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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	November 2, 2005
	)	Docket No. 70-7004
USEC Inc.	)	
(American Centrifuge Plant)	)	ASLBP No. 05-838-01-ML

USEC INC. BRIEF IN RESPONSE TO BRIEF OF GEOFFREY SEA ON APPEAL OF LBP-05-28

Donald J. Silverman
MORGAN, LEWIS & BOCKIUS, LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
Phone: (202) 739-5502
E-mail: dsilverman@morganlewis.com

Dennis J. Scott
Assistant General Counsel and
Director, Corporate Compliance
USEC Inc.
6903 Rockledge Drive
Bethesda, MD 20817
Phone: (301) 564-3352
E-mail: scottd@usec.com

Counsel for USEC Inc.

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SECY-02

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I. INTRODUCTION

In its Memorandum and Order (Ruling on the Admissibility of Contentions) dated October 7, 2005 (Decision),[1] the Atomic Safety and Licensing Board (Board) found that Mr. Geoffrey Sea (Mr. Sea or Petitioner) had failed to submit any admissible contentions in the proceeding on USEC Inc.'s (USEC) application for a license to construct and operate the American Centrifuge Plant (ACP). Accordingly, the Board ruled that Mr. Sea should not be admitted as a party to this proceeding.

Mr. Sea has now filed a "Brief of Geoffrey Sea on Appeal of LBP-05-28" (Sea Brief) in which he argues that some, but not all, of his proposed contentions should be admitted.[2] Because Mr. Sea has failed to demonstrate that there has been any error of law or abuse of discretion in

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1 Memorandum and Order (Ruling on Admissibility of Contentions), LBP-05-28, slip op., __ NRC __ (Oct. 7, 2005).

2 Mr. Sea has not challenged the Board's rejection of his contentions 4.1, 5.1, 6.1 and 7.1. Accordingly, those aspects of the Board's Decision are not before the Commission on this appeal, and these contentions should be considered abandoned. *Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001).

the Board's Decision, the Commission should affirm that Decision and dismiss Mr. Sea's Petition to Intervene.[3]

II. APPLICABLE LEGAL STANDARDS

The legal standards applicable to the Commission's review of the Board's decision were previously set forth by the Commission. "The Commission affirms Board rulings on admissibility of contentions if the appellant 'points to no error of law or abuse of discretion.'"[4] "'The appellant bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims.'"[5]

III. PETITIONER HAS IDENTIFIED NO ERROR OF LAW OR ABUSE OF DISCRETION IN THE BOARD'S TREATMENT OF HIS NHPA CLAIMS AND PETITIONER'S CLAIMS ARE ERRONEOUS AS A MATTER OF LAW

Before responding to Mr. Sea's individual contentions, USEC responds below to several fundamental themes that are raised by his Brief and which serve as the basic legal underpinning for the contentions he now brings before the Commission for review. Mr. Sea has made clear that the basis of his claims is the National Historic Preservation Act of 1966, as amended,[6] (NHPA) and the requirements that the NHPA allegedly imposes upon USEC.

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[3] In his "Introduction" Mr. Sea states that the Board has "with qualification permit[ted] late-filed new contentions" and that he "does not argue with the allowance of late-filed contentions." Sea Brief at 1. The Board stated that "[u]pon review of the DEIS for the ACP, if an interested person concludes that the NRC has failed to meet its obligations, he may have a basis to submit a late-filed contention." Decision at 51. Mr. Sea should be on notice that this is not an open invitation to submit new or amended contentions whenever he wishes and without demonstrating compliance with the NRC's standards for late-filed contentions.

[4] *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Stations, Units 2 and 3), CLI-04-36, 60 NRC 631, 637 (2004) (*citing Private Fuel Storage, L.L.C.*, CLI-00-21, 52 NRC 261, 265 (2000)).

[5] *Id.* at n.25 (*quoting Advanced Med. Sys., Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994)).

[6] National Historic Preservation Act, 16 U.S.C. § 470 (2005).

In the Introduction to his Brief, Mr. Sea summarizes his objections to the Board's Decision. He states that the Board's Decision "should be reversed because it contravenes the Commission's obligation to implement the" NHPA.[7] He then recounts the broad purposes of the NHPA,[8] states that "USEC's Environmental Report fails to demonstrate any degree of compliance with or sensitivity to the concerns of NHPA,"[9] and asserts that "USEC is required to prove that all procedural requirements of the NHPA have been met before it receives a license."[10] Mr. Sea's overall theme is that USEC has failed to meet its obligations to identify cultural resources near the ACP and to evaluate the impacts of the ACP on those resources, and that as a result, violations of the NHPA have occurred.

There are several fundamental reasons why Mr. Sea is wrong as a matter of law, has failed to identify any error of law or abuse of discretion by the Board, and has failed to support his allegations. These are discussed below. Mr. Sea's specific contentions are addressed in Section IV below.

A. Mr. Sea Has Not Presented Evidence of an Adverse Impact on Any Historic Resource

Throughout his Brief, Mr. Sea repeatedly attempts to create the impression that he has provided voluminous evidence of potential adverse impacts of the ACP on nearby historic or cultural resources. Although we address in more detail Mr. Sea's allegations regarding potential impacts in response to his Contention 1.2 below, he makes a number of general assertions in the "Background" and "Argument" sections of his Brief regarding the evidence he has presented on impacts before he addresses the individual contentions.

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7 Sea Brief at 1.

8 *Id.* at 2.

9 *Id.* at 4.

10 *Id.* at 7.

Mr. Sea first mentions the "astounding Barnes Works," "the kill-site of the Sargents Pigeon," "the excavated remains of an ancient burial mound that was used as a dumpsite for a contaminated factory from West Virginia", and "the Sargent Home".[11] This chronicling of alleged historic or cultural sites in the general vicinity of the Portsmouth Reservation says nothing about any potential adverse impacts that may occur as a result of the construction or operation of the ACP. Mr. Sea next references "numerous exhibits testifying to" his "efforts and intentions" to: write a book about historical sites near the ACP, purchase the Barnes Home, prepare the nomination of the Barnes Home, and open the Home as a "center for tourism, study and reflection."[12] Again, none of Mr. Sea's statements identify any adverse impacts on historic properties that could be caused by the ACP.[13]

Mr. Sea provides three examples of where he believes that "the Panel ignored or discounted the significant quantity of evidence presented by the Petitioner . . . regarding the impacts of the ACP on historic properties."[14] First, he notes that the Barnes Home is "in the direction of prevailing winds" and "is the site of the 'maximally exposed individual.'"[15] He also states that the ACP "lies near a large Hopewell earthwork complex" and that "accidental radiological releases or fear of such could make the Barnes Home and the Hopewell earthworks inaccessible for observation, enjoyment or study."[16] Mr. Sea is simply incorrect. The ER clearly

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11 Sea Brief at 3.

