

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Paul B. Abramson
Dr. Charles N. Kelber

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

**NEW MEXICO ATTORNEY GENERAL'S REPLY IN SUPPORT
OF PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING**

Pursuant to 10 C.F.R. § 2.309(h)(2) and the Atomic Safety and Licensing Board's ("Board") May 10, 2004, Memorandum and Order (Granting in Part on Time Extension Motion and Setting Reply Schedule), the New Mexico Attorney General ("Attorney General") hereby submits her reply to Nuclear Regulatory Commission Staff's ("Staff") and Louisiana Energy Services', L.P. ("LES") responses to her Petition for Leave to Intervene and Request for Hearing.

INTRODUCTION

On April 5, 2004, the Attorney General filed her Petition for Leave to Intervene as a party in the hearing to be held before the Board on the application submitted by LES to construct and operate a centrifuge enrichment facility in Eunice, New Mexico. In an April 15, 2004, Memorandum and Order (Initial Prehearing Order), the Board required that both the Attorney General and the New Mexico Environment Department

("NMED") file supplements that identified each of our contentions as technical, environmental, or miscellaneous, and to determine which, if any, of the other's contentions we wished to adopt. Pursuant to the April 15, 2004, Memorandum and Order (Initial Prehearing Order), the Attorney General filed a supplemental petition on April 23, 2004, identifying her contentions as technical, environmental, or miscellaneous, and exercised the option provided by the Board to adopt NMED's contention 5e. On April 30, 2004, Staff filed its response to the Attorney General's Petition for Leave to Intervene and Request for Hearing, recognizing that while "the Attorney General has standing to participate in the hearing as a representative of the State of New Mexico," she had purportedly "failed to advance an admissible contention." NRC Staff Response to Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene at 2 (April 30, 2004). On May 3, 2004, LES filed its response to the Attorney General's Petition for Leave to Intervene and Request for Hearing, asserting that while it "does not contest the standing of the AG," it is "opposed to the admission of the contentions proffered in this proceeding" by the Attorney General. Answer of Louisiana Energy Services, L.P. to the Requests for Hearing and Petitions for Leave to Intervene of the New Mexico Attorney General and Nuclear Information and Resource Service and Public Citizen at 110 (May 3, 2004).

DISCUSSION

The responses of LES and Staff wage an attack upon the Attorney General's contentions on the basis of the form of her contentions rather than upon the substance of the contentions, seeking, in essence, to prohibit New Mexico's Attorney General from

participating in the licensing of a uranium enrichment facility in her state given her purported failure to comply, to the extent desired by LES and Staff, with the pleading requirements of 10 C.F.R. § 2.309(f). Staff and LES fail to recognize that the Attorney General's contentions have not been drawn by counsel experienced in NRC practice, as have their responses, but rather by counsel seeking to assure the participation of New Mexico's Attorney General in these licensing proceedings and she should be provided a modicum of latitude with respect to the degree of pleading specificity demanded by LES and Staff. Compare, e.g., NRC Staff Response to Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene at 12 (April 30, 2004) (noting that "[a]gain, the AG has failed to provide the necessary specificity and support for admission of this proposed contention") with Kansas Gas & Elec. Co. (Wolf Creek Generating Station), ALAB-279, 1 N.R.C. 576-77 (1975) (providing that the contentions drawn by counsel experienced in NRC practice must exhibit a high degree of specificity).

Furthermore, both Staff and LES, in their highly restrictive interpretations of 10 C.F.R. § 2.309(f), overlook the purpose behind, and past application of, this section. Texas Util. Elec. Co. (Comanche Peak Steam Electric Station, Unit 1, ALAB-868, 25 N.R.C. 912, 933 (1987) and its progeny make clear that the only purposes of the contention and basis requirements are to give adequate notice of what is to be litigated, and assure there is a genuine issue sufficient to proceed further with discovery and a hearing. Technical perfection in the drafting of contentions is not required. In re Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-03, 53 N.R.C. 84, 99 (2001); In re N. Atlantic Energy Serv. Corp. (Seabrook Station, Unit I), LBP-98-23, 48 N.R.C. 157, 166 (1998).

Additionally, the Board should be reluctant to deny intervention simply on the basis of pleading skills where a petitioner clearly has an affected interest. Houston Lighting and Power Co. (S. Texas Project, Units 1 and 2), ALAB-549, 9 N.R.C. 644, 650 (1979). Nor must the Attorney General, at this preliminary juncture, prove her case or, for that matter, provide information such that, were she in federal court, she would be able to withstand a motion for summary judgment. See Gulf States Util. Co. (River Bend Station, Unit 1), CLI-94-10, 40 N.R.C. 43, 51 (1994). Indeed, the responses by both Staff and LES indicate that they understand, and have been provided adequate notice of, the bases of the contentions that the Attorney General seeks to have litigated. Further, their responses illustrate that there are, in fact, genuine issues sufficient to proceed further with discovery and a hearing. Finally, where, as here, an application provides incomplete proof of safety and compliance with Commission regulations, there is no requirement that a petitioner anticipate what an adequate application might contain. Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-98, 16 NRC 1459, 1469 (1982).

At the outset, the Attorney General wants to make clear that she does not wish or intend to prohibit the construction and operation of this facility, but rather seeks to ensure that the construction, operation, and decommissioning are accomplished with adequate security and protection for the citizens of New Mexico. The Attorney General also seeks to assure that the limited resources of the State will not need to be expended to avoid or mitigate the safety and environmental hazards that will arise should the enrichment tails be abandoned on the site without safe and complete decommissioning.

The Attorney General's contentions reflect deep concerns about (1) the lack of an operating disposal facility in the United States for the depleted uranium tails that will be generated by LES, Technical Contention ii, Environmental Contention iii, and Miscellaneous Contention i, (2) LES's inability, as a consequence of there not being an operative disposal facility within the United States capable of accepting LES's waste, to accurately calculate the disposal security, Technical Contentions i & ii, Environmental Contention iv, and Miscellaneous Contention ii, and (3) the length of time that LES intends to store depleted uranium tails in outdoor storage within her State given that there is no operative disposal facility in the United States for disposing of LES's depleted uranium tails, Environmental Contention ii.

While LES may postulate purported "plausible strategies" for waste disposal, no program for treatment and disposal of private enrichment tails actually exists and LES cannot articulate a schedule for when treatment and disposal will become available. LES fails to establish that the tails can and will be safely stored until they are safely disposed. Without any disposal program or knowledge of when the tails will, in fact, be disposed of, the period of on site storage cannot be estimated. Finally, LES has not made any verifiable calculations for storage costs or demonstrated compliance with NRC's decommissioning financial assurance requirements. Environmental Contention iii & Miscellaneous Contention i.

Replies to LES's and Staff's Objections to the Attorney General's Contentions¹

Lack of an Operating Disposal Facility that will Accept LES's Depleted Uranium

Tails – Environmental Contention iii & Miscellaneous Contention i

In her third environmental contention, the Attorney General stated that

In its current application LES has identified two “plausible” approaches for waste disposal: (1) a plan under which other private investors would construct a “deconversion” plant to change the depleted UF6 into U3O8, whereupon the U3O8 would be buried in an exhausted uranium mine, LES Application, 4.13-7 to –8, and (2) a plan under which, pursuant to Sec. 3113 of the U.S. Enrichment Corporation (USEC) Privatization Act, LES would require the Department of Energy (DOE) to accept for conversion and to dispose of the depleted UF6 as low-level radioactive waste at a price determined by DOE. LES Application, 4.13-7 to -8. Further, NRC's scheduling order dated February 6, 2004 states that a plan to transfer depleted tails to DOE for disposal tails pursuant to Sec. 3113 of the USEC Privatization Act constitutes a “plausible strategy” for dispositioning such waste. 69 Fed. Reg. at 5877.

