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DOCKETED
USNRC

August 20, 2002 (2:40PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

August 19, 2002

Office of the Secretary
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
One White Flint North
Rockville, MD 20852-2738
Attn: Docketing and Service Branch

Re: Applicant's Answer to Letters From David Wallack and Trudy L. Wallack

Dear Ms. Vietti-Cook:

Enclosed for filing is the original and two copies of applicant Nuclear Fuel Services, Inc. ("NFS") "Answer Opposing The Letters From David Wallack and Trudy L. Wallack." Please stamp and return the file copy in the enclosed self-addressed stamped envelope.

Respectfully submitted,



Daryl M. Shapiro

Enclosures

August 19, 2002

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

In the Matter of)
)
NUCLEAR FUEL SERVICES, INC.)
)
(Special Nuclear Material License))

Docket No. 70-143

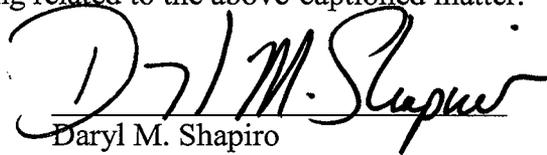
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NOTICE OF APPEARANCE

The undersigned, being an attorney at law in good standing admitted to practice before the courts of the District of Columbia and various federal courts, hereby enters his appearance as counsel on behalf of the licensee Nuclear Fuel Services, Inc., 1205 Banner Hill Road, Erwin, Tennessee, 37650-9718, in any proceeding related to the above-captioned matter.



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Dated: August 19, 2002

August 19, 2002

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

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In the Matter of)
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**APPLICANT’S ANSWER TO LETTERS FROM
DAVID WALLACK AND TRUDY L. WALLACK**

I. INTRODUCTION

Applicant Nuclear Fuel Services, Inc. (“NFS”) submits this answer opposing the letters from David Wallack on August 6, 2002, and Trudy L. Wallack on August 7, 2002, (collectively, “the Wallacks” and the “Wallack Letters”). The Wallacks’ “hearing requests” must be denied, because the Wallacks have neither established standing nor identified areas of concern, as required by NRC regulations. Indeed, the Wallack Letters are little more than vague questions prompted by a newspaper article. The Wallacks do not appear to have read the license amendment application and relevant environmental documentation that are the subject of this proceeding. In any event, they do not claim that they are injured by the proposed amendment.

II. BACKGROUND

This proceeding involves a license amendment application filed by NFS on February 28, 2002, to authorize storage of materials containing low-enriched uranium (“LEU”) at the Uranyl Nitrate Building (“UNB”).¹ This is one of three license amendment applications that will be

¹ NFS, Inc. (B.M. Moore) letter to NRC, *License Amendment Request to Support the Uranyl Nitrate Building at the BLEU Complex* (February 28, 2002).

needed to support process operations associated with the Blended Low-Enriched Uranium Project (the “BLEU Project”) at the NFS site in Erwin, Tennessee.

The BLEU Project is part of an important Department of Energy (“DOE”) project to benefit national security by reducing stockpiles of surplus Highly Enriched Uranium (“HEU”) through reuse or disposal. In 1996, DOE issued the Disposition of Surplus Highly Enriched Uranium Environmental Impact Statement (“DOE EIS”), in which DOE evaluated the downblending at the NFS site of surplus HEU for re-use as commercial fuel.² DOE favors re-use as commercial fuel because: (1) conversion of weapons grade material to a non-weapons form addresses a nuclear proliferation concern, (2) the resulting commercial fuel can be used for peaceful purposes, (3) the commercial value of the surplus HEU can be recovered, and (4) limited radioactive waste disposal space is conserved. NRC EA at 1-3 (summarizing the DOE EIS).