12 *Id.*

13 None of the specific exhibits that Mr. Sea references provide any evidence of potential impacts of the ACP on historic or cultural properties. *See* Petition to Intervene by Geoffrey Sea (February 28, 2005) (Sea February 28 Petition) Exhibits D, E, I, H and M; Petition to Intervene by Geoffrey Sea (March 1, 2005) (Sea March 1 Petition) Exhibits D, E, I, H and M.

14 Sea Brief at 5-7.

15 *Id.* at 5; *see also Id.* at 6.

16 *Id.* at 5. The mere "fear" of a radiological release cannot form the basis of an admissible contention. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776- 78 (1983), affirming *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-80-39, 12 NRC 607 (1980).

shows that the Barnes Home is in the *opposite* direction from the prevailing winds,[17] and that the "maximally exposed individual" (MEI) is a calculation based upon the potential dose to a hypothetical individual at the ACP fenceline.[18] Furthermore, the ER makes clear that routine radiological impacts to the public offsite are expected to be small fractions of the applicable regulatory limits, and that impacts from plausible accidents pose acceptably low risks, as defined in 10 CFR Part 70, Subpart H – the applicable requirement for assessing impacts of potential accidents.[19] This analysis was confirmed by the NRC Staff in its Draft Environmental Impact Statement (DEIS) which found the radiological impacts to be "small."[20] Thus, Mr. Sea has failed to identify any impact on historic properties from radiological releases.[21]

Second, Mr. Sea states that "the defoliant Garlan-4 has been used to clear a ten-foot security strip along [the] fence-line" and that this was "clearly related to preparations for ACP."[22] Mr. Sea did not provide any basis for concluding that the current DOE maintenance and security activities at the Portsmouth Reservation are related to the ACP application, or any basis for concluding that there will be any adverse impact on historic or cultural properties from the use of such defoliants. In fact, Mr. Sea's Petition to Intervene described the potential impact as "[c]ontinuation of the DOE policy of using herbicides to defoliate a 'security strip' around the

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17 Environmental Report for the American Centrifuge Plant in Piketon, Ohio, Revision 5 (Oct. 21, 2005) (ER) at 3-47 through 3-50.

18 *Id.* at 4-110.

19 The ER stated that the hypothetical maximally exposed individual effective dose equivalent was modeled to be less than 1 millirem per year which is well below the NRC regulatory Total Effective Dose Equivalent limit of 100 millirem per year and the EPA NESHAP standard of 10 millirem per year. *Id.* Executive Summary at 4 and Section 4.12.3.2.1.

20 DEIS at xxv and xxvi.

21 Mr. Sea has not challenged USEC's analysis in the ER of potential radiological impacts, nor has he challenged the analysis of such impacts by the NRC Staff in the DEIS.

22 Sea Brief at 5. Mr. Sea claims that DOE began using Garlan-4 in 2003 (i.e. before the Portsmouth site was even selected for the ACP). *Id.*

atomic site perimeter."[23] Thus, Mr. Sea asserts that DOE is currently using a defoliant along the existing fence line of the DOE reservation, but fails to provide any facts to support his contention that the construction, operation or decommissioning of the proposed ACP will have any impact on any historical or cultural resources.

Third, Mr. Sea argues that the Board "incorrectly ignored" an expert declaration in which the declarants discuss their observations concerning earth mounds of indeterminate origin at an existing well field which supplies water for the Portsmouth Reservation.[24] Nothing in that declaration alleges any adverse impacts from the ACP on the structures identified at the well field.[25] The closest the declarants get to an allegation of impact is their statement that: "[i]f the structure is determined to have historic significance, an evaluation should be made of the visual and physical impact of the American Centrifuge Project on that structure . . . . Whether pumping of water . . . damages the structure is a question that should be evaluated by hydrology experts."[26]

Moreover, the Board did not ignore the declaration. On the contrary, the Board stated:

> With his proposed Amended Contentions . . . Mr. Sea provided additional evidence *to establish that there may be cultural or historic resources in close proximity* to the proposed ACP. What he did not do, however, is provide facts or expert opinion [that] the ACP *could reasonably be expected to adversely impact those resources* [referring specifically to the opinion of the declarants that the effects of water pumping on the structure at the well field should be studied by a hydrologist].[27]

Thus, Mr. Sea's allegation that the Board "ignored" the expert declaration is false.[28]

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23 Sea February 28 Petition at 23; Sea March 1 Petition at 23.

24 Sea Brief at 6.

25 *See* Amended Contentions of Geoffrey Sea, August 17, 2005, at Exhibit AA.

26 *Id.*

27 Decision at 45-46 (emphasis added).

28 It is quite clear in reading the actual declaration that the declarants were stating that they lacked the qualifications to make a judgment on Mr. Sea's contention and that a hydrology expert would be required in order to determine whether any potential adverse effects on the structure might occur. In fact, the ER

It is also important to note that under the NHPA, cognizable "adverse effects" are only those which may alter "*any of the characteristics of a historic property that qualify the property for inclusion in the National Register* in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association."[29] Thus, for example, if the primary "characteristics" that qualify a property for inclusion in the National Register are the "informational" benefits that can be gained by studying the property (*e.g.*, study of a Hopewell mound to learn more about the culture), even impacts such as visual intrusion, noise, increased traffic, etc., would not "alter . . . the characteristics . . . that qualify the property for" listing. Mr. Sea has failed to link the ACP to any such impact on the relevant characteristics of the potential historic or cultural resources he has identified. Indeed, as discussed in the ER, the ACP will not have any significant adverse impacts beyond the Portsmouth site boundary, let alone significant adverse impacts affecting relevant characteristics of the resources discussed by Mr. Sea.[30] This analysis of the potential impacts of the ACP was confirmed in the DEIS.[31]

In short, while Mr. Sea has expounded at some length about the possible existence and potential historical or cultural significance of various resources or sites in the vicinity of the Portsmouth Reservation, he has not provided any indication that the ACP will adversely affect any of those sites or resources. Because such alleged adverse impacts are the fundamental underpinning of his Petition to Intervene and appeal, the Board's decision to reject his contentions should be affirmed.

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demonstrated that the small increment of additional water to be pumped in support of the ACP from the existing wells is well within the historic levels of pumping and will have no adverse impact. ER at Executive Summary and Section 4.4.3. The DEIS confirmed this analysis (*See* DEIS at xxiii and Section 4.2.6) and specifically found that there was no impact to the earthen "structure" identified by Mr. Sea in his filings. DEIS at 4-7 and 4-24.

29 36 CFR § 800.5 (a)(1).