Both of these alternative strategies, however, present large practical difficulties: No deconversion plant exists within the United States, and the necessary licenses to bury U3O8 in an abandoned mine may be hard to obtain. As for the DOE option, when tendered depleted tails, DOE must recover “an amount equal to the Secretary's costs, including a pro rata share of any capital costs.” USEC Privatization Act, Pub. L. 102-486, Sec. 3113(a)(30). DOE may be unable to estimate its actual costs of disposal, and it may be unable to accomplish disposal as required. DOE would undoubtedly give higher priority to the 704,000 metric tons of existing tails from the DOE, and former DOE, plants, which DOE is required to dispose of, in preference to waste from LES. The actual obstacles to disposal are suggested by the January 15, 2004 letter to NRC from Governor Taft of Ohio, who stated that waste from a New Mexico plant would not be allowed in Ohio. Albuquerque Journal, January 17, 2004. In sum, LES may postulate “plausible” strategies, but executing a specific disposal plan may be extremely difficult and costly, which increases the likelihood that the burden will fall upon New Mexico to achieve proper disposal.

¹ It is the Attorney General's position that her contentions raise concerns under both the Atomic Energy Act and NEPA. They are only classified as “environmental,” “technical,” and “miscellaneous” pursuant to this Board's Memorandum and Order (Initial Prehearing Order) based simply on the location of much of the pertinent discussion in the application documents. However, the application cannot control over the requirements of the two statutes. Memorandum and Order (Initial Prehearing Order) at 2 (April 15, 2004) (requesting that the Attorney General “provide a supplement to its petition that for each of its already-specified contentions assigns a separate numeric or alpha designation” within a Technical, Environmental, or Miscellaneous category).

Supplemental Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene at 6 (April 29, 2004). Additionally, in Miscellaneous Contention i, the Attorney General expressed her apprehension about the ambiguity presented by the absence of a definition of the term “plausible strategy” in this proceeding. The Attorney General noted that “[t]he term ‘plausible strategy’ appears in a NRC order referring to a determination by an Atomic Safety and Licensing Board (ASLB) that deep-mine disposal is a ‘plausible strategy’ for handling depleted uranium waste. Order in LES proceeding regarding the Claiborne Enrichment Center (Sept. 19, 1997). The term does not appear in any regulation or statute, and New Mexico is extremely concerned about the potential for future adverse consequences resulting from this ambiguity.” Supplemental Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene at 9 (April 29, 2004).

Staff suggests, in response, that LES’s approach in listing only two strategies, the first of which, namely the burial at Cotter Mine that has been rejected by the President of Cotter Mine on the basis that Cotter neither could nor would accept the depleted uranium waste, and the second a mere citation to Section 3113 of the U.S. Enrichment Corporation Privatization Act (USEC), “is consistent with the Commission’s statement, when noticing consideration of the earlier application for an enrichment facility, that the applicant need only present a plausible strategy for disposition of DU.” LES, too, asserts that this contention should be rejected, claiming it is “an impermissible challenge to the Hearing Order and the NRC regulatory process in general.” Answer of Louisiana Energy Services, L.P. to the Requests for Hearing and Petitions for Leave to Intervene of the New Mexico Attorney General and Nuclear Information and Resource Service and Public

Citizen at 27-8 (May 3, 2004). However, as LES itself acknowledges, determinations of the CEC proceeding from which LES draws support for an indefinite “plausible strategy” “are not binding on the Licensing Board in this proceeding.” Answer of Louisiana Energy Services, L.P. to the Requests for Hearing and Petitions for Leave to Intervene of the New Mexico Attorney General and Nuclear Information and Resource Service and Public Citizen at 27-8 (May 3, 2004).

Both Staff and LES, in their responses, intrude upon the province of this Board to define, in this proceeding, what constitutes a sufficient plan for disposal of depleted uranium tails. In doing so, neither Staff nor LES draw attention to the Waste Confidence Decisions of the Nuclear Regulatory Commission. While NRC (or Agreement State) licensed operations typically create low-level radioactive waste that is disposed of in existing, licensed low-level waste disposal facilities such as the Barnwell, South Carolina and Envirocare, Utah disposal facilities, the Commission has also squarely confronted the fundamental safety issues that arise when a proposed licensed activity would generate a kind of radioactive waste with no licensed disposal option.

In a series of decisions beginning in 1984, called the “Waste Confidence” decisions, the Commission held under the Atomic Energy Act that it would not license reactors, which generate high-level radioactive waste, unless it had reasonable confidence the technology was available for safe disposal, a program and schedule were in place for development of the necessary disposal facilities, and the wastes would be safely stored pending disposal. The first Waste Confidence decision found the requisite confidence based on a review of disposal technology, a review of the program for development of the necessary high level waste disposal facilities established by the Nuclear Waste Policy

Act, a finding that the requisite disposal facilities would become operational by the years 2007-2009, and a finding that the high level waste (reactor spent fuel) could be stored safely on reactor sites until then. "Waste Confidence Decision," 49 Fed. Reg. 34658 (August 31, 1984). This original decision was revisited, updated, and essentially affirmed in 1989, 54 Fed. Reg. 39767 (September 28, 1989), and again in 1990. 55 Fed. Reg. 38474 (September 18, 1990).

The existence of an established program, which enabled the Commission to predict when disposal facilities would become available, was key to all three decisions. Estimating when facilities would become available was, in turn, the key to finding that the waste could be stored safely while the necessary disposal facilities were developed because, unless such an estimate could be made, it would have been necessary to presume high level waste would be left on each reactor site for an indefinite period, and the safety of indefinite storage cannot be evaluated. In fact, the Commission was so concerned about the possibility of an indefinite high level waste storage period at reactor sites, and the consequences of a judicial decision holding that environmental impacts of indefinitely long storage of spent fuel needed to be considered, that it conducted a separate rule-making to codify its resolution of the issue. See Minnesota v. NRC, 602 F. 2d. 412 (D.C. Cir. 1979); 49 Fed. Reg. 34688 (August 31, 1984).

While the Waste Confidence decisions addressed high level waste (reactor spent fuel) generated in reactors, the essential logic and policy of the decisions apply to any license application for an activity that generates radioactive waste with no licensed disposal option. "Depleted UF6 is toxic and radioactive. It will pose potential harm to human health and the environment as it is stored at LES or at an authorized off-site

facility. According to DOE/EIS-0269, FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT FOR ALTERNATIVE STRATEGIES FOR THE LONG-TERM MANAGEMENT AND USE OF DEPLETED URANIUM HEXAFLUORIDE, Table 4.3, radiological hazards include radiation-induced cancer and fatalities that can occur a considerable time after exposure, typically 10 to 50 years. Chemical hazards include adverse health effects (e.g., kidney damage and respiratory irritation or injury), which can be immediate or can develop over time, typically less than a year.” Messenger Affidavit at 2 ¶ 7 (Attachment A). “The LES application provides no information to document or demonstrate it is reasonable to assume a licensed off-site facility will be available to receive its accumulated Depleted UF6 inventory.” Messenger Affidavit at 5 ¶ 17. In fact, “there currently are no conversion or storage facilities that are authorized to receive the Depleted UF6 that LES proposes to accumulate in storage at its proposed Eunice, New Mexico fuel cycle facility.” Messenger Affidavit at 3 ¶ 12.

