

RAS 5086

December 13, 2002

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

December 17, 2002 (11:29AM)

Before the Presiding Officer

In the Matter of	)		OFFICE OF SECRETARY
	)		RULEMAKINGS AND
Nuclear Fuel Services, Inc.	)	Docket No. 70-143	ADJUDICATIONS STAFF
	)	Special Nuclear Material	
	)	License No. SNM-124	
(Blended Low Enriched Uranium Project)	)		

**APPLICANT'S ANSWER TO REQUEST BY THE FRIENDS OF THE  
NOLICHUCKY RIVER VALLEY, THE STATE OF FRANKLIN GROUP OF  
THE SIERRA CLUB, THE OAK RIDGE ENVIRONMENTAL PEACE  
ALLIANCE, AND THE TENNESSEE ENVIRONMENTAL COUNCIL  
TO HOLD PROCEEDING IN ABEYANCE**

Applicant Nuclear Fuel Services, Inc. ("Applicant" or "NFS") files this answer to the request by the Friends of the Nolichucky River Valley, the State of Franklin Group of the Sierra Club, the Oak Ridge Environmental Peace Alliance, and the Tennessee Environmental Council, collectively "Petitioners," to hold this proceeding in abeyance pending the submission of additional license amendment applications by NFS.<sup>1</sup> NFS submits this answer pursuant to 10 C.F.R. § 2.730(c) and § 2.788(d). NFS respectfully requests that the Presiding Officer deny Petitioners' request to hold the proceeding in abeyance on the grounds that the request is unripe and the Petitioners have not provided any legal grounds for halting the proceeding.

**I. BACKGROUND**

On February 28, 2002, NFS submitted a request for an amendment to Special Nuclear Material License No. SNM-124 to authorize the storage of low-enriched uranium

<sup>1</sup> Request by Friends of the Nolichucky River Valley, State of Franklin Group of the Sierra Club, Oak Ridge Environmental Peace Alliance, and Tennessee Environmental Council to Hold Proceeding in Abeyance Pending Submission of Additional License Amendment Applications (Nov. 27, 2002) ("Request").

Template = SECY-041

SECY-02

“LEU”)-bearing materials at the Uranyl Nitrate Building (“UNB”) at NFS’ nuclear fuel fabrication and uranium recovery facilities in Erwin, Tennessee.<sup>2</sup> The license amendment is the first of three amendments that will be necessary to support process operations associated with the portion of the Blended Low-Enriched Uranium (“BLEU”) Project that will be performed at NFS. *Id.* at 66,173. The BLEU Project is part of a Department of Energy (“DOE”) program to reduce stockpiles of surplus high enriched uranium (“HEU”) through re-use or disposal as radioactive waste.<sup>3</sup>

On October 30, 2002, the NRC Staff published a revised notice of opportunity for hearing on the license amendment application. 67 Fed. Reg. at 66,172 (corrected November 12, 2002, 67 Fed. Reg. 68,699). The Presiding Officer ruled that “the scope of the proceeding is limited to those safety and environmental areas of concern that directly relate to the February 2002 [i.e., first] license amendment application.” Memorandum and Order (Ruling on Motion for Clarification of Scope of Hearing) (Nov. 19, 2002) (emphasis added). Pursuant to another order of the Presiding Officer,<sup>4</sup> on November 27, 2002, Petitioners filed a new request for hearing on the proposed amendment.<sup>5</sup> Simultaneously, they filed the instant request to hold the proceeding in abeyance.

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<sup>2</sup> Letter from B. Marie Moore, Vice President, Safety and Regulation, NFS, to Director, Office of Nuclear Materials Safety and Safeguards, U.S. NRC (Feb. 28, 2002) (“NFS Letter”); Environmental Statements; Availability, etc.: Nuclear Fuel Services, Inc., Notice of docketing, etc., 67 Fed. Reg. 66,172 (Oct. 30, 2002).