30 ER Executive Summary at 4.

31 DEIS at xxvii.

B. USEC Has Complied With Its Obligations Under Applicable NRC Requirements

Mr. Sea's appeal should also be rejected because USEC has fulfilled its obligations to evaluate potential historic or cultural resources under applicable NRC requirements, and he has failed to allege any facts to the contrary.

1. Applicable NRC Requirements – Section 51.45

The NRC's regulations implementing the National Environmental Policy Act (NEPA) require certain license applicants to assist the Agency in meeting its statutory responsibilities under NEPA by submitting an ER that provides input to the Staff on, among other things, the nature of the proposed action, a description of the affected environment, and the impact of the proposed action on the environment.[32] Section 51.45(b), in particular, requires that an applicant such as USEC prepare an ER that includes "a description of the environment affected" by the proposed action.[33] In ruling upon Mr. Sea's contentions, the Board correctly stated that the "obvious purpose of this regulation is to identify resources for the NRC Staff, including cultural and historic resources, that could be *reasonably expected* to be adversely affected so the NRC can meet its obligations under NEPA . . . the [NHPA] . . . and other relevant environmental statutes."[34] The Board went on to state:

> We do not believe that the mere presence of historic or cultural resources in close proximity to the proposed activity, standing alone, requires a description in the ER. Rather, the governing regulation, 10 C.F.R. § 51.45(b), requires that the ER identify the "environment affected," and we find no basis for construing the regulation to require identification of every portion of the environment which might, even in the remotest of possibilities, be affected. There must be some demonstration of potential effect upon those resources before the failure to list the resources would

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32 10 CFR § 51.45.

33 *Id.* at § 51.45(b).

34 Decision at 43-44 (emphasis added).

> constitute a deficiency in the ER. We believe that the appropriate interpretation of Section 51.45(b) is that the ER must identify only sites that can reasonably be expected to be "affected" by the proposed federal action, thereby alerting the Agency to the need to examine the potential impacts upon those sites.[35]

This statement is clearly correct. Under Section 51.45(b), USEC was obligated to describe the "affected environment," and not to identify any potential historic or cultural property in the general vicinity of the ACP -- without regard to the potential that the ACP could have some relevant adverse effect on the property. In the absence of some reasonable expectation that adverse impacts may occur, USEC was not obligated to address such properties in the ER.

USEC's ER acknowledges that the ACP will be located "within a region where Adena and Hopewell Indian mounds [or earthworks] have existed", discusses the results of prior archaeological studies, and properly focuses on potential historic or cultural resources on the DOE Portsmouth Reservation.[36] USEC's ER goes on to state that "[i]mpacts to cultural resources were determined by consultations with the [State Historic Preservation Officer] SHPO and previously conducted cultural surveys to identify the existence of historic and cultural resources and assess[] impacts."[37] USEC found that "no projected impacts as a result of the commercial centrifuge project are expected," in part because "construction and refurbishment activities will be conducted in areas known to be devoid of cultural and historic resources."[38] Mr. Sea has never taken issue with this conclusion.

Mr. Sea claims that USEC's ER should have mentioned various alleged historic or cultural resources. Throughout his Brief, Mr. Sea mentions a number of different properties including the Barnes Home, the Barnes Works (also known as the Scioto Township Works), the

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35 Decision at 45 (emphasis in original).

36 ER at 3-62 through 3-63.

37 *Id.* at 4-88.

38 *Id.* at 4-89 through 4-90.

"kill-site of Sargent's Pigeon," and an alleged ancient earthwork adjacent to well fields near the Portsmouth Reservation. Again, however, Mr. Sea fails to provide any evidence that these sites would be impacted by the ACP nor does he challenge the analysis of impacts of the ACP presented in the ER. Even if USEC had erred by not identifying these sites in the ER, the fact that they are now addressed in the DEIS "cures" any such alleged error and renders any such contentions moot. In the DEIS, the NRC Staff discusses, among other sites, the Barnes Home, the Scioto Township Works, the alleged kill-site of the last Passenger Pigeon, and the alleged earthwork adjacent to the well fields.[39]

The Commission has held that if a draft EIS addresses information allegedly omitted from the ER, then the original contention is moot.[40] In *Duke Energy Corp.* the Commission reviewed an admitted contention claiming that the applicant had not considered a specific study while preparing an analysis for the ER. *Id.* at 377. In response to the contention, the NRC Staff sent Requests for Additional Information (RAIs) to the applicant. *Id.* at 376. The Commission stated:

> And, most importantly, the Staff explicitly has chosen to take into account the [study information] in the draft [Supplemental Environmental Impact Statement].[41]
>
> The Commission thus sees no purpose in returning to the question whether the earlier Environmental Reports should have considered the [study], a matter that went to the sufficiency of the admitted contention, to be sure, but that now has been superseded by the draft SEISs' actual use of the [study]. That is why the Commission emphasized that the original contention – while

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39 DEIS at 3-5 through 3-11, 4-4 through 4-7.

40 *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 378 (2002).

41 *Id.* at 378. CLI-02-28 concerns the license renewal for nuclear power plants. The NRC issued a generic Environmental Impact Statement for license renewal, therefore the EIS issued in a license renewal proceeding is a Supplemental EIS (SEIS). Accordingly, for this purpose, the draft SEIS should be treated the same as a draft EIS.

> indeed admissible, as the Board had found – now 'largely appear[ed]' moot.[42]

The Commission in the *Duke Energy Corp.* case went on to state:

> [W]here a contention is "superseded by the subsequent issuance of licensing-related documents" – whether a draft EIS or an applicant's response to a request for additional information – the contention must be disposed of or modified .... [Footnote omitted.] There is, in short, a difference between contentions that merely allege an "omission" of information and those that challenge substantively and specifically how particular information has been discussed in a license application. Where a contention alleges omission ... and the information is later supplied by the applicant or considered by the Staff in a draft EIS, the contention is moot. [Footnote omitted.][43]

More recently, the Commission has reiterated this principle:

> Our contention pleading rule requires a petitioner to file NEPA contentions on the applicant's ER so that environmental issues are raised as soon as possible in the proceeding. The requirement that a petitioner raise NEPA contentions in response to the ER gives the Staff the opportunity to request additional information from the applicant and work to resolve any deficiencies as the Staff develops its own Environmental Impact Statement (EIS). If the EIS addresses the concerns alleged in the contention, the original contention becomes moot and the intervenor must raise a new contention if it claims the EIS discussion is still inaccurate or incomplete.[44]

In this case, the Staff has sent USEC RAIs concerning Mr. Sea's contentions and the draft EIS addresses Mr. Sea's alleged omissions.[45] Accordingly, Mr. Sea's contentions alleging omissions in the ER are now moot by virtue of the Staff's treatment of those matters in the DEIS.

