER").⁴ Consistent with the Commission's directives in CLI-05-20, LES hereby moves to dismiss as moot or untimely the specific NIRS/PC bases identified below.

II. BACKGROUND

A. The Narrow Scope of the Proceedings on Remand

In remanding Amended Contention NIRS/PC EC-4 for further consideration, the Commission carefully circumscribed the scope of any remand proceedings. The Commission in no way countenanced a broad-scope or free-ranging inquiry into the NRC Staff's evaluation of the potential environmental impacts of DU disposal. Rather, the Commission emphasized that it was remanding only an amended contention "on the DEIS waste impact analysis, as proposed in NIRS/PC's October 20, 2004 contention challenging the DEIS and as renewed early this year in wake of our decision in CLI-05-5."⁵ Indeed, the Commission specifically "directed[ed] the Board and parties to focus on the terms and bases of the contention submitted in the first motion rather than the overbroad claims in the renewed motion."⁶

³ CLI-05-20, slip op. at 13 n.48.

⁴ *Id.* at 15 n.52.

⁵ *Id.* at 13-14.

⁶ *Id.* at 11-12.

Notably, in identifying the particular "terms or bases" subject to consideration on remand, the Commission was careful to provide "pinpoint" page citations to the October 2004 and February 2005 NIRS/PC motions. The Commission, with surgical precision, focused exclusively on pages 13, 15, and 16 of the October 2004 Motion, and on pages 2, 8, 9-12, and 16-17 of the February 2005 Motion. In so limiting the scope of Amended Contention NIRS/PC EC-4, the Commission also took pains to earmark for putative dismissal certain NIRS/PC claims that it believes to be moot and/or untimely. Those issues included, among others: (1) the manner in which "the DEIS used the earlier *Claiborne* dose estimates," and (2) the validity of "the specific groundwater or intruder dose conclusions set forth in the LES Environmental Report, the methodology upon which the dose calculations were made, and the adequacy of generic "wet" site and "dry" site dose analyses."⁷ The Commission characterized the latter set of issues as issues that "should have been raised earlier," *i.e.*, in the intervenors' original intervention petition. On this point, the Commission added that the February 2005 Motion sought "inappropriately [] to introduce an extensive array of untimely claims, many altogether unrelated to their challenge to the DEIS analysis of depleted uranium disposal impacts,"⁸ and that February 2005 Motion "may be considered only to the extent that it raises or elaborates upon essentially the same 'impacts' analysis arguments made following the DEIS."⁹

B. Applicable Legal Standards

1. *Mootness*

In effectuating its goal for efficient adjudication, the Board, upon motion of a party and where relevant, can dismiss issues that fail to raise a genuine factual dispute, or that

⁷ CLI-05-20, slip op. at 10 n.38 & 13 n.48.

⁸ *Id.* at 10.

have become "moot" during the course of the proceeding.¹⁰ The mootness doctrine, in particular, allows Board recognition of the fact that circumstances may "shift during the course of litigation in a way that calls into question whether a concrete dispute between the parties exists any longer"¹¹ The mootness doctrine may be applied during any phase of a proceeding when it becomes applicable,¹² because considerations of judicial economy and efficiency underlie this doctrine.¹³ As the Commission has recognized, ample NRC precedent exists for dismissal of admitted contentions on grounds of mootness "[w]here a contention alleges the omission of particular information . . . and the information is later supplied by the applicant or considered by the staff in a draft [or final] EIS"¹⁴ The mootness doctrine has been applied by Licensing Boards to dispose of admitted contentions that have been overcome by events.¹⁵

⁹ *Id.* at 12.

¹⁰ See, e.g., *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 384 (2001); *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), LBP-04-7, 59 NRC 259 (2004).

¹¹ *Advanced Med. Sys., Inc.* (One Factory Row, Geneva, Ohio 44041), LBP-92-36, 36 NRC 366, 368 n.7 (1992) (citations omitted).

¹² *Texas Utils. Elec. Co.* (Comanche Peak Station Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993). (The mootness doctrine "applies to all stages of review, not merely to the time when a petition is filed."). Indeed, this Board has stated that "a party can seek a merits resolution of a contention of omission by submitting an appropriate motion seeking to establish that the omission has been cured. If time does not permit or a party does not wish to take this course, however, it can instead await the evidentiary hearing and present testimony (or other evidence) to the same effect." Memorandum and Order (Ruling on In Limine Motions and Providing Administrative Directives) (Jan. 21, 2005) (unpublished), at 5 n.3.

¹³ See, e.g., *Airline Pilots Ass'n Int'l. v. UAL Corp.*, 897 F.2d 1394, 1396-97 (7th Cir. 1990). See also Wright, Miller, and Cooper, *FEDERAL PRACTICE AND PROCEDURE*, § 3533.1 (1984).

¹⁴ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 383 (2002).

¹⁵ See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-2, 55 NRC 20 (2002).

2. *Timeliness of Environmental Contentions (and Amendments Thereto)*

Section 2.309(f)(2) of the NRC's Rules of Practice 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") in particular, Section 2.309(f)(2) specifically provides that "the petitioner shall file contentions *based on the applicant's environmental report*."¹⁶ *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).

