

December 8, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
LOUISIANA ENERGY SERVICES, L.P.)	Docket No. 70-3103
)	
(National Enrichment Facility))	ASLBP No. 04-826-01-ML
)	

NRC STAFF REPLY TO RESPONSES OF LES AND NIRS/PC
TO NRC STAFF'S MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

On November 18, 2005, the NRC Staff filed a motion for summary disposition of a portion of Nuclear Information Resource Service and Public Citizen ("NIRS/PC") Contention EC-4 whereby NIRS/PC alleged the Draft Environmental Impact Statement for the National Enrichment Facility ("NEF DEIS") failed to support or explain the modeling of depleted uranium. NRC Staff Motion for Summary Disposition (November 18, 2005) ("Staff Motion"). Pursuant to the Board's Order of November 9, 2005, the applicant, Louisiana Energy Services, L.P. (LES), and the Intervenor, NIRS/PC, filed responses to the Staff Motion on November 28, 2005. "Order (Accepting Joint Report Proposals)," November 9, 2005 (unpublished); LES Response to Motions For Summary Disposition Filed by NRC Staff and [NIRS/PC (November 28, 2005) ("LES Response"); Response on Behalf of NIRS/PC to NRC Staff Motion for Summary Disposition (November 28, 2005) ("NIRS/PC Response"). The NRC Staff files this reply to the responses filed by NIRS/PC and LES.

BACKGROUND

This case has a complex procedural background, which must be understood to define the scope of the issues that are the subject of this summary disposition motion. LES applied for a license in December 2003, at which time it submitted its Environmental Report ("NEF ER").¹ In the NEF ER, LES specifically cited the NRC's Staff's conclusion in Appendix A from the Claiborne Enrichment Center ("CEC") Final Environmental Impact Statement ("CEC FEIS") regarding the estimated impacts of deep disposal of depleted uranium.² NIRS/PC filed a petition to intervene on April 6, 2004, with its proposed contentions, none of which challenged the sufficiency of the underlying deep disposal dose estimates from the CEC FEIS. Petition to Intervene By NIRS/PC, April 6, 2004. In a July 14, 2004 Memorandum and Order, the Board admitted NIRS/PC as a party to this proceeding and admitted several contentions, including NIRS/PC EC-4, "Impacts of Waste Storage and Disposal." *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 75-76 (2004).

In September 2004, the Staff published a Draft EIS for the NEF ("NEF DEIS").³ The NEF DEIS included dose estimates of deep disposal of depleted uranium, referencing the CEC FEIS. NEF DEIS at 4-59. On October 20, 2004 NIRS/PC filed a motion to amend or supplement previously admitted contentions based on certain additional information contained in the NEF DEIS. Motion on Behalf of NIRS/PC To Amend and Supplement Contentions (Oct. 20, 2004) ("October Motion"). In the October motion, NIRS/PC alleged that the "DEIS fails

¹ Staff Ex. 36. NUREG-1790 "Environmental Impact Statement for the Proposed National Enrichment Facility in Lea County, New Mexico," Draft Report for Comment (Sept. 2004) ("NEF DEIS").

² NIRS/PC Ex. 58. NUREG-1484 "Final Environmental Impact Statement for the Construction and Operation of Claiborne Enrichment Center, Homer, Louisiana," Public Comments and NRC Response, Appendix A (August 1994) ("CEC FEIS").

³ Staff Ex. 36. NUREG-1790 "Environmental Impact Statement for the Proposed National Enrichment Facility in Lea County, New Mexico," Draft Report for Comment (Sept. 2004) ("NEF DEIS").

to support or explain the modeling of disposal of depleted uranium.” *Id.* at 13. Specifically, NIRS/PC alleged:

The DEIS fails to disclose the models used or parameter values. The text suggests that models used in analyzing the CEC site were used; however, the results are unlike any reported in connection with the CEC facility.