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42 CLI-02-28 at 378.

43 *Id.* at 382-83.

44 *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 130 (2004).

45 *See* Letter from S. Toelle to J. Strosnider, dated August 16, 2005, regarding "Submittal of Additional Information Related to Requests for Additional Information Regarding the Environmental Report"; *see also* DEIS at 3-5 through 3-11. In his Brief, Mr. Sea also briefly mentions the Sargent Home and the Rittenour Home. Sea Brief at 3, 8. He states, without any basis whatsoever, that these two sites "would qualify for the National Register but for the fact that they have not yet been nominated." Sea Brief at 8. NHPA

2. The NHPA

Throughout his Brief, Mr. Sea repeatedly alleges that USEC has an independent legal obligation under the NHPA to identify and evaluate impacts on historic and cultural resources. Mr. Sea has not provided a single citation to the NHPA, the relevant implementing regulations set forth in 36 CFR Part 800,[46] or relevant case law supporting his position that the NHPA imposes the obligation on a private entity such as USEC to identify historic and cultural resources and evaluate potential impacts on those resources. Moreover, to the extent Mr. Sea is arguing that the NRC should impose additional requirements over and above those imposed by applicable NRC regulations, his contention must be rejected as an impermissible attack on NRC regulations.[47]

Contrary to Mr. Sea's assertions, the NHPA imposes no obligation on private entities such as USEC. Instead, it establishes certain obligations on *federal agencies* to identify and evaluate impacts on certain historic or cultural resources before engaging in a federal "undertaking." In particular, Section 106 of the NHPA states:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.[48]

Section 106 addresses resources that are "included in or eligible for inclusion" in the National Register. 16 U.S.C. § 470(f) (2005). There is no evidence that either site is eligible for inclusion and both are beyond the Area of Potential Effects, and thus they need not be further considered. 36 CFR § 800.4.

46 "Protection of Historic Properties," 36 CFR Part 800 (Aug. 5, 2004).

47 10 CFR § 2.335 (2005); *Florida Power & Light Co.*, CLI-01-17, 54 NRC 3, 16 (2001); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 252 (1996).

48 16 U.S.C. § 470(f) (2005).

This language makes clear that the NHPA requires federal agencies, not private entities such as USEC, to evaluate the effects of their activities or "undertakings" before proceeding with such undertakings. There is nothing in the remainder of the NHPA to the contrary.[49]

Section 106 of the NHPA is implemented by the Advisory Council on Historic Preservation (ACHP) regulations set forth in 36 CFR Part 800. Those regulations also clearly demonstrate that the identification and evaluation obligations imposed by Section 106 are imposed on the relevant federal agency and not on any private party.[50]

Furthermore, the federal courts have made clear that a violation of the NHPA "can only be committed by a federal agency," and that "[b]y its terms, only a federal agency can violate Section 470f [*i.e.*, Section 106]."[51] Thus, in the context of addressing one of Mr. Sea's contentions, the Board correctly stated:

> USEC has no obligations directly imposed upon it by NHPA. That statute is directed to federal agencies such as the NRC, not to license applicants. Thus, the requirement to identify cultural and historic resources [is] imposed upon license applicants, such as USEC, by 10 CFR § 51.45(b), not by the NHPA.[52]

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49 Clearly, Section 106 of the NHPA is the primary focus of Mr. Sea's allegations of noncompliance with the NHPA. He references no other provision of the statute in his Brief. Thus, any prior allegations of noncompliance with other provisions of the statute are waived. *Int'l Uranium*, CLI-01-21, 54 NRC at 253. In his earlier filings with the Board, Mr. Sea briefly mentioned NHPA Sections 110 and 112. *See e.g.*, Sea February 28 Petition at 26; Sea March 1 Petition at 26. Those provisions are inapposite here and in any event, like Section 106, do not impose any obligation on USEC to identify or evaluate potential impacts on historic or cultural resources.

50 *See* 36 CFR §§ 800.1, 800.2, 800.4, and 800.5. Section 800.2 defines the role of "participants" in the Section 106 process, including the ACHP, consulting parties, and the public. With respect to the role of license applicants, it states: "Applicants for . . . permits, licenses and other approvals," such as USEC, are "entitled to participate as a consulting party" but are not required to do so. 36 CFR § 800.2(c)(4). *See also*, NUREG-1748 (August, 2003) at 1-7, 5-10 through 5-12, 5-19 through 5-20, 6-14 through 6-15, and Appendix D.

51 *W. Mohegan Tribe and Nation of N.Y. v. New York*, 246 F.3d 230, 232 (2nd Cir. 2001) (citing *Vieux Carre Prop. Owners v. Brown*, 875 F.2d 453, 458 (5th Cir. 1989)). *See also Preservation Coalition of Erie County v. Fed. Transit Admin.*, 356 F.3d 444, 455 (2nd Cir. 2004).

52 Decision at 50.

In short, to the extent that Mr. Sea's contentions are based upon his belief that USEC has independent legal obligations under the NHPA to identify and evaluate impacts on historic or cultural resources, he is incorrect as a matter of law.[53]

Even if USEC had such an obligation, it was not required to identify historic or cultural resources beyond the Area of Potential Effects (APE) and the properties that are the subject of Mr. Sea's contentions are all beyond that area. Under 36 CFR § 800.4, the relevant agency official is responsible to, among other things, "[d]etermine and document the area of potential effects," "[r]eview existing information on historic properties within the area of potential effects," and "take the steps necessary to identify historic properties within the area of potential effects."[54]

In accordance with NRC regulations, USEC's ER analyzed the potential impacts of the ACP and found that the potential impacts of the ACP on historical and cultural resources were limited to the area within the Portsmouth Reservation boundary. USEC's determination on the appropriate area to be evaluated for potential adverse effects on historic or cultural resources was confirmed by the NRC Staff in its DEIS:

> In accordance with 36 CFR Part 800, NRC defined the area of potential effects to include the footprint of all ground-disturbing activities and the perimeter of all buildings to be refurbished plus a 100 meter (328-foot) buffer around all such areas to account for heavy equipment operations, workers, and temporary staging of construction materials adjacent to the proposed work sites. NRC

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[53] Mr. Sea argues that "contentions and notions of impact and assessment related to compliance with NHPA are fundamentally different from those that arise under the Atomic Energy Act or even, in most cases the National Environmental Policy Act." Sea Brief at 4-5. Mr. Sea's only citation is to his own reply brief. While Mr. Sea's views of the NHPA's obligations are contrary to established law, to the extent he is arguing that there are additional requirements that should be imposed on USEC, his argument is an impermissible attack on NRC regulations. *Supra* n.47, at 12. USEC's obligation to identify cultural resources is spelled out in current NRC regulations governing the preparation of the ER (10 CFR § 51.45) and Mr. Sea has failed to submit an admissible contention that USEC has failed to meet this regulatory requirement.