“Depleted UF6 has been stored in the United States for over 50 years at the facilities that generated the Depleted UF6 as a byproduct of enriched uranium production.” Messenger Affidavit at 3 ¶ 12. “The inventory of Deplete[d] UF6 accumulated and still stored at these same facilities is proposed by DOE to be processed (converted) in order to separate the fluoride component (F6) of the Depleted Uranium for commercial use and generate and dispose of the Depleted Uranium (Depleted U) component in a form that no longer contains fluoride.” Messenger Affidavit at 3 ¶ 12. Section S.2.2 of the Draft EIS Summary for Paducah, Kentucky facility “proposes to convert the De[p]leted UF6 generated and accumulated at Paducah and to decommission the conversion facility at the end of the 25-year operational life.” Messenger Affidavit at

3-4 ¶ 13. Likewise, “[t]he Draft EIS for the Portsmouth, Ohio facility proposes to convert the accumulated Depleted UF6 at Portsmouth and ETTI facilities and to decommission the conversion facility at the end of its 18-year operational life.”

Messenger Affidavit at 3-4 ¶ 13. “Neither conversion facility proposes to process the Depleted UF6 that LES will generate and accumulate at the facility proposed for Eunice, New Mexico.” Messenger Affidavit at 3-4 ¶ 13. Thus, “[t]he two facilities that could convert LES’s accumulated Depleted UF6 inventory at the end of the plant’s 30-year operating life are proposed to be decommissioned and, therefore, could not receive the accumulated Depleted UF6 from the proposed Eunice, New Mexico facility.”

Messenger Affidavit at 4-5 ¶ 17. The Attorney General is not asking at this point that LES identify precise conversion facilities. Rather, the Attorney General would simply like LES to produce a ‘plausible strategy.’

Because there is currently no disposal option and no assurance that a facility will exist to take the proposed accumulated Depleted UF6 LES will generate, the logic and policy of the Waste Confidence decisions should apply to LES’s application. In the Notice of Hearing, the Commission appears to have recognized the issue, for it referenced the qualified, federal obligation to dispose of tails as waste in section 3113 of the USEC Privatization Act, and stated that a disposal approach founded on that provision would be a “plausible strategy” in the limited sense that it constitutes a plausible option for evaluation. It also stated that LES must address the health, safety, and environmental issues associated with storage of the tails on site pending removal of the tails from the site for treatment and disposal.

LES somehow finds it “implicit” in the Notice of Hearing that a simple citation to section 3113 is all that is required to address Waste Confidence issues. This cannot be the case. While section 3113 may evidence a plausible strategy, that section does not establish an actual program for treatment and disposal of private enrichment tails, or establish a schedule for when treatment and disposal will become available. Moreover, section 3113 will be of no avail to LES if, when treatment and disposal become available, LES cannot pay for it. Finally, section 3113 does not address safe storage pending development of the necessary treatment and disposal facilities. As the Waste Confidence decisions make clear, in order for LES’s application to be granted four criteria must be established. First, it must be proven that the technology for safe treatment and disposal is available. Second, it must be proven that a program is in place for applying that technology and for development of the treatment and disposal facility. Third, it must be proven when disposal will become available. Fourth, it must be proven that the tails can and will be safely stored until they are safely disposed of.

For LES a fifth element must also be proven. In the Waste Confidence decisions there was no need to address funding of disposal because the Nuclear Waste Policy Act established a funding program based on generator fees and a trust fund. There is no such established program for enrichment tails, despite the requirement that federal disposal be made available only if the private generators are prepared to pay for the disposal costs. So, for LES, the estimated costs for storage after cessation of operations, treatment, and disposal of the tails must be included in the decommissioning financial assurance required by 10 C.F.R. § 40.36. This further emphasizes the need to apply the Waste Confidence decisions. Without any existing disposal program capable of accepting the

depleted UF6 produced by LES, the period during which on site storage and its attendant cost must be accounted in order to demonstrate compliance with NRC's decommissioning financial assurance requirements cannot be accurately determined.

Section 3113 by itself proves none of these elements. At best, section 3113 constitutes a plausible strategy or framework for doing the evaluation and planning that would be necessary for satisfying the needs of Waste Confidence and the NRC's regulations. The Notice of Hearing must be construed consistent with the prior Waste Confidence precedent and NRC's decommissioning financial assurance requirements.

Indeed, if a departure from the Waste Confidence precedent had been intended, the Notice of Hearing would have set an entirely new, unexplained, and unjustified standard applicable only to LES in violation of both the Atomic Energy Act and the federal Administrative Procedure Act. Decisions in formal adjudications cannot be made without affording all parties the opportunity to participate in the resolution of the issue, 5 U.S.C. § 554 (c), and the Notice of Hearing was issued without any participation by parties other than NRC Staff and LES, who had ample opportunity to influence the drafting of the Notice of Hearing on an ex-parte basis. Moreover, the Notice of Hearing does not discuss the Waste Confidence decisions and related rule making. An unexplained departure from prior precedent would have been unlawful. 5 U.S.C. § 557 (3)(A); Greyhound Corporation v. ICC, 551 F. 2d 414, 416 (D.C. Cir. 1977) ("This Court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them."). Finally, had the Commission intended to develop some new adjudicatory standard for LES, and then proceeded to do so based on input only from NRC Staff and LES, it would have violated restrictions on separation of

functions and ex-parte communications in 5 U.S.C. §§ 554 (d) and 557 (d) and 10 C.F.R. §§ 2.347 and 2.348, since it would necessarily have known a notice of hearing would soon be issued. 10 C.F.R. §§ 2.347 (e)(1)(ii) and 2.348 (d)(1)(ii).

There is no reason to presume such violations occurred, and every reason to construe the Notice of Hearing in a manner that is consistent with prior Waste Confidence precedent and policy. For the reasons provided in the Supplemental Petition for Leave to Intervene and Request for Hearing, and provided here in reply to LES's and Staff's responses, the Attorney General respectfully submits that Environmental Contention iii and Miscellaneous Contention i satisfy the contention requirements of 10 C.F.R. § 2.309(f) and merit admission in this proceeding.

Attendant Concerns Regarding Cost of Disposition of Depleted Uranium Tails and Proper Disposal Security - Technical Contentions i & ii, and Environmental Contention iv

The absence of an existing disposal facility capable of accepting LES's waste generates yet additional concerns regarding the calculation of the costs of disposal of the depleted uranium waste, LES's failure to accurately calculate the disposal security, and the length of time that LES intends to store depleted uranium tails in outdoor storage within New Mexico. In both of her Technical Contentions, the Attorney General expresses her concern that "[t]he manner in which the disposal security will be calculated is not at all clear," and that "[t]he bases for LES's cost estimates are suspect and the actual cost of disposing of tails will exceed the \$5.50 per KgU estimated by LES."²

² Pursuant to the Licensing Board's Memorandum and Order (Ruling on Request for Access to Proprietary Information) (May 12, 2004), the Attorney General reserves the opportunity to discuss in greater detail her reply to Technical Contention ii. See Memorandum and Order (Ruling on Request for Access to Proprietary Information) at 2-3 (May 12, 2004) ("Once the Board has issued the protective order, AGNM

Supplemental Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene at 2-3 (April 29, 2004).

Additionally, the Attorney General states

[i]n its application, LES has requested permission to build a storage pad that will hold 30 years of waste output. LES Application, 4.13 to – 5. It is clear that, if the waste is accumulated during operations, the disposal cost must be paid at the time of decommissioning. Such a cost is exposed to all the risks of other shutdown costs: On shutdown, customers have paid their bills, and the only entity that may be asked to bear these costs is the owner, which foresees no further revenue from the plant and is, in fact, a foreign owner with no attachment to the locality. The situation begs for a determination that security for disposal costs must be provided.