The NRC EA assesses the aspects of the BLEU Project specific to the Erwin site. To avoid segmentation of the environmental review, the NRC EA addresses the environmental aspects not only of the first license amendment authorizing storage at the UNB, but also of two additional amendments that will be filed relating (1) to downblending HEU metal and alloys to LEU solutions and (2) to operating the LEU conversion process and effluent processing facilities. NRC EA at 1-2, 1-3. The NRC concluded that these amendments involve no significant environmental impact. *Environmental Assessment and Finding of No Significant*

² *Environmental Assessment for Proposed License Amendments to Special Nuclear Material License No. SNM-124 Regarding Downblending and Oxide Conversion of Surplus High-Enriched Uranium*, NRC, Docket 70-143 (hereinafter “NRC EA”) at 1-2 (2002).

Impact of License Amendment for Nuclear Fuel Services, Inc., 67 Fed. Reg. 45,555, 45,558 (2002).

On July 9, 2002, the NRC published a notice in the Federal Register that the NRC had prepared the NRC EA and Finding of No Significant Impact for the UNB license amendment. *Id.* at 45,555. The NRC also provided notice of an opportunity for a hearing on the UNB license amendment pursuant to 10 C.F.R. § 2.1205(a) (“Subpart L”) and stated that by August 8, 2002 interested persons could file with the NRC a written request for a hearing. *Id.* at 45,558. The Wallack Letters were addressed to NFS rather than the NRC as specified by the notice.³

III. NRC LEGAL REQUIREMENTS FOR HEARING REQUESTS

Under § 189 of the Atomic Energy Act (“AEA”) (42 U.S.C. § 2239) and NRC regulations, a hearing for the review and approval of a materials license amendment is not mandatory. A hearing under Subpart L is only required if requested by a person who meets the judicial standards for standing and specifies at least one area of concern germane to the license amendment. *See* 10 C.F.R. § 2.1205(h). Because a hearing is not required and because the requestor is the proponent of an order to grant a hearing, the requestor carries the burden to demonstrate the need for a hearing. 10 C.F.R. § 2.1237(b); Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 N.R.C. 72, 81 (1993); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Bennett v. Spears, 520 U.S. 154, 167-168 (1997).

Persons requesting a hearing in a Subpart L proceeding must describe in detail –

- (1) The interest of the requestor in the proceeding,

³ The Wallacks apparently also sent to the NRC a copy of both letters to NFS.

- (2) How the interests may be affected by the results of the proceeding, including the reasons why the requestor should be permitted a hearing, with particular reference to the factors in paragraph (h) of [§ 2.1205 and],
- (3) The requestor's areas of concern about the licensing activity that is the subject matter of the proceeding.

10 C.F.R. § 2.1205(e). The NRC notice of an opportunity for a hearing on the UNB amendment specifically instructed a person requesting a hearing to address these requirements. 67 Fed. Reg. at 45,558.

In determining whether to grant a request to hold a hearing, the Presiding Officer must first consider whether the requestor has established sufficient standing to participate in such a hearing. The Commission customarily applies the judicial concept of standing "to determine whether a petitioner's particular asserted 'interest' provides an appropriate basis under § 189a of the Atomic Energy Act for triggering an adjudicatory hearing." International Uranium (USA) Corp. (Receipt of Material from Tonawanda, New York), CLI-98-23, 48 NRC 259, 264 (1998). In order to establish standing to participate in a materials licensing case, a requestor must show:

- (1) it has suffered a distinct and an actual or threatened, concrete and particularized injury, that
- (2) is fairly traceable to the challenged action,
- (3) falls among the general interests protected by the Atomic Energy Act (or other applicable statute...), and
- (4) is likely to be redressed by a favorable decision.

Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 NRC 9, 13 (2001); see also 10 C.F.R. § 2.1205(h).⁴

⁴ The NRC commonly employs a "geographic-proximity" presumption for proceedings involving reactor construction permits, reactor operating licenses, or significant

A requestor not only must demonstrate standing, but also must set forth at least one area of concern germane to the license amendment. 10 C.F.R. § 2.1205(h). The requestor must “state his areas of concern with enough specificity so that the Presiding Officer may determine whether the concerns are truly relevant – i.e., ‘germane’ – to the license amendment at issue.” Sequoyah Fuels, CLI-01-02, 53 NRC at 16.