<sup>3</sup> U.S. Nuclear Regulatory Commission, Division of Fuel Cycle Safety and Safeguards, NMSS, Environmental Assessment for Proposed License Amendments to Special Nuclear Material License No. SNM-124 Regarding Downblending and Oxide Conversion of Surplus High-Enriched Uranium (June 2002) (“EA”) at 1-3.

<sup>4</sup> Memorandum and Order (Suspending Further Proceedings Pending Issuance of Revised Federal Register Notice) (Sept. 23, 2002).

<sup>5</sup> Request for Hearing by Friends of the Nolichucky River Valley, State of Franklin Group of the Sierra Club, Oak Ridge Environmental Peace Alliance, and Tennessee Environmental Council, (Nov. 27, 2002). NFS responds to the hearing request separately from this response to the request to hold in abeyance. Applicant’s Answer to Request for Hearing by Friends of the Nolichucky River Valley, State of Franklin Group of the Sierra Club, Oak Ridge Environmental Peace Alliance, and Tennessee Environmental Council, (Dec. 13, 2002).

## II. ANALYSIS

### A. Petitioners' Request

Petitioners request that the Presiding Officer hold this proceeding in abeyance pending NFS's submission of the two additional license amendment applications for the BLEU Project. Request at 1. Petitioners claim that this "is needed to ensure that environmental issues are addressed in a manner that complies with the National Environmental Policy Act ('NEPA')." Id. Petitioners also assert that it "is necessary to ensure that litigation of safety issues is conducted fairly and efficiently." Id.

Petitioners claim that the EA for the BLEU Project, which concluded with a Finding of No Significant Impact ("FONSI"), is inadequate because it is allegedly not based on "a detailed environmental review" and hence is merely a "provisional document." Id. at 3. Thus, they claim that "there is no final NEPA documentation that can be the subject of a hearing." Id. at 5. They assert that in fact the NRC Staff is barred from making its final environmental determination until after it has completed its final safety review of the project. Id. 5-6 & n.3. Petitioners also claim that holding a hearing on the environmental impacts of the BLEU Project one amendment at a time would constitute impermissible segmentation of the NEPA review and could make impacts of the project appear less significant than if considered all together. Id. at 5. Finally, regarding NEPA, they claim that none of their concerns on which they have requested a hearing are solely related to the first license amendment application and thus hearings should be put off until the NRC Staff has completed its environmental review of the entire BLEU Project. Id. at 5.

Regarding safety issues, Petitioners assert that it would not be "efficient, fair, or commonsensical" to litigate issues concerning the BLEU Project one amendment at a time, although they concede that such would be possible. Id. at 6. They claim that separate litigation would result in overlap and duplication of effort. Id. They also claim

that there is no reason not to litigate all of the issues together and that waiting to do so would not cause significant delay in the proceeding. Id. at 7. Finally, they assert that considering the amendments one at a time will not enable NFS to begin construction any faster, in that they claim that NFS cannot start construction until the NRC has determined that no environmental impact statement (“EIS”) is necessary for the project, which Petitioners assert the NRC has not yet done. Id. (citing 10 C.F.R. § 70.23(a)(7)).

**B. Petitioners Request Should Be Denied**

**1. Petitioners’ Request is Unripe**

The Presiding Officer should deny the Petitioners’ requests to hold the proceeding in abeyance. At the outset, the request is unripe, in that Petitioners are not yet parties to the proceeding. Petitioners are effectively requesting a stay of action of the Presiding Officer in holding this hearing. See 10 C.F.R. § 2.1263. They cannot make such a request until they are parties to the proceeding. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-89-6, 29 NRC 348, 354 (1989). In order to participate as parties, the Presiding Officer must first rule on their request for hearing and find that Petitioners have standing and that they have submitted at least one germane area of concern. Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 422 (1997); 10 C.F.R. §§ 2.1205(e) and (h).