Supplemental Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene at 8 (April 29, 2004). In response, Staff admits that “the application indicates that finalization of the specific financial instruments has not been accomplished.” NRC Staff Response to Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene at 5 (April 30, 2004). Staff continues,

Is[sic] essence, therefore, LES has stated that it will set up a funding mechanism as contemplated by the Commission’s regulations. Compliance with Commission regulations is all that is required of applicants; therefore, any contention which amounts to asserting that the Commission’s requirements are not adequate must be rejected. It has long been established that NRC adjudications are not the proper forum for challenging applicable requirements or the basic structure of the agency’s regulatory process.

NRC Staff Response to Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene at 5-6 (April 30, 2004).

Staff’s response is completely unresponsive to the Attorney General’s concerns. The Attorney General contends that “the manner in which the disposal security will be calculated is not at all clear,” Technical Contention i, and that “[s]ecurity for disposal costs must be provided.” Environmental Contention iv. The Commission’s regulations

shall have seven days from date upon which the material becomes available to it to file its reply relative to TC-ii.”) (emphasis in original).

require that LES provide a decommissioning funding plan with the certification of a funding mechanism, not “state[] that it will set up a funding mechanism.” Compare NRC Staff Response to Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene at 5-6 (April 30, 2004) with 10 C.F.R. § 40.36 and 10 C.F.R. § 70.25. It is one thing for LES to say that it will set up a funding mechanism, and quite another for LES to actually set up the funding mechanism. The Attorney General requests nothing more than compliance with Commission regulations. Cf. NRC Staff Response to Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene at 5-6 (April 30, 2004). Nor does the Attorney General assert that the Commission’s requirements are not adequate. Cf. NRC Staff Response to Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene at 5-6 (April 30, 2004).

In response to the Attorney General’s first technical concern that “[t]he manner in which the disposal security will be calculated is not at all clear,” Staff suggests “the fact that the estimate will not be exact is to be expected and is the reason for the use of mechanisms such as contingency factors and periodic adjustments in the funding estimate, both of which are part of the LES application.” NRC Staff Response to Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene at 6-7 (April 30, 2004). In the footnote following this assertion, Staff notes that “LES has included a 10% contingency factor in the decommissioning cost estimate, NEF SAR Vol.5, Table 10.1-2, and states that it will update the decommissioning cost estimate over the life of the facility to account for changes from, for example, inflation. *Id.* at 10.2.2.” NRC Staff Response to Request of the New Mexico Attorney General for Hearing and

Petition for Leave to Intervene at 7 n.10 (April 30, 2004). In turn, LES states that “[b]ased on extensive actual centrifuge decommissioning experience, a contingency of 10% is used in lieu of the 25% as suggested in NUREG-1727 (NRC, 2000). This is based upon over 10 years of Urenco experience decommissioning two pilot uranium enrichment centrifuge facilities at the Almelo enrichment facility in the Netherlands.” See LES Application, Table 10.1-1.

Staff and LES overlook NUREG 1727, Section 15.1.1, page 15-7, which specifies that a contingency factor of 25% be added to the estimate of all other costs. “LES proposes a 10% contingency factor instead of 25% to pay for costs associated with Depleted UF6.” Messenger Affidavit at 6 ¶ 20. NUREG 1727 provides “[t]he cost estimate applies a contingency factor of at least 25% to the sum of all estimated costs.” NUREG 1727, Section 15.1.1, page 15-7. “LES does not provide sufficient documentation to demonstrate the Urenco experience regarding pilot scale facilities conducted in the Netherlands is applicable in the United States, or that the 10% contingency is adequate given the uncertainties of Depleted UF6 disposition.” Messenger Affidavit at 6 ¶ 21. Additionally, “LES does not provide documentation to show the Urenco experience in the Netherlands includes the cost of storage and disposition of Deplete[d] UF6 tails or is analogous to management of Depleted UF6 in the United States.” Messenger Affidavit at 6 ¶ 21. “There is no statement of equivalent regulation to demonstrate comparability nor does it appear appropriate to place a broadly applicable NUREG specification based on a single data point.” Messenger Affidavit at 6 ¶ 21.

Again, this raises concerns with respect to the lack of an authorized off-site facility to receive the depleted uranium hexafluoride and on-going storage costs, both of which have yet to be addressed in sufficient detail by LES. “[I]t is reasonable to assume there will be decommissioning costs not identified in the LES cost estimate, including but not limited to, on-going storage, maintenance, operational and monitoring costs of its storage and ancillary facilities, and preparation of nonconforming cylinders for transportation. LES’s decommissioning cost estimate is not sufficiently detailed to allow a third party contractor to accept responsibility to decommission the facility.” Messenger Affidavit at 3 ¶ 11. Additionally, “[t]he cost of ongoing storage, maintenance, security and other costs required for long-term Depleted UF6 storage or the cost of storage at a commercial facility is not detailed in the LES decommissioning cost estimate. A reasonable decommissioning cost assumption is to require financial assurance sufficient to provide long-term storage, cylinder maintenance, storage and ancillary facility maintenance, and security for an indefinite period of time after facility operations cease and the rest of the LES facility is decommissioned.” Messenger Affidavit at 5 ¶ 19.

Accordingly, the Attorney General submits that her first and second technical contentions, and her fourth environmental contention, concerning the ambiguity surrounding the calculation of the disposal security and the basis for LES’s cost estimates, not only provide LES and NRC Staff with adequate notice of what is to be litigated, but further assure that there is a genuine issue sufficient to proceed further with discovery and a hearing. See Texas Util. Elec. Co. (Comanche Peak Steam Electric Station, Unit 1, ALAB-868, 25 N.R.C. 912, 933 (1987).

Beyond merely providing LES and NRC Staff with notice of what is to be litigated, the Attorney General's Supplemental Petition for Leave to Intervene and Request for Hearing provides a specific statement of the issue of fact to be controverted, a brief explanation of the basis of the Attorney General's concerns regarding the method of calculating the disposal security and concerns regarding the basis of LES's cost estimates, demonstrates that these issues are both within the scope of this proceeding and that the issue is material to this Board's findings regarding LES's disposal security and disposal cost estimates, are supported by adequate references to specific sources and documents, and provide sufficient information to show that a genuine dispute exists with LES with respect to the manner in which the disposal security will be calculated. Given LES's failure to comply with the Waste Confidence decisions by failing to prove that the technology for safe treatment and disposal is available, that a program is in place for applying that technology and for development of the treatment and disposal facility, when disposal will become available, that the tails can and will be safely stored until they are safely disposed of, and that it has included the estimated costs for storage after cessation of operations, treatment, and disposal of the tails in the decommissioning financial assurance required by 10 C.F.R. § 40.36 and 10 C.F.R. § 70.25, and because the requirements of 10 C.F.R. § 2.309 have been satisfied, the Attorney General respectfully requests that this Board admit her first and second technical contentions and fourth environmental contention.

