

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

January 16, 2003
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January 22, 2003 (11:37AM)

Before the Presiding Officer

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)	
)	Docket No. 70-143
NUCLEAR FUEL SERVICES, INC.)	Special Nuclear Material
)	License No. SNM-124
(Special Nuclear Material License))	

APPLICANT'S MOTION TO STRIKE PART OF THE REPLY 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 APPLICANT'S ANSWER TO THEIR HEARING REQUEST

On January 6, 2003, 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 ("Petitioners") filed a reply¹ to Applicant Nuclear Fuel Services, Inc.'s ("Applicant" or "NFS") December 13, 2002 answer² to their November 27, 2002 request³ for a hearing in this proceeding. Applicant moves to strike the part of Petitioners' Reply challenging the dose estimates in the Environmental Assessment and the declaration of Dr. Arjun Makhijani on the grounds that they do not constitute a reply to Applicant's Answer but rather entirely new material that should have been filed with Petitioners' Hearing Request.

¹ Reply 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 Applicant's Answer to Their Hearing Request (Jan. 6, 2003) ("Reply").

² 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 (Dec. 13, 2002) ("Answer").

³ 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) ("Hearing Request").

I. FACTUAL BACKGROUND

Petitioners' Reply contains new material in the form of challenges to the radioactive dose assessments in the NRC Staff's Environmental Assessment ("EA")⁴ for NFS's license amendment request for the Blended Low Enriched Uranium ("BLEU") Project. See Reply at 7-9. Petitioners assert their standing to participate in a hearing on the basis of the radiological doses they claim their members will receive from the proposed action. Id. at 5. The Reply claims that there are "significant discrepancies in the data underlying the EA" which, claim Petitioners, undermine NFS's claim that the radiological discharges from the proposed action will be extremely small. Id. at 7. Petitioners submitted the declaration of Dr. Arjun Makhijani in ostensible support of their assertion. Declaration of January 6, 2003 by Dr. Arjun Makhijani ("Makhijani Dec."). Dr. Makhijani claims that Tables 5.1 and 5.2 in the EA, which show the liquid and gaseous radiological effluents and resulting radiation doses from the NFS facility associated with the BLEU Project, are in error because they supposedly do not incorporate data on radiological effluents that NFS submitted to the NRC in a response to an NRC Request for Additional Information ("RAI"). See id. at 3-4. Dr. Makhijani also claims that the radiological source terms for liquid effluents in EA Table 5.1 "do not correspond" to the radiological doses for those effluents. Id. at 6. Finally, he claims that NFS stated in its RAI response that "its discharge estimates may go up in the future by unspecified amounts." Id.

II. THE NEW MATERIAL IN PETITIONERS' REPLY SHOULD BE STRICKEN

Under NRC rules of practice for hearings conducted under 10 C.F.R. Part 2, Subpart L, Petitioners were required to file their request for a hearing within 30 days of the Federal Register notice of opportunity for a hearing. 10 C.F.R. § 2.1205(d)(1). The request must include the Petitioners' showing that they had standing to warrant a hearing and Petitioners' areas of concern

⁴ 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).

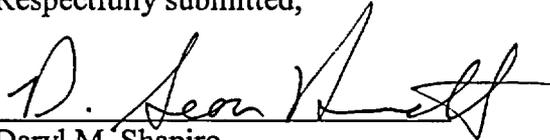
that they believe are germane to the proceeding. 10 C.F.R. § 2.1205(e); see 10 C.F.R. § 2.1205(h). A request submitted more than 30 days after the Federal Register notice is late. See 10 C.F.R. § 2.1205(h). If Petitioners fail to meet the late-filing requirements and establish that the request otherwise should be entertained (under 10 C.F.R. § 2.1205(l)(1)), then it will not be considered in the context of a potential hearing on the proposed action. 10 C.F.R. § 2.1205(l)(2). Rather, it “will be treated as a petition under § 2.206 and referred for appropriate disposition.” Id. In particular, Petitioners must show that the delay in filing the late material was excusable. 10 C.F.R. § 2.1205(l)(1)(i).

Where Presiding Officers have allowed the filing of replies to answers to petitioners’ hearing requests in Subpart L proceedings, they have limited the scope of the replies to the issues raised in the hearing requests; regarding new material not specified in the initial request, the petitioners have had to satisfy the late filing requirements of 10 C.F.R. § 2.1205(l). See Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 149, 154 (1992). The purpose of allowing replies to answers to hearing requests in NRC practice generally is to allow petitioners to respond to arguments in the answers that otherwise might have been difficult to anticipate in the requests. See Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979). It is not to allow the making of entirely new arguments and the filing of new factual material.

Here, Petitioners did not challenge the EA’s dose estimates in their initial Hearing Request. In fact, they relied upon the doses estimated in the EA as the basis for standing. See Hearing Request at 5-6. If Petitioners’ had wished to challenge the dose estimates in the EA, either to demonstrate standing or to raise an area of concern, they should have done so at the time they filed their Hearing Request on November 27. While the Presiding Officer provided for the Petitioners’ filing of a reply to NFS’s Answer, a reply does not include entirely new material.

Babcock and Wilcox, LBP-92-24, 36 NRC at 154. Thus Petitioners' new material and the accompanying declaration of Dr. Makhijani are late. Petitioners failed to demonstrate that this late-filed material met the requirements for admitting late-filed material set forth in 10 C.F.R. § 2.1205(l)(1). Hence, the lateness of Petitioners' new material is not excusable. 10 C.F.R. § 2.1205(l)(1)(i). Therefore, the material on pages 7-9 of Petitioners' Reply and the declaration of Dr. Makhijani should be stricken and treated as an enforcement petition under section 2.206. 10 C.F.R. § 2.1205(l)(2).

Respectfully submitted,



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January 16, 2003

CERTIFICATE OF SERVICE

I hereby certify that copies of Applicant's Motion to Strike Part of Kathy Helms-Hughes Response to Nuclear Fuel Services, Inc.'s Motion to Deny Helms-Hughes' Request for Standing and Leave to Intervene and Applicant's Motion to Strike Part of the Reply 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 Applicant's Answer to Their Hearing Request 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 16th day of January, 2003.

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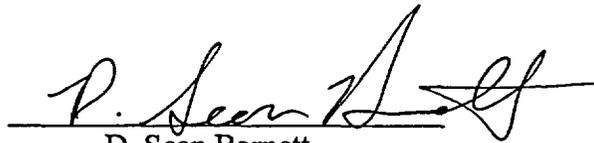
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