III. ARGUMENT

A. Amended Contention NIRS/PC EC-4 Should be Dismissed as Moot and Untimely Insofar as It Contests the Staff's Discussion of Claiborne EIS Radiological Dose Estimates

In addressing the intervenors' "challenge to the DEIS estimate of doses from a geological repository," as set forth in Amended Contention NIRS/PC EC-4, the Commission stated as follows:

Given corrections made in the FEIS, this issue appears amenable to summary disposition. Significantly, the NRC staff in the FEIS clarified that the same models used in the *Claiborne* proceeding were used, and apparently has corrected the DEIS dose discrepancy highlighted by NIRS/PC. *See* LES FEIS (NUREG-1790), Vol. 1 at 4-64. If NIRS/PC actually mean to challenge the dose estimates used in the *Claiborne*

¹⁶ *See also Louisiana Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998) ("Although the NRC Staff bears the ultimate burden of demonstrating that environmental issues have been adequately considered, intervenors must file their environmental contentions as soon as possible, even before issuance of the draft EIS, if the contested issue is addressed in the applicant's ER.")

proceeding, such a challenge appears untimely, given that the LES Environmental Report said that it was relying on the *Claiborne* dose estimates. Similarly, if NIRS/PC seek to challenge the dose analysis because it is based upon two representative disposal sites, such a claim seemingly also could have been based upon the Environmental Report, which addressed the same two representative sites.¹⁷

The Commission's assessment of this issue is a correct one. First, shortly after the filing of the October 2004 Motion, the NRC Staff addressed the concerns raised by NIRS/PC relative to Staff's reliance on the results of the prior *Claiborne* geologic disposal dose analysis. In a November 2004 interrogatory response, the Staff explained as follows:

The basis for Table 4-19 of the DEIS lies in the previous evaluation of impacts of disposal of U_3O_8 in deep geologic disposal units provided in the CEC EIS (pp. 4-66 to 4-68). The impacts were adjusted based on the possible quantity of U_3O_8 assumed in the CEC EIS to the amount from the operations of the proposed NEF. Specifically, the CEC EIS states that 91,000 MT (9.1×10^7 kg) of U_3O_8 would need to be disposed. See CEC EIS at p. 4-66. The proposed NEF would generate approximately 197,000 MT of DUF_6 during the time of operation. Based on the DOE DUF_6 conversion facilities' Final Environmental Impact Statements [], these facilities would produce approximately 0.79 MT of U_3O_8 for every metric ton of DUF_6 processed. This would result in 157,000 MT of U_3O_8 from the conversion of the DUF_6 for the proposed NEF. Therefore, the CEC EIS geologic disposal units impacts were adjusted based on a ratio of 1.72 (157,000 MT divided by 91,000 MT).¹⁸

Second, as the Commission notes, to the extent any inadvertent "discrepancies" existed between the dose estimates reported in the *Claiborne* EIS and those presented in Table 4-19 of Staff's DEIS for the NEF, the Staff remedied those discrepancies in the final EIS ("FEIS").¹⁹ Intervenor's argument is moot in this regard as well.

¹⁷ CLI-05-20, slip op. at 13 n.48.

¹⁸ "NRC Staff's Response to Interrogatories and Document Request by Petitioners [NIRS/PC] to Commission Staff" (Nov. 10, 2004), at 6-7.

¹⁹ Compare Table 4-19 of the DEIS (page 4-59) with Table 4-19 of the FEIS (page 4-64).

Third, as LES made clear in a July 25, 2005 submittal to the Board, LES does not intend to pursue disposal of DU in an abandoned mine or "geologic disposal site" of the type evaluated in the Claiborne EIS.²⁰ Instead, LES intends to dispose of DU from the NEF in a shallow land or near-surface disposal facility. The *Claiborne*-related claims of NIRS/PC also appear moot on this ground.

Finally, even *assuming* that LES continued to rely on the *Claiborne* dose estimates, any related NIRS/PC challenges would be untimely, as the Commission itself noted. On pages 4-13-13 to 4-13-14, LES explicitly referenced the *Claiborne* EIS (NUREG-1484), and discussed in some detail the results of radiological impacts evaluation presented therein. Significantly, based on the ER, NIRS/PC could have challenged such reliance on the *Claiborne* evaluation in its original April 2004 intervention petition, but neglected to do so. Hence; the *Claiborne*-related arguments set forth in "Basis C" of the October 2004 Motion (at page 16), and any related arguments contained in the February 2005 Motion (*see* Bases K, L, M, and R, at pages 17-18 and 22-23) should be dismissed as moot and/or untimely.