[54] 36 CFR §§ 800.4(a)(1), (2) and (b).

> defined the area of potential indirect effects to include all area[s] within the property boundary of the DOE reservation. This conservative area for indirect impacts accounts for potential indirect impacts . . . that could occur beyond the area of construction disturbance.[55]

Thus, the NRC Staff concluded that the DOE reservation boundary served as a "conservative" area for evaluating both the potential direct and indirect effects of the ACP.

As a result of public comments during the scoping process, however, the NRC also chose to evaluate various properties that are "adjacent to the [DOE Portsmouth site] property boundary," but in doing so it specifically stated that it "considers such properties to be outside of the area of potential effects (direct or indirect)."[56] The NRC Staff considered three such properties outside the APE: the Scioto Township Works, the Barnes Home, and the Bailey Chapel.[57] Mr. Sea's contentions address, among other locations, the Scioto Township Works and the Barnes Home. (He raises no issues with respect to the Bailey Chapel.) In addition, although the alleged prehistoric earthworks in the vicinity of a well field adjacent to the Portsmouth Reservation discussed by Mr. Sea were not within the APE, the NRC Staff nevertheless addressed potential impacts on those alleged earthworks.[58] Mr. Sea has identified *no* existing potential historic or cultural resources within the APE and has failed to challenge any of the analysis of the potential impacts of the ACP. Thus, to the extent that the NHPA could be viewed as requiring consideration of the locations cited by Mr. Sea, such requirement is met by the NRC's consideration of these locations.

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55 DEIS at 3-6.

56 *Id.* at 3-6.

57 *Id.* at 4-5 through 4-7.

58 *Id.* at 3-6, 4-7.

C. Mr. Sea Repeatedly Challenges Matters Relating to Past DOE Activities and Existing Site Operations That Are Not Related to the ACP and are Outside the Scope of the Proceeding

Throughout his Brief, Mr. Sea repeatedly raises issues concerning past DOE activities (such as DOE's former Gas Centrifuge Enrichment Plant (GCEP) project) or existing site activities (such as the use of Garlan-4) that are not elements of the ACP. DOE's prior actions at the Portsmouth site in general and Mr. Sea's disagreements with past actions of the DOE are clearly outside the scope of this proceeding. Possible impacts of past DOE activities and operations at an existing DOE facility are simply not cognizable in this forum.[59] And even if Mr. Sea's contention were proven, it would not entitle him to any relief in this proceeding,[60] underscoring the fact that such allegations do not raise a genuine issue of material fact or law.

IV. MR. SEA HAS IDENTIFIED NO ERROR OF LAW OR ABUSE OF DISCRETION WITH RESPECT TO THE BOARD'S RULINGS ON HIS SPECIFIC CONTENTIONS

A. Contention 1.1

Contention 1.1 states that: "USEC has failed to identify cultural resources potentially impacted by the American Centrifuge Plant."[61] As discussed in Section III above: (1) Mr. Sea has not identified any such resources that could reasonably be impacted by the ACP; (2) he has not shown that USEC has failed to meet any applicable NRC requirement; (3) he has not demonstrated that USEC has failed to meet its obligation under 10 CFR § 51.45(b) to identify historic or cultural resources that could reasonably be affected by the proposed action; and (4) even if USEC did not identify properties it should have identified, NRC Staff awareness of those

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59 *See e.g., Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 450 (2001).

60 Notice and Order, CLI-04-30, 69 Fed. Reg. 61,411, 61,412 (Oct. 18, 2004) ("Each contention must be one that, if proven would entitle the petitioner to relief.").

61 Sea Brief at 7.

properties, and their consideration in the EIS addresses the matter, cures the alleged error, and moots the contention. On these bases, Mr. Sea's challenge to the Board's decision on Contention 1.1 should be rejected. Nevertheless we discuss some of Mr. Sea's specific allegations further below.

Mr. Sea states that there are: two prehistoric sites already listed on the National Register (the Barnes earthworks and the Piketon earthworks) "in proximity to the ACP project site"; one historic site (the Barnes Home) "that has been determined to qualify for the National Register"; and "three other sites" (the Sargent Home, Rittenour Home and the kill-site of the Sargents Pigeon) "proximate . . . that would qualify for the National Register but for the fact that they have not yet been nominated."[62] The Barnes earthworks and Piketon earthworks have, as Mr. Sea has indicated, been included on the National Register. However, Mr. Sea has not shown that the Barnes Home has actually "qualified for" listing. In addition, his conclusion that the three remaining "proximate" sites "would qualify" if they were nominated is entirely speculative, since apparently no nomination has ever been submitted. Most importantly, as discussed above, Mr. Sea fails to demonstrate there would be any adverse impacts to those sites.

Mr. Sea argues that as a consulting party, he has a right to "discuss and achieve mitigation for impacts that may fall short of the required documentation for intervention."[63] Regardless of whether Mr. Sea, as a consulting party under the NHPA Section 106 process, may discuss an issue with the agency, in order to submit an admissible contention and be admitted as an intervenor in the licensing hearing, Mr. Sea must meet the "required documentation for intervention" established in NRC regulations.

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62 Sea Brief at 8.

63 *Id.* at 10.

Mr. Sea also cites to the Commission's statement in its decision granting him standing to intervene in this proceeding that "there is an obvious potential that those residing within one mile of the [ACP] may be affected by construction, operation, and decommissioning."[64] From this he concludes that "[s]urely if the Commission regards the potential for effect to be 'obvious,' USEC should not be able to rule out the possibility of impact *a priori*, without so much as identifying the property in question."[65] This is an effort to bootstrap the Commission's liberal standards governing legal standing (which provide that even a small potential effect may be sufficient for standing purposes) to satisfy entirely different standards for assessing the area of potential effects of a project for purposes of compliance with 10 CFR § 51.45. A Commission finding of such an "obvious potential" in general falls far short of a finding that there will be adverse effects on the specific "characteristics" that qualify a property for inclusion on the National Register.

Mr. Sea next takes issue with the Board's conclusion that the contention is moot because of the Staff's consideration of these matters in the DEIS. He objects that "[s]uch an argument could thus lead to the dismissal of any contention by the following chain of events:"

> 1. Applicant's application and ER contain some serious defect, 2. An affected party files a petition of intervention raising the defect as a material dispute proper for hearing, 3. The petition is denied because the Panel and Staff were made aware of the issue and are correcting the matter on behalf of the Applicant.[66]

As discussed in Section III.B.1 above, that is in fact the law.[67]

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64 Sea Brief at 15.

65 *Id.* at 10.