IV. ARGUMENT

The Wallacks’ “hearing requests” must be denied because the Wallacks have neither established standing nor identified areas of concern. Indeed, the Wallack Letters are little more than vague questions prompted by a newspaper article. While it might not be equitable to require a requestor to file a written presentation setting forth all concerns without access to the hearing file, it is equally inequitable to require the Staff to assemble a hearing file on the vague and unsubstantiated questions the Wallacks raise. See generally, International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247 (2001).

A. The Wallacks Lack Standing Because They Do Not Demonstrate Injury-In-Fact

The Wallacks’ letters, which are about one-page long, do not demonstrate that they have or will suffer “injury-in-fact” and thus fail to establish standing. The only fact that the Wallacks allege to establish their injury-in-fact is their residency on the Nolichucky River. A hearing request about a license amendment at a facility which the requestor alleges is near him or her,

amendments to reactor licenses having obvious potential for offsite consequences. Apollo, LBP-93-4, 37 NRC at 83. However, the Commission has made clear that no such presumption applies in material licensing cases. *Informal Hearing Procedures for Materials Licensing Adjudications*, 54 Fed. Reg. 8269, 8272 (1989). To show the injury-in-fact component of standing, requestors “must provide some evidence of a causal link between the distance they reside from the facility and injury to their legitimate interests.” Apollo, LBP-93-4, 37 NRC at 83.

without more, is facially insufficient to establish standing to intervene. Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 2001 NRC LEXIS 243, *11 (2001); Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 426 (1997); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 193 (1991). Questions about releases, both radiological and non-radiological, like those questions posed by the Wallacks, are insufficient without showing a reasonable nexus to the requestor. Hydro Resources, Inc. (2929 Coors Road, Suite 101 Albuquerque, New Mexico 87120), LBP-98-9, 47 NRC 261, 277-278 (1998). Although the Wallack Letters do not state how far they live from the NFS site, NFS believes that their residence is at least twenty-two miles away. This distance is too far from the NFS site for any credible impact from the air and water emissions they raise questions about. Neither of the Wallacks allege any potential harm caused by the UNB license amendment.

The remainder of the Wallack Letters state only generalized environmental and policy interest in the requested hearing, which are insufficient to support standing because such generalized concerns demonstrate no potential for particularized injury to the requestors. White Mesa, CLI-01-21, 54 NRC at 252. The Wallacks' generalized concerns are irrelevant to a hearing request on this license amendment and simply reflect that they apparently have not read the application or NRC EA.

Finally, David Wallack expresses a concern about transportation accidents, but provides no information showing that he personally is at risk. Questions about transportation accidents are insufficient to demonstrate standing without showing that there is a reasonable relationship between the license amendment and an increased risk of accidents. Close proximity to a radioactive material transportation route alone is not sufficient to establish standing. Northern

States Power Co. (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 43-44 (1990); accord Exxon Nuclear Co., (Nuclear Fuel Recovery and Recycling Center), LBP-77-59, 6 NRC 518, 520 (1977). This is true even when the requestor resides a mile from the identified route. Pathfinder, LBP-90-3, 31 NRC at 42-44. In denying the petitioner's standing, the Pathfinder Board noted,

Nuclear waste safely and regularly moves via truck and rail throughout the nation under regulations of the NRC and Department of Transportation (49 C.F.R. Parts 100-179). The mere fact that additional radioactive waste will be transported if decommissioning is authorized does not ipso facto establish that there is a reasonable opportunity for an accident to occur [on a transportation route one mile from petitioner's residence], or for the radioactive materials to escape because of accident [*sic*] or the nature or the substance being transported.

Id. at 43 (emphasis added). A requestor cannot establish standing based solely on an increase in radioactive material transportation on routes in close proximity to the requestor's location, but must rather demonstrate that the subject licensing action "is defective in a manner so as to cause the injuries described." Id. at 44. David Wallack's conclusionary concern about transportation does not even allege a concrete injury let alone demonstrate a causal link to the UNB license amendment.