Id. at 16. However, NIRS/PC did not challenge the underlying deep disposal analysis from the CEC FEIS except to allege that the model used in the CEC analysis addressed only hypothetical sites and not an actual location for disposal. *Id.*

On February 2, 2005, NIRS/PC filed a second motion for the admission of late-filed contentions, which included an attempt to supplement its previously filed deep disposal contentions. Motion on Behalf of Intervenors For Admission of Late-Filed Contentions (Feb. 2, 2005) (“February Motion”). In its renewed motion, NIRS/PC elaborated upon this challenge by stating that the Staff’s stated reliance on the CEC analysis is belied by the differences in the reported doses. February Motion at 18, ¶ K. It also made untimely claims challenging the validity of the CEC FEIS analysis, characterizing the dose estimates as “incredibly low (literally).”⁴ *Id.* at 18, ¶ L-M. In June 2005, the Staff published a Final Environmental Impact

⁴ The Staff’s November 28 “NRC Staff Response to NIRS/PC’s Partial Motion for Summary Disposition” asserted that the challenge to the CEC dose estimates for mine disposal was not timely and that NIRS/PC did not challenge the CEC dose estimates in either the October Motion or the February Motion. However, as the response filed by LES correctly recognized, NIRS/PC did, in fact, address the CEC findings for the first time in the February motion. Nevertheless, the Staff was correct that the CEC challenge was untimely because it was not raised in NIRS/PC’s intervention petition based on the NEF Environmental Report (ER) which referenced and relied on the CEC deep disposal analysis. The Commission, in its remand, recognized that NIRS/PC’s February motion was untimely to the extent it raised issues which could have been raised based on the ER, noting that “many of the claims appear to be late attempts to challenge the radiological dose analysis provided in the LES Environmental Report.” *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC ___, slip op. at 11, n. 38 (2005). Therefore, the Commission did not remand this issue. Rather, the Commission only remanded issues *timely* raised in the October motion, meaning those based on new information in the Staff’s Draft Environmental Impact Statement. For this reason, the Commission directed the Board to consider the arguments in the February motion only to the extent that they elaborated upon the issues raised in the October motion, noting that NIRS/PC had inappropriately used the February motion to introduce “an extensive array of untimely claims, many altogether unrelated to their challenge to the DEIS analysis. . .” *Id.* at 12-13. Because the February motion’s challenges to the validity of the CEC

(continued...)

Statement for the NEF ("NEF FEIS").⁵

The Board disallowed the late-filed contentions in the October and February Motions. See Licensing Board Order (Ruling on Late-Filed Contentions) (Nov. 22, 2004) at 8-18 (unpublished); Licensing Board Order (Ruling on NIRS/PC Late-Filed Contentions and Providing Administrative Directives) (May 3, 2005) at 10 (unpublished). Following the hearing and issuance of a decision on the admitted contentions, NIRS/PC appealed to the Commission, which issued a Memorandum and Order on October 19, 2005, limited to the issue of whether the Board erred in denying NIRS/PC's proffered amendment to Contention EC-4--Impacts of Waste Storage. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC ____ (2005). The Commission found that the Board erred in determining NIRS/PC's supplemental claims in the October, 2004 motion untimely to the extent they were based on new information contained in the DEIS. *Id.* slip. op. at 11. In addition, the Commission found that NIRS/PC had improperly used its February motion to raise untimely claims. *Id.* Accordingly, the Commission directed the Board and parties to focus on the terms and bases of the contention as submitted in the October motion and only consider the February motion to the extent that it elaborated upon the same arguments made in the October motion. *Id.* at 12-13.

DISCUSSION

Because the Commission directed the Board and parties to consider the February motion only to the extent that it raises or elaborates upon issues raised in the October motion, the scope of NIRS/PC's admitted contention is limited to the alleged failure to disclose the

⁴ (...continued)
analysis were not raised in the October motion, and cannot fairly be described as elaborating upon issues raised in the October motion, they were expressly excluded from consideration on remand by the Commission.

⁵ Staff Ex. 47. NUREG-1790 "Environmental Impact Statement for the Proposed National Enrichment Facility in Lea County, New Mexico," Final Report (June 2005) ("NEF FEIS").

models or parameters used to assess the deep disposal impacts given the differences between the CEC EIS and the NEF FEIS. As discussed in the Staff Motion:

Therefore the contention language upon which the parties are to focus is as follows: “[t]he DEIS fails to support or explain the modeling of disposal of depleted uranium,” and NIRS/PC’s assertion that “the DEIS fails to disclose the models used or the parameter values” because, while the text suggests that the models used in analyzing the Claiborne Enrichment Center (CEC) site were used in the DEIS, “the results are unlike any reported in connection with the CEC facility” [October Motion at 12-13,16]. NIRS/PC did elaborate upon the first issue in the February motion, claiming that (a) the NRC has declined to provide the methods and assumptions underlying the dose calculation; (b) the estimate for the drinking water dose in the river scenario with a sandstone/basalt site is almost 54,000 times lower in the current DEIS than in the CEC FEIS; and (c) the total dose estimates are different from those in the CEC FEIS by nearly a factor of 2 [February Motion at 17].