66 *Id.* (emphasis in original).

67 Mr. Sea also asserts that his "dispute is with USEC, not with NRC Staff or the Panel .... Petitioner alleges that USEC is manifestly and grossly insensitive to historic property owners on its fence-line ... That material dispute – USEC's utter neglect of its neighbors – merits hearing." *Id.* at 11. Regardless of Mr. Sea's perception about USEC's sensitivity, the issue before the Commission is whether Mr. Sea has demonstrated any error of law or abuse of discretion by the Board in making its decision.

Finally, Mr. Sea complains that the "NRC Staff now considers its Section 106 process to be closed, or nearing closure," suggesting a lack of opportunity for interested persons or NHPA consulting parties to express their views and participate in the process.[68] Under the ACHP regulations, the NRC is "encourage[d]" to utilize its existing NEPA procedures to meet its obligations under the NHPA, including its consultation obligations.[69] In this case, since USEC filed its application in August 2004, Mr. Sea had and continues to have ample opportunity to participate including: (1) his participation in the Public Scoping Meeting on January 18, 2005;[70] (2) public comments on the DEIS;[71] and (3) as a Consulting Party in the ongoing Section 106 review.[72] In fact, the Board, itself considered every filing made by Mr. Sea despite his failure to comply with NRC rules.[73] For the reasons discussed above, the Board's decision not to admit this contention should be affirmed.

B. Contention 1.2

Contention 1.2 states that: "USEC has failed to identify potential impacts of the American Centrifuge Plant on nearby historic and prehistoric sites."[74] As discussed in Section III above: (1) Mr. Sea has not identified any such impacts of the ACP; (2) he has not shown that USEC has failed to meet any applicable NRC requirement; (3) he has failed to demonstrate that USEC failed to meet its obligations under 10 CFR § 51.45(b) to identify potential impacts on

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68 Sea Brief at 11.

69 36 CFR §§ 800.2(a)(4), 800.3(b), and 800.8.

70 Mr. Sea participated in the Public Scoping Meeting. *See* Transcript of January 18, 2005 Public Scoping Meeting, available as Accession Number ML0505903210, at http://www.nrc.gov/reading-rm/adams/login.html.

71 Mr. Sea participated in the Public Meeting on the DEIS on September 29, 2005 (the transcript has not been released yet).

72 Letter to G. Sea from B. Davis, dated September 6, 2005, regarding "Transmittal of Draft Environmental Impact Statement for the Proposed American Centrifuge Plant, Pike County, Ohio and Request for Consulting Party Comments."

73 Decision at 2-4 and 42-43.

74 Sea Brief at 11.

historic and cultural resources that could reasonably be affected by the proposed action; and (4) even if USEC did not consider impacts it should have evaluated, NRC Staff awareness of the allegedly affected properties, and consideration in the EIS addresses the matter, cures the alleged error, and moots the contention. On these bases, his challenge to the Board's decision on Contention 1.2 should be rejected. Again, however, we briefly discuss some of Mr. Sea's specific allegations further below.

Mr. Sea states that "[a]s discussed above with respect to Contention 1.1 . . . [he] did submit a large amount of factual evidence of impacts of the ACP on historic properties in the area."[75] Review of the portion of his Brief regarding Contention 1.1 and USEC's response above should make clear that no such evidence was presented. Indeed, Mr. Sea's discussion of Contention 1.1 focuses on legal theories as to why USEC was required to identify nearby resources, rather than on any explication of his basis for believing impacts will occur. Mr. Sea then refers to the expert declaration discussed above[76] which we have already shown identifies no potential adverse impacts on historic or cultural resources.[77]

Mr. Sea asserts that he has presented "two strong cases of impact" – impacts on the Barnes Home and on the earthworks "now identified on federal USEC-leased land at the Water Field site."[78] With respect to the Barnes Home, Mr. Sea makes the following points -- *none* of

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75 Sea Brief at 12.

76 *Id.*

77 Mr. Sea complains that the Board improperly "weigh[ed] the evidence" in stating that the photograph of an entrance to the Portsmouth site was "not as dramatic as Petitioner's description" and that he is being "unfairly penalize[d] for the lack of information provided by USEC regarding the entrance." Sea Brief at 12. In fact, the Board makes clear that Mr. Sea was "repeatedly asked how the modifications to the road were related to the . . . ACP" but that he "did not offer a viable explanation." The Board also pointed out that counsel for USEC made clear that the modifications were unrelated to the ACP. Decision at 48-49.

78 Sea Brief at 12-13.

which identify *any* potential or actual adverse impacts on the Barnes Home, let alone on the "characteristics" of the property "that [may] qualify [it] for inclusion in the National Register":[79]

- Preservation of the Home would strengthen the cultural heritage tourism industry and create the potential for high-quality, non-intrusive economic development;
- He provided a "wealth of information about the historic *value* and *importance* of the Barnes Home and his plans to develop it as a site for tourism"; and
- Impacts on cultural resources "cannot be quantified in the same manner as radiological impact of plant emissions."[80]

With respect to the alleged earthworks near the well field, Mr. Sea repeatedly relies on selected excerpts from and characterizations of an expert declaration prepared after a tour of the well field site.[81] His quotations from those excerpts are intended to give the impression that the experts concluded that a surface structure adjacent to well fields near the Portsmouth Reservation is in fact a prehistoric structure. In particular, Mr. Sea quotes a portion of the expert declaration which states: "DOE well-heads, by the dozen, line both sides of the structure and some are in the midst of it. Whether pumping of water from beneath the structure damages the structure is a question that should be evaluated by hydrology experts."[82] He goes on to refer to the structure as "*the earthwork now identified* on federal USEC-leased land at the Water Field site" and states that he, and the three cultural resource experts visited the site and "*[t]here we located an ancient*

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79 36 CFR § 800.5(a)(1).

80 Sea Brief at 14-15. Mr. Sea also objects to "roads and gates with fluorescent orange and yellow warning signs" on the southwest access road to the Portsmouth site and continues to assert, without basis, that these were erected for the ACP, despite being advised on two occasions that that is not the case. Prehearing Conference Transcript (July 19, 2005) at 89, Lines 19-25; USEC Inc. Answer to Geoffrey Sea Motion for Leave to Supplement Replies and Amend Contentions, August 29, 2005, at 13-14.

81 Mr. Sea claims that the site tour was arranged "only after long and extreme resistance by USEC." Sea Brief at 13. This is incorrect. USEC provided the tour within six business days of USEC voluntarily offering to help Petitioner. Mr. Sea had previously attempted to arrange the tour through DOE. *See* USEC Inc. Response to Geoffrey Sea Request to Delay ASLB Ruling on Contentions at 3-4 (August 10, 2005).