B. The Wallacks' Assertions Lack Detail And Fail to Establish an Area of Concern Germane to the UNB License Amendment

The Wallacks assertions are vague and, in places, incorrect. They are merely broad questions about air and water releases such as "how much will be released, how will this be monitored and measured"⁵ and "How will the addition of these new pollutants affect my familys'

⁵ Trudy L. Wallack letter to NFS, Inc., August 7, 2002.

[sic] health?”⁶ These questions show no evidence they reviewed publicly available documentation⁷ on the license amendment, including the amendment itself, the NRC EA, and the DOE EIS. The Wallack Letters do not approach the NRC requirement for detailing areas of concern. 10 C.F.R. § 2.1205(e)(3). An area of concern cannot be based on unfounded conjecture, such as by raising questions about whether a proposed action is harmful. White Mesa, CLI-01-21, 54 NRC at 252.

In addition, David Wallack’s concern about transportation accidents is merely conclusionary and without basis or foundation. DOE fully addressed the transportation aspects of the BLEU Project in its EIS and concluded there were no significant adverse environmental effects. NRC EA at 5-4 (summarizing the DOE EIS). David Wallack alleges no facts to support a different conclusion.

NRC precedent requires more effort from requestors than the Wallack Letters demonstrate. For example, in ruling on a hearing request for an amendment that described a proposed decommissioning plan for a materials processing facility, the requestor made only vague references to studies of “developing evidence” of potential threats to wildlife and ecosystems. Molycorp, Inc. (Washington, Pennsylvania), LBP-00-10, 51 NRC 163, 175 (2000). This area of concern was found to have an inadequate basis or foundation, especially since it lacked any detail about its references. Id. The Wallack Letters identify no support for their concern beside a vague reference to a newspaper article. Thus, the Wallacks provide no basis or foundation for any areas of concern justifying granting their hearing requests.

⁶ David Wallack letter to NFS, Inc., August 6, 2002.

⁷ The NRC has made the pertinent documents available electronically. See 67 Fed. Reg. 45,558.

C. **The Wallacks Procedural Concerns Do Not Support a Hearing on the UNB Amendment**

Much of the Wallack Letters state only a generalized environmental and policy interest in requesting a public hearing. Such interests are irrelevant to the UNB license amendment; they are not germane areas of concern and are insufficient to demonstrate standing. For example, Trudy L. Wallack asks for “additional information delivered to me and my family that gives us comfort in knowing that you share our same concerns” and David Wallack espouses a similar interest. Wallack Letters. The Wallacks’ procedural concerns are irrelevant to a hearing request on this license amendment and simply reflect that they apparently have not read much more than a newspaper article about this issue.

Both Wallacks also assert that 30 days for filing hearing requests is too short. David Wallack further asserts that the NRC should complete a safety evaluation prior to providing the opportunity for a hearing. These assertions are challenges to the NRC procedures, specifically the requirement of 10 C.F.R. § 2.1205(d)(1) that hearing requests be filed within thirty days of the publication of the Federal Register notice and that the Federal Register notice is the only hearing opportunity. Further, it is NRC practice to provide the hearing request opportunity early in the process. See Hydro Resources, Inc., LBP-98-9, 47 NRC at 280. It is long-standing NRC practice that generic challenges to NRC procedures are not proper for adjudication at individual license amendment hearings. See Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 217 (1974).

V. **CONCLUSION**

For all of the reasons stated above, NFS respectfully submits that neither David Wallack nor Trudy L. Wallack have identified sufficient injury-in-fact to establish standing, nor have they

alleged an area of concern germane to this proceeding. Accordingly, the Wallack Letters do not meet the Commission's standards for granting a hearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Daryl M. Shapiro". The signature is written in a cursive style with a large initial "D" and "S".

Daryl M. Shapiro
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Dated: August 19, 2002

**UNITED STATES OF AMERICA
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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Answer to the Letters from David Wallack and Trudy L. Wallack" and the "Notice of Appearance" of Daryl M. Shapiro were served on the persons listed below by deposit in the U.S. mail, first class, postage prepaid, this 19th day of August, 2002.

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* Also served by overnight delivery