Staff Motion at 5.

As the Staff demonstrated in its motion, the issues properly before the Board have been resolved and are moot. The Staff has explained that it reviewed the CEC deep disposal analysis and found it reasonable and appropriate before incorporation into the NEF DEIS. The Staff has explained the calculations by which the the CEC doses were converted to account for the larger quantities to be generated by the NEF, which explains why the values differ by nearly a factor of two. Appendix A to the CEC FEIS explains the assumptions underlying the dose calculation. The Staff has explained the mistake in the NEF DEIS estimate for the drinking water dose in the river scenario for the sandstone/basalt site, which has been corrected in the NEF FEIS. Therefore, every issue that was timely raised by NIRS/PC with respect to the deep disposal dose estimate analysis has been adequately corrected and/or explained and is now moot. See Attachment A to Staff Motion- Affidavit of Dr. Donald E. Palmrose; Attachment B to Staff Motion - Affidavit of Dr. Rateb Abu-Eid.

NIRS/PC apparently recognizes that the issues it raised in the October motion have been adequately addressed because it hardly addressed these issues in its response to the Staff motion, and instead focused almost entirely on their allegation that the Staff has not

duplicated the CEC analysis. However, as the Commission recently ruled in this proceeding, this is not required to comply with the Staff's NEPA obligations.

Indeed, NIRS/PC made a similar challenge to the Staff's reliance upon Environmental Impact Statements involving the impacts of deconversion prepared by the Department of Energy ("DOE") in the hearing conducted in February 2005. Specifically, NIRS/PC claimed that "the NRC Staff did no analysis and instead relied upon DOE documents, which [the] Staff neither prepared nor even checked." The Commission rejected that challenge, acknowledging the propriety of Staff reliance on an EIS prepared by another agency, so long as the Staff exercises independent judgment and does not "reflexively rubber stamp" the analysis. See *Louisiana Energy Services, L.P.* (National Enrichment Center), CLI-05-28, 62 NRC ____ (slip op. at 12) (November 21, 2005); see also *Louisiana Energy Services, L.P.* (National Enrichment Center), LBP-05-13, 61 NRC 385, 405 (2005).

The Commission explained the Staff's responsibility:

In addition, the NRC's Staff expert repeatedly affirmed during the hearing that he had assessed the reasonableness of the DOE assumptions, calculations and conclusions, even though he did not redo its underlying calculations. Actually redoing the DOE's calculations would have been a duplication of resources not required by law. What an agency cannot do is reflexively rubber stamp a statement prepared by others." Here, the Staff's expert found the DOE conversion impacts analyses reasonable "based on an assessment of the material presented and their surrounding documents." In short, there was an independent evaluation of the DOE conclusions.

CLI-05-28 at 12. As demonstrated through the Affidavits of Dr. Palmrose and Dr. Abu-Eid, the Staff met this obligation and properly incorporated this material into the NEF FEIS. The Staff has certainly evaluated, understands, and can defend the figures in the NEF FEIS and the CEC EIS. NIRS/PC's statements to the contrary are without merit.

NIRS/PC does not challenge the reasonableness of the Staff's incorporation of this material by arguing that the Staff's actions amount to a "reflexive rubber stamping" of the incorporated analysis, which the Commission indicated would be an appropriate inquiry.

Rather, they argue that the Staff must provide enough supporting data for members of the public to be able to replicate its analysis, a standard for review that is not consistent with the prior decisions of the Commission. In fact, none of the authority it cites supports this idea. NIRS/PC begins its argument by mentioning 10 C.F.R. §§ 51.45 and 51.71. Section 51.45 requires the analyses for an ER, and by incorporation, an EIS, “to the fullest extent practicable, quantify the various factors considered.” 10 C.F.R. § 51.70 requires an EIS to “identify any methodologies used and sources relied upon, and . . . be supported by evidence that the necessary environmental analyses have been made.” NIRS/PC interprets these regulations to mean that the Staff’s analysis is required to be “transparent and understandable.” NIRS/PC Response at 6. From this reasonable assertion, NIRS/PC crafts a rule whereby the Staff is required to include information to such a level of detail that the Staff’s analysis can be duplicated by members of the public. According to NIRS/PC’s Response, essentially every number the Staff plugged in the PHREEQE code must be included in the EIS. The regulations and cases cited by NIRS/PC mandate no such thing.