82 Sea Brief at 6.

linear earthwork."[83] Although Mr. Sea quotes the expert declaration at some length, he leaves out the following passage:

> [W]e identified a human-made earthwork on the site, *whose origin is unknown* but which appears to pre-date the U.S. Department of Energy ("DOE") water system .... We believe that further investigation is warranted in order to determine the origin of the earthworks with confidence.... *Though the structure is man-made, it is impossible to say upon partial visual inspection what this structure is, how old it is (though it is not very recent), or who built it.* However, it is within the realm of possibility that the structure is an Indian earthwork of the Middle Woodland period .... *It is also possible that the structure is a 19th or 20th century construction*, although we are not aware of any major structures that were built in the area during this time.[84]

The ER determined there would be no impacts to any potential historic or cultural resources outside the DOE reservation boundary.[85] The NRC Staff confirmed this and determined that the APE was limited to the DOE reservation.[86] The NRC Staff has specifically addressed both of these properties in the DEIS, despite the fact that they are outside the APE. It concluded that there would be no effects on the Barnes Home from either ACP construction or operations.[87] It also concluded that there would be no effects on the "potential earthworks located near the DOE wellfields" and presents an evaluation showing that the wells are not expected to cause subsidence.[88] Thus, for the reasons discussed above, the Board's Decision not to admit this contention should be affirmed.

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83 Sea Brief at 13 (emphasis added).

84 Amended Contentions of Geoffrey Sea, Aug. 15, 2005, at Exhibit AA (emphasis added).

85 ER at 4-90.

86 DEIS at 4-5.

87 *Id.* at 4-6 and 4-7.

88 *Id.* at 4-7.

C. Contention 2.1

Contention 2.1 states that: "The USEC-DOE collaborative arrangement is out of compliance with the National Historic Preservation Act and related legislation."[19] As discussed in Section III.C above, the Board correctly held, among other things, that the issue presented in this contention is outside the scope of this proceeding.[20] Mr. Sea challenges that conclusion on the basis of his belief that the ACP is:

> the continuation of a project begun by DOE called the Gas Centrifuge Enrichment Plant (GCEP). Petitioner has argued that for the purpose of defining the "federal action" that triggered NHPA review obligations, that action was the inception of the GCEP program, which then evolved continuously into ACP.[21]

Mr. Sea has provided no legal or factual basis for his position that GCEP and the ACP are one in the same "federal action," nor could he. GCEP was a DOE program commenced in the 1970s and terminated in 1985, seven years before USEC even existed.[22] Furthermore, the DOE/USEC legal agreement is beyond the scope of this proceeding.

Mr. Sea concludes by asserting that the expert declaration "showed that on what is called the GCEP Water Field site . . . there has been effectively no program of NHPA compliance since the site was acquired in 1983."[23] This statement confirms his desire to litigate DOE's historical activities on the Portsmouth site. For the reasons discussed above, the Board's Decision not to admit this contention should be affirmed.

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19 Sea Brief at 15.

20 Decision at 49.

21 Sea Brief at 16.

22 ER at 1-3.

23 Sea Brief at 17.

D. Contention 2.2

Contention 2.2 states that "Noncompliance with federal preservation law has undermined the legitimacy and legal basis of the USEC-DOE agreement."[24] The Board found that this contention is outside the scope of the proceeding, not supported by facts or expert opinion, and does not raise a genuine dispute of material fact or law.[25] Mr. Sea presents to the Commission almost no basis for his challenge to the Board's decision on this contention, and simply refers back to the arguments he made with respect to Contention 2.1. In particular, he states:

> For the aforementioned reasons, petitioner rebuts the Panel's opinion that "DOE's activities, however, are entirely outside the purview of this board." The Board cannot meet its obligation to review USEC's proposed project without also reviewing the precursor to it, which happened to be operated by DOE.[26]

As discussed above, DOE's activities associated with the GCEP project are not part of the licensing action before this Agency and not within the scope of the proceeding. Mr. Sea's allegations regarding past DOE activities do not raise a genuine issue of material fact or law. For the reasons stated above, the Board's decision not to admit this contention should be affirmed.

E. Contention 3.1

Contention 3.1 states that: "USEC has failed to consider a broad range of alternatives to the proposed action."[27] Mr. Sea states that the Board erred in rejecting his contention on the basis that the contention "suggests consideration of alternatives that are 'beyond those reasonably related to the purposes or goals of the proposed project.'" He continues: "The Panel's decision is in error, because it focuses only on NEPA's requirements for the

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24 Sea Brief at 17.

25 Decision at 51.

26 Sea Brief at 17-18.

27 *Id.* at 18.

consideration of alternatives and does not address NHPA's requirements for consideration of alternatives."[98] The Board ruled correctly and Mr. Sea is wrong as a matter of law.

Mr. Sea does not appear to suggest that USEC's identification of alternatives was inconsistent with the requirements of NRC regulations or NEPA, nor could he since USEC appropriately considered a broad range of alternatives including, among other things, siting alternatives, design alternatives, alternative technologies, and the "No Action" alternative.[99] Under NRC regulations and NEPA, USEC was not required to consider alternatives that do not meet the need for the proposed project (except for the "No Action" alternative).[100]

Instead, Mr. Sea argues that the NHPA mandates a "fundamentally different" approach to the consideration of alternatives, and cites in particular, 36 CFR § 800.6(a) which states that:

> The agency official shall consult . . . to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties.[101]

Mr. Sea accurately quotes the relevant provision. What he fails to do is to provide the Commission with the critical context. Under the Part 800 regulations, the requirement to consider alternatives or modifications to the undertaking only arises after: (1) historic or cultural properties are identified within the APE (36 CFR § 800.4); and (2) the criteria of adverse effect are applied and it is determined that such effects may exist (36 CFR § 800.5). As described earlier, none of the properties that Mr. Sea discusses is within the APE and none will be adversely affected by the ACP. Moreover, while the contention again criticizes USEC for failing to consider certain alternatives, the Part 800 regulations cited above make it very clear that these

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98 Sea Brief at 18.

99 ER at 2-1 through 2-25.

100 *Sacramento Mun. Utility Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 144-45 (1993) (citing *Process Gas Consumers Group v. U.S. Dep't of Agric.*, 694 F.2d 728, 769 (D.C. Cir. 1981)); 40 CFR § 1502.14(d)(2005).