Storage Considerations – Environmental Contention ii

In the Attorney General's second environmental contention, she states that "[t]he storage of large amounts of depleted uranium tails in steel cylinders, which would remain in outdoor storage on concrete pads for 'a few years[,]’ poses a distinct environmental risk to New Mexico.” Supplemental Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene at 5 (April 29, 2004). In response, Staff recognizes that

[T]he application reveals that the applicant contemplates the storage of depleted uranium (“DU”) on site for some period of time. Because of this, LES has addressed health, safety and environmental issues associated with the manner in which the DU will be stored. Specifically, the application describes the environmental, health and safety aspects of storing DU in uranium byproduct cylinders in open air storage yards. NEF ER Vol.2, 4.13.3.1.1-4.13.3.1.5. As a necessary part of its review, the Staff will determine whether those provisions are adequate to assure the public health, safety, and the environment are adequately protected before issuing the requested license. While the AG contends that the State of New Mexico will be subject to ‘distinct environmental risk,’ the AG fails to provide sufficient information to show that a genuine dispute exists with the applicant regarding this information.

NRC Staff Response to Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene at 11 (April 30, 2004).

While the Attorney General is no doubt grateful that Staff, “as a necessary part of its review,” will determine whether the environment, public health, and safety are “adequately protected before issuing the requested license,” the Attorney General submits that she has been statutorily charged with ensuring the protection of the environment, public health, and safety within the confines of her state. See, e.g., NMSA 1978, § 8-5-2(J)(1975) (“The Attorney General shall . . . appear before local, state and federal courts and regulatory officers, agencies and bodies, to represent and to be heard on behalf of the

state when, in [her] judgment, the public interest of the state requires such action.”); see generally www.ago.state.nm.us (describing the extent of the Attorney General’s work within the context of the environment and public health and safety). Moreover, NRC Staff’s argument proves too much, for if the NRC Staff’s promise of a sufficient review were sufficient to dismiss a contention, no contention of any party could ever be admitted. See Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), cert. denied sub nom Arkansas Power & Light Co. v. Union of Concerned Scientists, 469 U.S. 1132 (1986).

Additionally, while Staff notes that “the application describes the environmental, health and safety aspects of storing DU in uranium byproduct cylinders in open air storage yards[,] NEF ER Vol.2, 4.13.3.1.1-4.13.3.1.5,” none of these sections of LES’s application identify that “[t]he project location is within the range of a state listed threatened species, *Scleropus arenicolus*, the sand dune lizard.” Letter from Lisa Kirkpatrick, the Chief of Conservation Services Division of the State of New Mexico Department of Game & Fish to Dr. Edward F. Maher (September 30, 2003) (Attachment B). “The sand dune lizard occurs in a limited range comprising a narrow band of shinnery oak sand dunes in southeast New Mexico and adjacent Texas. The Department species management plan identifies the range east of Highway 18 to the Texas border as a one mile wide band of primary habitat, with up to three miles wide of marginal habitat. ‘Future disruptions in this restricted habitat can sever the TX-NM habitat corridor of *S. arenicolus* populations and increase the risk of local extinction.’” Letter from Lisa Kirkpatrick, the Chief of Conservation Services Division of the State of New Mexico Department of Game & Fish to Dr. Edward F. Maher (September 30, 2003).

This is only one instance of the ignored impacts that indefinite storage of depleted uranium hexafluoride on concrete pads outside of the facility may have on the environment, public health, and safety in the region. As another example, “[a]pproximately one mile of carbon dioxide transmission pipeline will be relocated off the proposed project site to the Highway 176 corridor,” the construction of which “can trap small mammals, amphibians and reptiles and can cause injury to large mammals.” Trenching Guidelines New Mexico Department of Game and Fish (November 1994) (Attachment C). In fact, “[s]tate wide there are 41 threatened, endangered or sensitive species potentially at risk by trenching operations.” Trenching Guidelines New Mexico Department of Game and Fish (November 1994).

Moreover, NUREG 1727 requires that the licensee develop a decommissioning cost estimate for the facility based on documented and reasonable assumptions. See NUREG 1727, section 15.1 (“The purpose of the review of the cost estimate is to ensure that the licensee or responsible party has developed a cost estimate for decommissioning the facility based on documented and reasonable assumptions and that the estimated cost is sufficient to allow an independent third party to assume responsibility for decommissioning the facility if the licensee or responsible party is unable to complete the decommissioning. In addition, if the licensee or responsible party intends to request license termination under restricted conditions, the cost estimate should be sufficient to allow an independent third party to assume responsibility for all necessary control and maintenance activities at the site.”). “[T]he LES application provides no information to document or demonstrate it is reasonable to assume a licensed off-site facility will be available to receive its accumulated Depleted UF6 inventory.” Messenger Affidavit at 4-

5 ¶ 17. “The two facilities that could convert LES’s accumulated Deplete[d] UF6 inventory at the end of the plant’s 30-year operating life are proposed to be decommissioned and, therefore, could not receive the accumulated Depleted UF6 from the proposed Eunice, New Mexico facility.” Messenger Affidavit at 4-5 ¶ 17.

“The 15,727 cylinders of de[p]leted UF6 to be accumulated at the proposed Eunice, New Mexico facility are comparable in number to the 16,000 cylinders currently accumulated at the Portsmouth fuel cycle facility.” Messenger Affidavit at 5 ¶ 18. “The Draft EIS for Portsmouth estimates 2 years will be required to construct the Portsmouth conversion plant and 18 years to process the 16,000 cylinders. Messenger Affidavit at 5 ¶ 18. “It is reasonable to assume that a similar time frame will be required to convert LES’s accumulated de[p]leted UF6 inventory after such a conversion facility is authorized for construction.” Messenger Affidavit at 5 ¶ 18. Since there is no conversion plant currently proposed to be available to convert LES’s accumulated De[p]leted UF6 inventory and since the length of time required to obtain authorization, to construct, and then to convert the accumulated Depleted UF6 could reasonably be assumed to be over 20 years, it is also reasonable to assume that the LES facility will continue to store this material for an unknown period of time after the rest of the facility is decommissioned for unrestricted release.” Messenger Affidavit at 5 ¶ 18.

“The cost of ongoing storage, maintenance, security and other costs required for long-term Depleted UF6 storage or the cost of storage at a commercial facility is not detailed in the LES decommissioning cost estimate.” Messenger Affidavit at 5 ¶ 19. “A reasonable decommissioning cost assumption is to require financial assurance sufficient to provide long-term storage, cylinder maintenance, storage and ancillary facility

maintenance, and security for an indefinite period of time after facility operations cease and the rest of the LES facility is decommissioned.” Messenger Affidavit at 5 ¶ 19.

Having demonstrated that her second environmental contention satisfies the requirements of 10 C.F.R. § 2.309 and additionally implicates that portion of the Waste Confidence decisions regarding the safe storage of the depleted uranium tails until safe disposal is available, the Attorney General respectfully requests that this Board admit this contention.

Adopted Contention 5e

In response to the April 15, 2004, Memorandum and Order (Initial Prehearing Order), the Attorney General filed a supplemental petition on April 23, 2004, exercising the option provided by the Board to adopt NMED’s contention 5e. In its response, NRC Staff states that while it “does not object to the AG’s participation in the hearing on that specific contention,” that “adoption of a contention of another party is not sufficient to confer party status to the AG.” NRC Staff Response to Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene at 2 n.7 (April 30, 2004) (citing N. States Power Co. (Independent Spent Fuel Storage Installation), LBP-96-22, 44 NRC 138, 141 (1996) and Pac. Gas & Elec. Co. (Diablo Indep. Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413 (2002)). Neither of the cases cited by Staff, however, support its assertion that adoption of another party’s contention when invited to do so by the Board is insufficient to confer party status.³ Given Staff’s failure to identify authority that would support its assertion that adoption of another party’s

³ In all fairness, Staff cited to these cases with the introductory signal “[s]ee, generally,” indicating that these cases neither directly nor indirectly support its assertion but rather merely provide “helpful background material.” See, e.g., The Bluebook: A Uniform System of Citation R. 1.2(d), at 24 (Columbia Law Review Ass’n et al. eds., 17th ed. 2000)(discussing the use of “see generally” and noting that “[c]ited authority presents helpful background material related to the proposition”).

contention when invited to do so by the Board is insufficient to confer party status, it is reasonable to assume that no such authority exists. See, e.g., State v. Plouse, 2003-NMCA-048, ¶ 12, 64 P.3d 522, 133 N.M. 495 (N.M.Ct. App. 2003) ("We are entitled to assume, when arguments are unsupported by cited authority, that supporting authorities do not exist.") (internal quotation marks and citation omitted).