In its Response, NIRS/PC references pages 6-8 of its Motion for Partial Summary Disposition, where it cited *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), 59 NRC 129, LBP-04-4 (March 5, 2004). However, this case does not support NIRS/PC’s interpretation. In *Duke Energy*, the Intervenor alleged that the applicant violated 10 C.F.R. § 51.45(c) “by describing environmental impacts in purely qualitative terms, when it also has the information in quantitative terms.” *Id.* at 153. The Board acknowledged that the Intervenor had raised a legal/factual issue, but did not mandate that the Staff duplicate analyses which it incorporates from other Environmental Impact Statements. *Id.* at 165. It merely stands for the proposition that the quantification requirement is not met with qualitative descriptions. NIRS/PC’s implication that this case explains what it means to “quantify fully the factors and adequately set forth the methodologies, sources and analyses underlying Staff’s conclusions,”

is misleading. See NIRS/PC Motion at 8.

NIRS/PC also relies heavily upon the *Lands Council* case in its Response. Once again, NIRS/PC's authority does not support its proposition. *Lands Council* addressed the obligation of a federal agency to put a sufficiently detailed statement of environmental impacts "on the table" so as to permit informed decision making. 395 F.3d at 1027. In *Lands Council*, the Forest Service failed to catalog past timber harvests and their environmental harms in an EIS for a watershed restoration project, instead providing "only vague discussion of the general impact of prior timber harvesting," which might have informed analysis about alternatives to the project. The Ninth Circuit held that this was inadequate for the purpose of NEPA because "Congress wanted each federal agency to put on the table, for the deciding agency's and for the public's view, a sufficiently detailed statement of environmental impacts and alternatives so as to permit informed decision making."

The *Lands Council* EIS was found not to be "sufficiently detailed," because it did not address prior timber harvests in the area at issue. The case requires those impacts be addressed, but does not mention a level of scientific detail that the EIS must meet. It certainly does not state that for an EIS to be "sufficiently detailed" it must contain all input data the Staff used so that members of the public can exactly replicate the results. *Lands Council* merely requires that there be more than "a vague discussion of the general impact of prior timber harvesting." The NEF FEIS, which goes so far as to quantify in a table the estimated dose impacts of a disposal option that is not currently available in the United States and that the applicant has stated it will not utilize, certainly meets the *Lands Council* standard of putting on the table "a sufficiently detailed statement of environmental impacts and alternatives so as to permit informed decision making."

Furthermore, Intervenor's misunderstand the Staff's reason for referencing Dr. Makhijhani's participation in the previous CEC litigation. The Staff never argued that the

existence of a vacated opinion from a case in which NIRS/PC was not a party somehow stops them from criticizing the CEC EIS. This material was referenced to demonstrate that Appendix A to the CEC EIS contains information sufficient to allow for full and fair litigation and to show that Dr. Makhijhani was able in the past to raise specific objections to data in that analysis without the need to obtain additional input data.

CONCLUSION

As discussed above, as well as in the Staff Motion, the issues properly before the Board have been resolved and are moot. The Staff has explained that it reviewed the CEC deep disposal analysis and found it reasonable and appropriate before it was incorporated into the NEF DEIS. The Staff has explained the calculations by which the the CEC doses were converted to account for the larger quantities to be generated by the NEF, which explains why the values differ by nearly a factor of two. Appendix A to the CEC FEIS explains the assumptions underlying the dose calculation. Finally, the Staff has explained the mistake in the NEF DEIS estimate for the drinking water dose in the river scenario for the sandstone/basalt site, which has been corrected in the NEF FEIS. Therefore, every issue that was timely raised by NIRS/PC with respect to the deep disposal dose estimate analysis has been adequately corrected and/or explained and is now moot. There is no issue of material fact regarding the alleged failure of the NEF DEIS to support or explain the modeling of mine disposal of depleted uranium. Accordingly, the Staff is entitled to a favorable decision as a matter of law.

Respectfully submitted,

/RA/

Lisa B. Clark
Counsel for NRC Staff

Dated at Rockville, Maryland
this 8th day of December, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF REPLY TO RESPONSES OF LES AND NIRS/PC TO NRC STAFF'S MOTION FOR SUMMARY DISPOSITION" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 8th day of December, 2005.

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