101 36 CFR § 800.6(a).

obligations are those of the agency official, and not a private party. USEC's responsibility to develop alternatives in its ER are derived from the NRC's NEPA implementing regulations and it has properly fulfilled that responsibility.[102]

Finally, it is important to note the nature of the alternative that Mr. Sea believes USEC erred in not considering in the ER. He states: "you can't both build a uranium enrichment plant and erect a center and monument that memorialize the mound-building cultures and the passing to extinction of the passenger pigeon."[103] Mr. Sea elaborated in his original Petition to Intervene:

> Petitioner suggests that the old X-326 building . . . could be entombed as a national monument – a pyramid – as a memorial to the passenger pigeon which went extinct on this land . . . . A pyramid to the passenger pigeon would complement [an existing nearby archaeological park].[104]

These proposed "alternatives" do not represent alternatives to "avoid, minimize or mitigate" adverse effects on any existing historic properties. Instead, they point out that Mr. Sea's concern is that the ACP may be inconsistent with his own personal plans and "published proposals" with respect to new and different uses of parts of the DOE reservation that will not be used for the ACP -- having recently purchased the Barnes Home property (while being well aware of both the existing nuclear facilities at the site and the planned ACP).[105] For the reasons discussed above, the Board's decision not to admit this contention should be affirmed.

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102 10 CFR § 51.45(b)(3).

103 Sea Brief at 19.

104 Sea February 28 Petition at 30; Sea March 1 Petition at 30. Mr. Sea also suggests moving parts of the Oak Ridge National Laboratory to the Portsmouth site. *Id.* The Commission should be made aware that the X-326 building is an existing gaseous diffusion plant process building that is presently in cold standby status and will not be used as part of the ACP project. Thus, Mr. Sea's desire to convert it into a national pyramid memorializing the Passenger Pigeon is irrelevant to this proceeding.

105 Sea Brief at 19. Mr. Sea attempts to support his alternatives claim by citing to "(33 F.Supp at 492, 1 ELR 20105 – D. Del. 1971)." Apparently, Mr. Sea is citing *Delaware v. Penn. N.Y. Cent. Transp. Co.*, 323 F.Supp. 487, 492 (D. Del. 1971). The case does not support Mr. Sea's claims. Instead, the court stayed a proceeding until after a bankruptcy proceeding was completed. Mr. Sea's quote is from the section on standing -- which the Commission has already granted Mr. Sea.

F. Contention 3.2

Contention 3.2 states that: "USEC's stated action alternatives should be seriously considered."[106] The Board stated that "Mr. Sea argues that USEC should be required to move the ACP to Paducah, Kentucky, because the cultural impacts there would be less severe than the impact in Piketon, Ohio."[107] The Board also notes that "USEC . . . points out that the ER does consider Paducah as an alternative site, and Mr. Sea acknowledges this in his petition.[108]

Mr. Sea responds that "the Panel fails to detect the dispute. Quite simply, USEC did not do a valid comparison of the impacts on cultural resources at the two sites, precisely because USEC failed to identify the sensitive historic sites at Piketon and the impacts upon them, as elaborated in petitioner's Contentions 1.1 and 1.2."[109] Mr. Sea's statement makes clear that this contention is based upon the positions he has stated with respect to identification of historic or cultural resources, and attendant potential impacts, in Contentions 1.1 and 1.2. For that reason, this contention is inadmissible for the same reasons expressed above with respect to those two contentions.

Furthermore, since Mr. Sea has failed to provide facts or expert opinion showing that the ACP would have a significant adverse effect on historic or cultural resources, he has also failed to show that there is a genuine dispute on the issue of whether the Paducah site is "obviously superior" to the Portsmouth site. USEC would not be obligated to abandon the existing ACP site

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106 Sea Brief at 20.

107 Decision at 54.

108 *Id.*

109 Sea Brief at 20.

in the absence of such a finding.[110] For the reasons discussed above, the Board's decision not to admit this contention should be affirmed.

V. CONCLUSION

Mr. Sea's Petition to Intervene and Brief before the Commission are based upon fundamental misunderstandings or misstatements of the applicable legal requirements. He has failed to provide any information reasonably indicating that the ACP will cause adverse impacts on any historic or cultural resources. He has failed to identify any error of law or abuse of discretion by the Board in ruling on his contentions. Therefore, for the reasons discussed above, the Board's decision not to admit any of his contentions should be affirmed.

Respectfully submitted,

Donald J. Silverman
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
Phone: (202) 739-5502
E-mail: dsilverman@morganlewis.com

Dennis J. Scott, Esq.
Assistant General Counsel and
Director, Corporate Compliance
USEC Inc.
6903 Rockledge Drive
Bethesda, MD 20817
Phone: (301) 564-3352
E-mail: scottd@usec.com

Counsel for USEC Inc.

Dated November 2, 2005

[110] *Pub. Serv. Co. of N.H.*, (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 526-30 (1977), aff'd *New England Coalition on Nuclear Pollution v. NRC*, 582 F. 2d 87 (1st Cir. 1978). Indeed, the Staff found that the Paducah site "had a number of disadvantages." "Seismic factors . . . would increase the cost of construction, could make the engineering effort more complex, and could make the plant safety considerations more uncertain. Overall, the NRC Staff found that the selection of the Paducah site would result in somewhat greater environmental impacts due primarily to the need for construction of all new buildings, and the attendant excavation and land disturbance." DEIS at 2-37.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	November 2, 2005
USEC Inc. (American Centrifuge Plant)	)	Docket No. 70-7004
	)	ASLBP No. 05-838-01-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the "USEC Inc. Brief in Response to Brief of Geoffrey Sea on Appeal of LBP-05-28" were served upon the persons listed below by U.S. mail, first-class, postage prepaid, and by electronic mail (except where noted with an asterisk), on this 2nd day of November, 2005.

Secretary of the Commission[1]
Attn: Rulemakings and Adjudication Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: hearingdocket@nrc.gov)

Office of Commission Appellate Adjudication*
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Dr. Richard E. Wardwell
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: rew@nrc.gov)

Lawrence G. McDade, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: lgm1@nrc.gov)

Dr. Paul B. Abramson
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: pba@nrc.gov)

Sara E. Brock
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: seb2@nrc.gov)

[1] E-mail, original and two copies
* Served by U.S. mail, first-class, postage prepaid only.

Lisa B. Clark
Office of General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop: 0-15D21
Washington, DC 20555-0001
(E-mail: lbc@nrc.gov)

Margaret J. Bupp
Office of General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop: 0-15D21
Washington, DC 20555-0001
(E-mail: mjb5@nrc.gov)

Vina K. Colley
PRESS
3706 McDermott Pond Creek
McDermott, Ohio 45652
(E-mail: vcolley@earthlink.net)

Ewan Todd
PRESS
403 E. Oakland Ave.
Columbus, OH 43202
(E-mail: ewan@mathcode.net)

Geoffrey Sea
The Barnes Home
1832 Wakefield Mound Road
Piketon, Ohio 45661
(E-mail: sargentspigeon@aol.com)

Donald J. Silverman

Dated: November 2, 2005