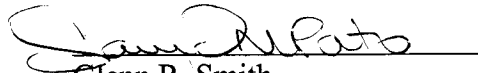
Additionally, Staff's position is inconsistent with core principles of federalism. State law must dictate which state official has the authority to represent a State's interests. Gregory v. Ashcroft, 501 U.S. 452, 460, 111 S.Ct. 2395, 2400 (1991) (recognizing that "[t]hrough the structure of government . . . a State defines itself as a sovereign"). New Mexico law dictates that the New Mexico Attorney General has the authority to represent the State's interests before federal agencies. See NMSA 1978, Section 8-5-2 (J) ("[t]he Attorney General shall . . . appear before . . . federal courts and regulatory officers, agencies and bodies, to represent and to be heard on behalf of the state when, in [her] judgment, the public interest of the state requires such action . . ."). No authority has been cited that grants any power to any other state agency or private person to displace the Attorney General's statutory authority simply by filing a contention prior to the Attorney General filing a contention. When the Attorney General exercises her statutory authority to act in the best interests of the State, she becomes the real party in interest for the State. State ex rel. Bingaman v. Valley Savings & Loan Assoc., 97 N.M. 8, 13, 636 P.2d 279 (1981). Consequently, the adoption of Contention 5e merits according the Attorney General party status in this proceeding.

CONCLUSION

For the reasons set forth above, the Attorney General submits that her contentions raise issues of deep concern to the State of New Mexico, that they properly conform to the requirements of 10 C.F.R. § 2.309, and that they raise genuine issues of material fact and law that properly await resolution by this Board.

Respectfully submitted,

PATRICIA A. MADRID
New Mexico Attorney General



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Paul B. Abramson
Dr. Charles N. Kelber

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the NEW MEXICO ATTORNEY GENERAL'S REPLY IN SUPPORT OF PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING have been served upon the following persons by electronic mail, facsimile, and/or first class U.S. mail this 24th day of May, 2004:

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Washington, DC 20555-0001

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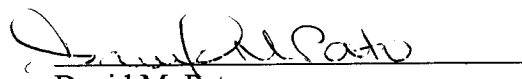
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David M. Pato
Assistant Attorney General

ATTACHMENT A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Paul B. Abramson
Dr. Charles N. Kelber

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

AFFIDAVIT OF ALLEN L. MESSENGER, P.E.

STATE OF TEXAS)
)ss.
COUNTY OF TRAVIS)

Allen L. Messenger, being first duly sworn, deposes and states:

1. I am over the age of eighteen years and I make this affidavit based upon my personal knowledge.
2. I have an M.S. in Civil Engineering from Texas A&M University and I have worked as a professional engineer for over eighteen years.
3. I have 24 years of experience in permitting and licensing hazardous and radioactive waste management facilities. I have directed the licensing and permit applications for the Waste Control Specialists, LLC (WCS) Class C radioactive materials storage and processing facility in Andrews County, Texas, a Class A, B & C radioactive waste disposal application, TSCA storage facilities, commercial hazardous waste landfills, and a hazardous waste and TSCA processing and incinerator complex including the cost estimates that established financial assurance for closure and post closure of these commercial waste management facilities. I directed the preparation of the decommissioning plan and financial assurance cost

estimate for WCS for its low-level radioactive waste storage and processing license and negotiated the applicable license conditions.

4. From 1981-85, I was the head of Disposal Facilities Unit of the Texas Department of Water Resources (TDWR), where I was responsible for developing regulations for the design, siting, approval and groundwater monitoring of hazardous and non-hazardous waste landfills throughout the State of Texas. In addition, I was responsible for technical approval of closure plans for industrial hazardous waste disposal units and the design of groundwater monitoring systems throughout the State of Texas. During my tenure at TDWR, I served on the EPA/ASTSWMO Task Force to develop siting standards for hazardous waste landfills. I also provided comments on behalf of the State of Texas on EPA regulations and guidance pertaining to hazardous waste management and implementation of HSWA requirements including Continuing Releases and Minimum Technological Requirements.
5. I have reviewed the application submitted by Louisiana Energy Services, L.P. ("LES") to construct and operate a centrifuge enrichment facility in Eunice, New Mexico. I have reviewed the petitions for leave to intervene filed by the New Mexico Attorney General and the New Mexico Environment Department, and the responses to those petitions filed by the Nuclear Regulatory Commission staff. Finally, I have reviewed portions of the Draft Environmental Impact Statement (Draft EIS) for the proposed Paducah, Kentucky Depleted UF6 conversion facility and portions of the Draft Environmental Impact Statement (Draft EIS) for the proposed Portsmouth, Ohio conversion facility.
6. Having reviewed the materials listed above, I have reached various opinions and conclusions that are set forth in the remaining paragraphs of my affidavit. Each of my opinions is formulated to a reasonable scientific probability.
7. Depleted UF6 is toxic and radioactive. It will pose potential harm to human health and the environment as long as it is stored at LES or at an authorized off-site facility. According to DOE/EIS-0269, *FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT FOR ALTERNATIVE STRATEGIES FOR THE LONG-TERM MANAGEMENT AND USE OF DEPLETED URANIUM HEXAFLORIDE*, Table 4.3, radiological hazards include radiation-induced cancer and fatalities that can occur a considerable time after exposure, typically 10 to 50 years. Chemical hazards include adverse health effects (e.g. kidney damage and respiratory irritation or injury), which can be immediate or can develop over time, typically less than a year.
8. The decommissioning cost estimate in the LES application includes neither the detail nor the documentation necessary to meet the

requirements of 10 CFR § 40.36 for the management and disposition of Depleted UF6 that will be accumulated in the enrichment facility that LES proposes to build at Eunice, New Mexico.

9. Decommissioning costs for the LES proposed facility may be incurred prior to Depleted UF6 disposition, including the cost of storage prior to conversion and preparation of nonconforming cylinders. If such costs are incurred, they will reduce the available decommissioning funding to the point that the remaining funding is inadequate for DOE disposition, if not included in the decommissioning cost estimate.
10. LES is requesting a license that will allow it to accumulate and store all of the Depleted UF6 that will be generated by the proposed enrichment facility during the 30-year life of the plant. The number of accumulated cylinders approximates the number of cylinders at Portsmouth, Ohio, which it is estimated will require 18 years to process into a form suitable for disposal or sale into commerce. Yet LES commits to promptly decontaminate and remove all radioactive material to achieve unrestricted release of the facility at the end of its 30-year operational life. See LES Application, §3.3.1.6, §3.3.1.6.1, §7.2.2.8, §10.1.4.
11. LES has not documented an authorized off-site facility that will be in existence at the end of the facility's operational life to receive any or all of the accumulated Depleted UF6 for storage or conversion. Consequently, it is reasonable to assume there will be decommissioning costs not identified in the LES cost estimate, including but not limited to, on-going storage, maintenance, operational and monitoring costs of its storage and ancillary facilities, and preparation of nonconforming cylinders for transportation. LES's decommissioning cost estimate is not sufficiently detailed to allow a third party contractor to accept responsibility to decommission the facility.
12. Depleted UF6 has been stored in the United States for over 50 years at the facilities that generated the Depleted UF6 as a byproduct of enriched uranium production. The inventory of Depleted UF6 accumulated and still stored at these same facilities is proposed by DOE to be processed (converted) in order to separate the fluoride component (F6) of the Depleted Uranium for commercial use and generate and dispose of the Depleted Uranium (Depleted U) component in a form that no longer contains fluoride. However, there currently are no conversion or storage facilities that are authorized to receive the Depleted UF6 that LES proposes to accumulate in storage at its proposed Eunice, New Mexico fuel cycle facility.
13. The Draft Environmental Impact Statement (Draft EIS) for the proposed Paducah, Kentucky Depleted UF6 conversion facility includes a summary of the history of large-scale uranium enrichment in the United States on