Petitioners argue that the hearings on the three license amendment requests should be consolidated because 1) Petitioners seek to challenge the NRC Staff’s assessments of environmental impacts that relate to the BLEU Project as a whole as opposed to particular amendments, Request at 5, and 2) the litigation of safety issues related to each of the amendment requests in separate hearings would not make sense, id. at 6-7. Arguments about the convenience or efficiency of the schedule of the litigation are unripe until it is

actually determined that Petitioners have shown the right to participate in a hearing in the first place.<sup>6</sup>

## 2. The EA is a Complete Document

Petitioners' request should also be denied because contrary to their claims, NEPA does not require that this proceeding be held in abeyance pending the NRC Staff's receipt or approval of the second and third BLEU Project license amendment requests. First, Petitioners are incorrect when they assert that the EA is improperly based on incomplete information or that it is a "provisional document." See Request at 3, 5. The NRC Staff did not state that it was unable to adequately review the environmental impact of the BLEU Project. The EA states that "[t]o avoid segmentation of the environmental review, NFS has submitted environmental documentation for three proposed license amendments." EA at 1-1 (emphasis added). "The NFS documentation was used by the NRC staff to prepare this EA pursuant to the Council on Environmental Quality regulations . . . and the NRC regulations . . . which implement the requirements of [NEPA]." Id. Thus, on the basis of the EA's assessment of the impacts of all three license amendments of the BLEU Project, the NRC Staff made its FONSI. 67 Fed. Reg. at 66,176.

The EA states that the NRC staff will perform further reviews when it performs the safety assessments for the second and third license amendments and will prepare additional EAs or an EIS only "if the environmental review indicates that this EA does not fully evaluate the environmental effects." EA at 1-1 (emphasis added); 67 Fed. Reg. at 66.173. Thus, the Staff's statements do not indicate any deficiency in this EA. The

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<sup>6</sup> In the alternative, those arguments could have been made in response to NFS's motion for clarification of the Federal Register notice, filed with the Presiding Officer on November 12, 2002, after which the Presiding Officer ruled that "the scope of the proceeding is limited to those safety and environmental areas of concern that directly relate to the February 2002 [i.e., first] license amendment application." Memorandum and Order (Ruling on Motion for Clarification of Scope of Hearing) (Nov. 19, 2002).

Staff stated that the EA “does not serve as authorization for any proposed activities,” because the authorization is provided by the safety reviews and license amendment approvals. *Id.* The function of the EA, on the other hand, is to “assess[] the environmental impacts of the actions.” *Id.*

Moreover, if the Petitioners believed that the EA had not adequately assessed any specific environmental impacts of NFS’ first license amendment application, they could have claimed so in their request for a hearing. If Petitioners believe that the EA is inadequate with respect to any impacts of the second or third license amendment requests, they can seek hearings on them when the NRC provides the opportunity for them to do so. A simple blanket assertion that the EA is inadequate with respect to the project as a whole is no reason to hold this proceeding in abeyance.

### **3. The NRC Has Made the FONSI Required to Proceed on the License Amendment**

Petitioners wrongly claim that the hearing must be held in abeyance because the NRC Staff is barred from making its final environmental determination until after it has completed its final safety review of the project. Request at 5-6 & n.3. First, under Subpart L, the holding of a hearing, including consideration of environmental issues, is not tied to the Staff’s action on the license amendment, i.e., completion of its safety review. 10 C.F.R. § 2.1205(m).<sup>7</sup> Rather, the conclusion of the Staff’s environmental review occurs with the preparation of the FONSI (if that is the Staff’s conclusion) after the performance of the environmental assessment. 10 C.F.R. § 51.31. Once the Staff has

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<sup>7</sup> If Petitioners are suggesting that a hearing cannot proceed until after the NRC’s safety review, they are mistaken. In NRC licensing proceedings, the issue with respect to safety evaluation is whether the application satisfies the Commission’s requirements, not the adequacy of the NRC Staff’s review of the application. Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, Final Rule, 54 Fed. Reg. 33,171 (1989). The promulgation of Subpart L did not change this. See Informal Hearing Procedures for Materials Licensing Adjudications, Proposed Rule, 52 Fed. Reg. 20,089 (1987).

prepared a final FONSI, NRC and applicant action on the proposed action is no longer limited by environmental review requirements. See 10 C.F.R. § 51.101(a).<sup>8</sup> The decision that a FONSI is final, as opposed to a draft, is made by the Staff and is reflected in the Federal Register notice in which the FONSI is published. 10 C.F.R. §§ 51.32, 51.33, 51.35. Here, the Staff stated in its Federal Register notice that it had made a final FONSI with respect to the first license amendment request. 67 Fed. Reg. at 66,176. Thus, there is no further bar to holding this proceeding.