B. Amended Contention NIRS/PC EC-4 Should be Dismissed Insofar as it Seeks to Challenge the DOE PEIS Radiological Dose Estimates Referenced and Discussed in the NEF Environmental Report

In CLI-05-20, the Commission also underscored its belief that any NIRS/PC late-filed challenges to the DOE PEIS radiological dose estimates referenced and discussed in the ER are also untimely. In footnote 38 of its ruling, the Commission characterized "many of the claims" in NIRS/PC's February 2005 Motion "to be late attempts to challenge the radiological dose analysis provided in the LES [ER]." In the same footnote, the Commission stated unambiguously that "[a]rguments challenging the specific groundwater or intruder dose

²⁰ See "Final Response of [LES] to Licensing Board Request for Clarification Regarding Applicant's Private Sector 'Plausible Strategy' for Disposition of Depleted Uranium" (July 25, 2005).

conclusions set forth in the LES Environmental Report, the methodology upon which the dose calculations were made, and the adequacy of generic 'wet' site and 'dry' site dose analyses *should have been raised earlier*" (emphasis added). The Commission provided further clarification in footnote 52 of its decision:

The record already contains additional information on estimated radiological doses at representative "wet" disposal sites, typical of the humid southeastern United States, and "dry" disposal sites, typical of the western United States. These estimates derive from a Department of Energy Programmatic Environmental Impact Statement on the long-term management of depleted uranium hexafluoride. LES's Environmental Report summarized and referenced the DOE analysis and conclusions. See LES Environmental Report (Dec. 2003) at 4-13-12 to 4-13-13; see also DOE "Final Programmatic Environmental Impact Statement for Alternative Strategies for the Long-term Management and Use of Depleted Uranium Hexafluoride, DOE/EIS-0269 (April 1999) at 1-19, 1-69 to 1-70, 1-3 to 1-4. NIRS/PC's intervention petition did not challenge the radiological dose estimates referenced in the LES Environmental Report, and therefore the Board should consider whether they have waived the opportunity to challenge the adequacy of the dose estimates for "wet" and "dry" disposal sites. (emphasis added)

Again, the Commission was right on the mark in identifying a critical timeliness issue. Sections 4.13.3.1.4 ("Converted Depleted UF₆ Disposal Options") and 4.13.3.1.5 ("Potential Impacts of Each Disposal Option") of LES's ER contain substantial discussion of the DOE's evaluation, in its April 1999 PEIS, of "the potential environmental impacts associated with the disposal of depleted uranium oxides in shallow earthen structures, vaults, and a mine." ER at 4.13-2. The ER makes abundantly clear that the information presented therein is derived from the PEIS. Importantly, LES views the PEIS (Appendix I in particular), which is already admitted into evidence (see LES Exhibit 18), and discussed further in LES's October 2005 prefiled testimony, as an appropriate "representative or reference site" analysis, within the meaning of CLI-05-20.

In view of the foregoing Commission statements, LES submits that any NIRS/PC claims or bases that effectively challenge the radiological dose evaluation reflected in the ER

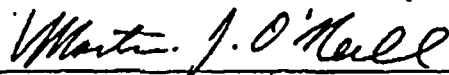
(and PEIS) should be dismissed. These include the claims set forth in Bases L through R on pages 18 through 24 of the February 2005 Motion (including, *e.g.*, NIRS/PC's "simple estimates of potential doses from DU disposal in a mine," and "test runs using ResRad to estimate doses under various assumptions for near-surface disposal in an arid climate," or intervenors' "screening calculations" using a resident farmer scenario).²¹ Indeed, as noted above, while the Commission made numerous references to specific pages of the October 2004 and February 2005 motions, it never once cited the pages (18-24) mentioned above. This fact is telling, and undoubtedly reflects the Commission's view that the NIRS/PC claims set forth therein were untimely raised. The "appropriate" Board action is rejection of those bases for failing to provide timely support for Amended Contention NIRS/PC EC-4, and the exclusion of any related NIRS/PC testimony.

²¹ Pages 13-15 and 24-30 of the February 2005 Motion raise many of the "array" of other "untimely claims" also identified by the Commission in footnote 38 of CLI-05-25, including claims about "federal drinking water regulations, transportation, depleted uranium's toxicity as a heavy metal, and alternative depleted uranium product forms." CLI-05-20, slip op. at 10 n.38.

IV. CONCLUSION

For the foregoing reasons, the Board should reject the specific NIRS/PC claims or bases identified above as moot and/or untimely. The claims at issue do not provide relevant or timely support for Amended Contention NIRS/PC EC-4, as remanded to the Board "for further consideration and appropriate action." Any NIRS/PC testimony seeking to raise the moot and untimely issues should be accordingly excluded from the evidentiary record of this proceeding.

Respectfully submitted,



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Dated at Washington, District of Columbia
this 25th day of October 2005

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 "MOTION ON BEHALF OF LOUISIANA ENERGY SERVICES, L.P. TO DISMISS CERTAIN BASES PROFFERED IN SUPPORT OF AMENDED CONTENTION NIRS/PC EC-4 REGARDING DEPLETED URANIUM ("DU") DISPOSAL IMPACTS" in the captioned proceeding has been served on the following by e-mail service, designated by **, on October 25, 2005 as shown below. Additional service has been made by deposit in the United States mail, first class, this 25th day of October 2005.

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