Page S-3 and describes the Depleted UF6 (DUF6) cylinders to be converted at the Paducah conversion facility. The Portsmouth Draft EIS describes the DUF6 to be converted at the Portsmouth facility. Section of S.2.2 of the Draft EIS Summary for Paducah proposes to convert the Deleted UF6 generated and accumulated at Paducah and to decommission the conversion facility at the end of the 25-year operational life. The Draft EIS for Portsmouth proposes to convert the accumulated Deleted UF6 at Portsmouth and ETTI facilities and to decommission the conversion facility at the end of its 18-year operational life. Neither conversion facility proposes to process the Deleted UF6 that LES will generate and accumulate at the facility proposed for Eunice, New Mexico.

14. In short, LES has not documented that a facility will exist to take the proposed accumulated Depleted UF6 it will generate and which the proposed license would authorize to be accumulated and stored at the time the facility is decommissioned for unrestricted release. See LES Application, §10.1.4.
15. Under NUREG 1727 *NMSS DECOMMISSIONING STANDARD REVIEW PLAN*, the licensee is required to develop a decommissioning cost estimate for the facility based on documented and reasonable assumptions.
16. LES does not provide a sufficient detail in its decommissioning cost estimate to demonstrate that its cost estimate includes all reasonable costs, or that the decommissioning costs will be sufficient to allow an independent third party to assume responsibility for decommissioning the facility. Such reasonable costs include, but are not limited to:
 - The cost to prepare containers for shipment (repackaging or over packing damaged, over-pressured or corroded cylinders that do not meet DOT requirements for transportation to an off-site facility); and
 - The cost to continue to store the Depleted UF6 at LES or an authorized commercial facility after the rest of the LES facility is decommissioned.
17. LES's cost estimate for decommissioning the proposed Eunice, New Mexico facility does not contain sufficient information to determine whether the estimate includes the cost of preparing non-conforming cylinders prior to shipment off-site. This could be a significant component of cost because the *Cost Analysis Report For the Long-Term Management of Depleted Uranium Hexafluoride* assumes that a majority of cylinders will not conform to shipping requirements. The following table is from Section 6.2.1, Page 112 of this report:

	Reference		Low		High	
	Number of Non-Conforming Cylinders	Number of Conforming Cylinders	Number of Non-Conforming Cylinders	Number of Conforming Cylinders	Number of Non-Conforming Cylinders	Number of Conforming Cylinders
Portsmouth	5233	8188	2693	10788	13348	16000
Paducah	19230	9750	9600	18781	28351	16000
K-25	4683	0	2342	2341	4683	0
Total	29083	17359	14540	31880	46422	32000

Further, the LES application provides no information to document or demonstrate it is reasonable to assume a licensed off-site facility will be available to receive its accumulated Depleted UF6 inventory. The two facilities that could convert LES's accumulated Deplete UF6 inventory at the end of the plant's 30-year operating life are proposed to be decommissioned and, therefore, could not receive the accumulated Depleted UF6 from the proposed Eunice, New Mexico facility.

18. The 15,727 cylinders of Deleted UF6 to be accumulated at the proposed Eunice, New Mexico facility are comparable in number to the 16,000 cylinders currently accumulated at the Portsmouth fuel cycle facility. The Draft EIS for Portsmouth estimates 2 years will be required to construct the Portsmouth conversion plant and 18 years to process the 16,000 cylinders. It is reasonable to assume that a similar time frame will be required to convert LES's accumulated Deleted UF6 inventory after such a conversion facility is authorized for construction. Since there is no conversion plant currently proposed to be available to convert LES's accumulated Deleted UF6 inventory and since the length of time required to obtain authorization, to construct, and then to convert the accumulated Depleted UF6 could reasonably be assumed to be over 20 years, it is also reasonable to assume that the LES facility will continue to store this material for an unknown period of time after the rest of the facility is decommissioned for unrestricted release.
19. The cost of ongoing storage, maintenance, security and other costs required for long-term Depleted UF6 storage or the cost of storage at a commercial facility is not detailed in the LES decommissioning cost estimate. A reasonable decommissioning cost assumption is to require financial assurance sufficient to provide long-term storage, cylinder maintenance, storage and ancillary facility maintenance, and security for an indefinite period of time after facility operations cease and the rest of the LES facility is decommissioned.

20. NUREG 1727, Section 15.1.1, page 15-7 specifies that a contingency factor of 25% be added to the estimate of all other costs. LES proposes a 10% contingency factor instead of 25% to pay for costs associated with Depleted UF6. See LES Application, §10.1-1, §15.7.
21. LES does not provide sufficient documentation to demonstrate the Urenco experience regarding pilot scale facilities conducted in the Netherlands is applicable in the United States, or that the 10% contingency is adequate given the uncertainties of Depleted UF6 disposition. There is no statement of equivalent regulation to demonstrate comparability nor does it appear appropriate to replace a broadly applicable NUREG specification based on a single data point. LES does not provide documentation to show the Urenco experience in the Netherlands includes the cost of storage and disposition of Deplete UF6 tails or is analogous to management of Depleted UF6 in the United States. The LES license application represents that disposition of tails (Depleted UF6) is an element of authorized operating activities and is not part of decommissioning activities and further asserts these tails are analogous to the disposal of spent fuel in the case of nuclear reactors. LES references Regulatory Guide 1.159, Section 1.4.2, page 1.159-8 to illustrate this principle. See LES application, §10.3.
22. NRC's Regulatory Guide 159, *ASSURING THE AVAILABILITY OF FUNDS FOR DECOMMISSIONING NUCLEAR REACTORS*, is applicable to commercial nuclear reactors regulated by NRC. Storage and disposal of spent fuel at and from nuclear reactors is regulated under the Nuclear Waste Policy Act of 1982 (codified as amended at 42 U.S.C. sections 10101-10270), which created the Nuclear Waste Fund to cover the cost of storage and disposal of spent fuel from nuclear reactors and does not apply to the LES fuel cycle facility.
23. LES proposes to meet NRC's DECON decommissioning standard that requires "immediate dismantling" of the facility, including the UBC storage pad. All Depleted UF6 must be removed as part of decommissioning and the cost of "tails disposition" will be a decommissioning cost.
24. LES must remove the accumulated Deplete UF6 in order to decommission the proposed facility for unrestricted release. DOE is responsible for disposal of the Depleted UF6 only if LES is able to pay DOE for disposal in an amount equal to the Secretary's costs, including a pro rata share of any capital costs. Pub.L. 104-134, Title III, sec. 3113 (April 26, 1996). LES has not demonstrated DOE will be able receive the accumulated Deleted UF6 inventory (potentially equivalent to 18 years of conversion time), and that the decommissioning cost estimate includes all of the costs for preparing DOT noncompliant cylinders and continued storage prior to

conversion. Although there is an established program to dispose of the accumulated Depleted UF6, LES has not provided documentation sufficient to predict when such disposal will be available either at the time of decommissioning or at a time after decommissioning.