Second, as a practical matter, the EA can serve as the basis for the resolution of environmental issues regarding the first license amendment request because the Staff made the FONSI based on its assessment of the impacts of the first amendment as submitted by NFS and the second and third amendments as they were discussed in environmental information submitted to the NRC by NFS. EA at 1-1. Thus, the Staff has taken a “hard look” at the impacts of the first amendment, which is the subject of this proceeding, plus the connected second and third amendments. The Petitioners’ claim that the Staff has not looked at the project’s safety and radiological emissions is simply wrong: section 5.1.1.2 of the EA considers radiological impacts and section 5.1.2 considers possible accidents. The fact that the Staff will look at safety issues in more detail when it conducts its safety review does not make its environmental review inadequate. EA at 5-7.<sup>9</sup> Moreover, as stated above, if the Petitioners had disagreed with the EA’s analysis or conclusions, they had ample opportunity to say so in their hearing request.

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<sup>8</sup> Of course, independent of environmental review requirements, an applicant cannot undertake any action for which the license amendment is required until after the license amendment is approved.

<sup>9</sup> The safety review “will provide additional confidence that potential accidents have been adequately evaluated prior to making a decision on the proposed license amendments.” Id.

#### **4. Consideration of the First License Amendment Request Would Not Be Improper Segmentation of the Environmental Review**

Petitioners incorrectly claim that holding a hearing on the environmental impacts of the BLEU Project one amendment at a time would constitute impermissible segmentation of the NEPA review and could make impacts of the project appear less significant than if considered all together. Request at 5. As discussed above, the NRC Staff prepared the EA based on information concerning all three license amendments of the BLEU Project so as to avoid the segmentation of environmental impacts. EA at 1-1; 67 Fed. Reg. at 66,173. “The purpose of this [EA] is to assess the environmental impacts of the proposed license amendments of the NFS portion of the BLEU Project.” EA at 1-1. Under the Presiding Officer’s order defining the scope of this hearing, Petitioners were free to challenge the EA with respect to any impact arising from the first license amendment. When the NRC provides notice of opportunities for hearings on the second and third amendment requests, Petitioners will be free to challenge the EA with respect to the impacts of those amendments. Because the NRC must provide opportunities for hearings on all three amendment applications, there is no possibility that Petitioners will be unable to challenge some impact associated with NFS’ activities in connection with the BLEU Project.

#### **5. NFS is Not Prohibited from Beginning Construction Related to the First License Amendment**

Petitioners claim that NFS cannot start construction until the NRC has determined that no EIS is necessary for the project, which Petitioners assert the NRC has not yet done. Request at 7 (citing 10 C.F.R. § 70.23(a)(7)). Petitioners are wrong. As noted above, once the NRC Staff has made a final FONSI regarding a proposed action it has decided that no EIS is required and hence environmental review no longer bars that action. See 10 C.F.R. § 51.101(a). The Staff has clearly made a final FONSI with respect to the first license amendment. 67 Fed. Reg. at 66,176. Section 70.23(a)(7), cited




by Petitioners, provides guidance as to the types of activities that may take place prior to licensing for actions that are deemed to have a significant impact on the environment.<sup>10</sup> Here, however, the NRC Staff has completed its environmental assessment and issued a Finding of No Significant Impact. Thus, section 70.23(a)(7) does not bar any activity related to the first license amendment at NFS.

### III. CONCLUSION

For the foregoing reasons, the Presiding Officer should deny Petitioners' request to hold the hearing in abeyance.

Respectfully submitted,



Daryl M. Shapiro

D. Sean Barnett

SHAW PITTMAN, LLP

2300 N Street, N.W.

Washington, DC 20037

(202) 663-8507

Counsel for Nuclear Fuel Services, Inc.

Neil J. Newman

Vice President and General Counsel

Nuclear Fuel Services, Inc.

Dated: December 13, 2002

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<sup>10</sup> See Notice of Receipt of Application for License etc., Louisiana Energy Services, L.P., Claiborne Enrichment Center, 56 Fed. Reg. 23,310, 23,312 (1991); see 10 CFR Parts 30, 40, 70, and 150, Uranium Mill Licensing Requirements, Final Rules, 45 Fed. Reg. 65,521, 65,529 (1980).

## CERTIFICATE OF SERVICE

I hereby certify that copies of Applicant's Answer To Request By The Friends Of The Nolichucky River Valley, The State Of Franklin Group Of The Sierra Club, The Oak Ridge Environmental Peace Alliance, And The Tennessee Environmental Council To Hold Proceeding In Abeyance; Applicant's Answer To Request For Hearing Of The Friends Of The Nolichucky River Valley, The State Of Franklin Group Of The Sierra Club, The Oak Ridge Environmental Peace Alliance, And The Tennessee Environmental Council; Applicant's Answer To Request For Hearing And Areas Of Concern Of The Blue Ridge Environmental Defense League; and Applicant's Answer To Declaration Of Kathy Helms-Hughes were served on the persons listed below by electronic mail or by facsimile and deposit in the U.S. mail, first class, postage prepaid, this 13<sup>th</sup> day of December, 2002.

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

Administrative Judge  
Alan S. Rosenthal, Presiding Officer  
Atomic Safety and Licensing Board Panel  
Mail Stop – T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
Fax: 301-415-5599  
email: [rsnthl@aol.com](mailto:rsnthl@aol.com); [sam4@nrc.gov](mailto:sam4@nrc.gov)

Administrative Judge  
Richard F. Cole, Special Assistant  
Atomic Safety and Licensing Board Panel  
Mail Stop – T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
Fax: 301-415-5599  
Email: [rfl1@nrc.gov](mailto:rfl1@nrc.gov)

Dennis C. Dambly  
Jennifer M. Euchner  
David A. Cummings  
Office of the General Counsel  
Mail Stop: O-15 D21  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
Fax: 301-415-3572  
Email: [dac3@nrc.gov](mailto:dac3@nrc.gov); [jme@nrc.gov](mailto:jme@nrc.gov);

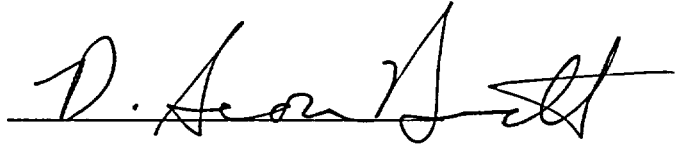
Louis Zeller  
Blue Ridge Environmental Defense League  
P.O. Box 88  
Glendale Springs, NC 28629  
Email: [BREDL@skybest.com](mailto:BREDL@skybest.com)

Diane Curran  
Harmon, Curran, Spielberg & Eisenberg,  
L.L.P.  
1726 M Street, N.W., Suite 600  
Washington, D.C. 20036  
Fax: 202-328-6918  
Email: [dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com)

Office of the Secretary  
U.S. Nuclear Regulatory Commission  
11555 Rockville Pike  
One White Flint North  
Rockville, MD 20852-2738  
Attention: Docketing and Service Branch  
Fax: 301-415-1101  
Email: [hearingdocket@nrc.gov](mailto:hearingdocket@nrc.gov)  
(original and two copies)

\*\*C. Todd Chapman, Esq.  
King, King & Chapman, P.L.L.C.  
125 South Main Street  
Greeneville, TN 37743  
Fax: 423-639-3629

\*Kathy Helms-Hughes  
P.O. Box 58  
Hampton, TN 37658  
Email: [Khelms@mounet.com](mailto:Khelms@mounet.com)

A handwritten signature in black ink, appearing to read "D. Aaron Salt". The signature is written in a cursive style with a horizontal line underneath the name.

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