25. In order to assure DOE disposition of the accumulated tails, the decommissioning fund must be adequate for a third party to accept responsibility for decommissioning and to pay DOE in accordance with Section 3113. If the financial assurance to manage and dispose of the accumulated Depleted UF6 is not sufficient, DOE is not required to dispose of these "tails" from the facility. Decommissioning costs such as the cost of storage prior to conversion and preparation of nonconforming cylinders can reasonably be assumed to occur prior to disposition and if not included, could reduce the available decommissioning fund to the point it is inadequate to pay DOE for disposition.

Further affiant sayeth naught.

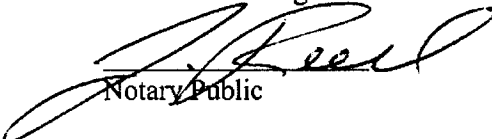
Date: May 22, 2004

By: 
ALLEN L. MESSENGER

ACKNOWLEDGEMENT FOR NATURAL PERSONS

STATE OF TEXAS)
)ss.
COUNTY OF TRAVIS)

The foregoing instrument was subscribed and sworn to me this 22 day of May, 2004, by Allen L. Messenger.


Notary Public



My commission expires:
01.29.08

ATTACHMENT B

GOVERNOR
Bill Richardson



STATE OF NEW MEXICO
DEPARTMENT OF GAME & FISH

One Wildlife Way
PO Box 25112
Santa Fe, NM 87504

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STATE GAME COMMISSION
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Santa Fe, NM

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Zia Pueblo, NM

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Leo Sims
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DIRECTOR AND SECRETARY
TO THE COMMISSION
Bruce C. Thompson

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September 30, 2003

Dr. Edward F. Maher
Framatome ANP
4000 Donald Lynch Blvd.
Marlborough MA 01752

Re: Louisiana Energy Services National Enrichment Facility, Lea County, New Mexico
NMGF Project No.: 8926

Dear Dr. Maher:

This letter was prepared in response to a September 15, 2003, letter from R.M. Krich of Louisiana Energy Services, requesting written comment from the NM Department of Game and Fish (Department) on the above referenced project. A project scoping meeting for state regulatory agencies, held in Santa Fe on September 17, 2003, was attended by Rachel Jankowitz of my staff.

The proposed project is a gas centrifuge uranium enrichment facility, located on Section 32 and 33, Township 21S, Range 38E. The size of the site is 543 acres, of which approximately 350 acres will be directly impacted by construction. Facilities will include process and administrative structures, access roads and a depleted uranium storage pad. Framatome ANP is in process of generating an Environmental Report which will be used by the U.S. Nuclear Regulatory Commission to prepare an Environmental Impact Statement for the facility, as required under the National Environmental Policy Act (NEPA).

The project location is within the range of a state listed threatened species, *Scleropus arenicolus*, the sand dune lizard. Ms Denise Gallegos of GL Environmental, a subcontractor for Framatome ANP, has identified potential suitable habitat for the sand dune lizard on the project site. She stated that occupancy surveys had not yet been completed, and also that GL Environmental had been in contact with the Department herpetologist, Mr. Charlie Painter.

The sand dune lizard occurs only in a limited range comprising a narrow band of shinnery oak sand dunes in southeast New Mexico and adjacent Texas. The Department species management plan identifies the range east of Highway 18 to the Texas border as a one mile wide band of primary habitat, with up to three miles wide marginal habitat. "Future disruptions in this restricted habitat can sever the TX-NM habitat corridor of *S. arenicolus* populations and increase the risk of local extinction." It is considered prudent to conserve even unoccupied suitable habitat because of the dynamic nature of the sand dune system, and uncertainties regarding the life history and metapopulation characteristics of the lizard. Oil and gas development has been identified as a threat to the species. NEPA analysis of the project's impact on sand dune lizard should include a discussion of the cumulative impacts in the region.

For the purpose of minimizing adverse impact to sand dune lizards and their habitat, facilities (including parking lots, drainage ponds, storage sheds, etc) should be located as far as feasible from occupied or suitable dune blowouts and associated stands of shinnery oak. Suitable habitat should be clearly identified and protected from traffic or other damage during construction and operation. It should be noted that while the lizards may be active until mid-September, the management plan survey methodology recommends that, in order to increase the probability of finding sand dune lizards if they occur, presence/absence surveys should be conducted during May and June between 0800 and 1300 h. If occupancy of the project site is documented, or for any further information, please contact Mr. Painter at (505) 476-8106.

Approximately one mile of carbon dioxide transmission pipeline will be relocated off the proposed project site to the Highway 176 corridor. Any impact associated with the pipeline relocation should be included in NEPA analysis as an indirect impact of the enrichment facility project. A copy of the Department trenching guidelines is enclosed with this letter.

The site design includes three ponds which will hold runoff and cooling water. The NM Water Quality Control Commission has established surface water quality standards for wildlife usage. If the ponds will not meet those standards, compliance with the federal Migratory Bird Treaty Act requires that they be protected from avian wildlife. This is usually accomplished by the use of netting or floating plastic balls. It was indicated at the scoping meeting that floating balls will be used to exclude birds. Advantages of floating balls over netting include disguising of the water surface so birds don't try to land, and lower maintenance needs. Disadvantages include higher initial cost and susceptibility to high winds. The bird exclusion balls also reduce evaporation, which may be an advantage or disadvantage depending on the design purpose of the pond.

Thank you for the opportunity to review and comment on your project. If you have any questions, please contact Rachel Jankowitz of my staff at 505-476-8159 or rjankowitz@state.nm.us.

Sincerely,



Lisa Kirkpatrick, Chief
Conservation Services Division

LK/rjj

(encl)

CC: Joy Nicholopoulos, Ecological Services Field Supervisor, USFWS
Roy Hayes, SE Area Operations Chief, NMGF
Alexa Sandoval, SE Area Habitat Specialist, NMGF
Rachel Jankowitz, Habitat Specialist, NMGF

ATTACHMENT C

TRENCHING GUIDELINES

NEW MEXICO DEPARTMENT OF GAME AND FISH

November 1994

Open trenches and ditches can trap small mammals, amphibians and reptiles and can cause injury to large mammals. Periods of highest activity for many of these species include night time, summer months and wet weather. Loss of wildlife can be minimized by implementing the following recommendations.

- To minimize the amount of open trenches at any given time, keep trenching and back-filling crews close together.
- Trench during the cooler months (October – March). However, there may be exceptions (e.g., critical wintering areas) which need to be assessed on a site-specific basis.
- Avoid leaving trenches open overnight. Where trenches cannot be back-filled immediately, escape ramps should be constructed at least every 90 meters. Escape ramps can be short lateral trenches sloping to the surface or wooden planks extending to the surface. The slope should be less than 45 degrees (100%). Trenches that have been left open overnight, especially where endangered species occur, should be inspected and animals removed prior to back-filling.

State wide there are 41 threatened, endangered or sensitive species potentially at risk by trenching operations, (Source: 11/01/94 query of Biota Information System of New Mexico, version 2.5). Risk to these species depends upon a wide variety of conditions at the trenching site, such as trench depth, side slope, soil characteristics, season, and precipitation events.