



environmental review and determining whether an Environmental Impact Statement (“EIS”) is required for the proposed BLEU Project.<sup>1</sup>

Petitioners request that the Commission give this request expedited consideration, because it is Petitioners’ understanding that construction of the UNB is already well underway, and construction of the OCB is due to commence imminently.

## II. FACTUAL BACKGROUND

### A. Description of Petitioners

Petitioners are organizations with members who live and/or recreate downstream from the NFS-Erwin facility, and whose interests would be adversely affected by increased radiological effluents discharged to the Nolichucky River from the proposed BLEU Project. Petitioners have requested a hearing on the EA and the first of three license amendment applications filed by NFS for the proposed BLEU Project.<sup>2</sup> Petitioners contend that the NRC should prepare an EIS for the proposed BLEU Project, because it will have significant adverse impacts on the environment.<sup>3</sup> Petitioners’ hearing request is pending before the Presiding Officer.

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<sup>1</sup> Although there is a pending proceeding before a Presiding Officer of the Atomic Safety and Licensing Board regarding the adequacy of NFS’s first license amendment application for the proposed BLEU project, the scope of the Presiding Officer’s authority, as set forth in the hearing notice, does not appear to extend to enjoining activity by NFS. Accordingly, Petitioners have brought this request before the Commission.

<sup>2</sup> See 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 (November 27, 2002); 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 (January 6, 2003).

<sup>3</sup> Petitioners contend, for example, that an EIS should consider significant risks posed by handling HEU and toxic chemicals. In addition, NFS’s history of permit violations,

## B. NRC Environmental Review and Submittal of Applications

In June of 2002, the NRC Staff issued an Environmental Assessment (“EA”) that purported to address the site-specific environmental impacts of three license amendment applications that had been or would be submitted by NFS for the downblending of surplus High Enriched Uranium (“HEU”) into blended low-enriched uranium (“BLEU”) at NFS’s Erwin, Tennessee site.<sup>4</sup> However, at the time the Staff issued the EA, NFS had submitted an application for only the first license amendment, which pertained to storage of uranyl nitrate in the UNB. Thus, the EA identified the “proposed action” only as “to allow NFS to construct and operate” the UNB. EA at 1-2.

The EA asserted that the activities to be authorized by the two other license amendments “were considered to contribute to the environmental impacts” of the first license amendment. *Id.* It also claimed that, to “avoid segmentation,” NFS had submitted “environmental documentation for all three of these license amendment applications.” *Id.* at 1-1. However, recognizing the inherent problems of conducting a premature environmental review, given that two of three related license amendment applications had yet to be filed, the EA contained the following caveat:

This EA does not serve as approval for the three proposed activities, rather it assesses the environmental impacts of the actions. As each amendment application is submitted, the NRC staff will do a safety evaluation, which will be the basis for the approval or denial of the requests. As part of the safety

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illegal spills, and worker contamination demonstrates a serious risk that NFS will continue to pollute the environment, causing significant adverse impacts to the health and welfare of workers, the public, and the general environment. These risks should be addressed in an EIS. *See* Hearing Request at 9-11.

<sup>4</sup> Environmental Assessment for Proposed License Amendments to Special Nuclear Material License No. SNM-124 Regarding Downblending and Oxide Conversion of Surplus High-Enriched Uranium.

evaluation, the NRC will perform an environmental review. If the review indicates that this EA effectively assesses the environmental effects of the proposed action, then no further assessment will be performed. However, if the environmental review indicates that this EA does not fully evaluate the environmental effects, another EA [or environmental impact statement (EIS)] will be prepared in accordance with NEPA.

EA at 1-1. Thus, the NRC did not complete an environmental review for any of the three license amendments, because such review could only follow completion of a safety review.

The EA stated that the NRC anticipated receipt of the second and third license amendment applications in July 2002 and January 2003, respectively. *Id.* at 1-2. The second license amendment application would seek authorization for license changes necessary to downblend HEU to low-enriched uranyl nitrate solutions. *Id.* This work would be carried out at the BPF, using equipment from another part of the NFS-Erwin complex. EA at 2-1. The third license amendment application would seek authorization for operation of the LEU conversion process and effluent processing. *Id.* Implementation of the third license amendment would require construction of the OCB and EPB. *Id.* at 1-1, 1-2 – 1-3.<sup>5</sup>

On July 9, 2002, the NRC published a Finding of No Significant Impact (“FONSI”) for the first license amendment. 67 Fed. Reg. 45,555. Yet, the notice did not cite any combined safety and environmental review that would support a FONSI. Instead, the notice repeated the EA’s caveat that the NRC Staff’s environmental review

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<sup>5</sup> The new buildings are significant in size. The EA gives the approximate areas of the buildings as follows: UNB (1200 m<sup>2</sup> or 13,000 ft<sup>2</sup>); OCB (700 m<sup>2</sup> or 8,000 ft<sup>2</sup>); EPB (300 m<sup>2</sup> or 3,000 ft<sup>2</sup>). *Id.*

would not be complete for any of the license amendment applications until the NRC had conducted its safety review. *Id.*<sup>6</sup>

On October 11, 2002, NFS submitted the second license amendment application, i.e., for downblending of HEU at the existing BFP.<sup>7</sup> The NRC Staff has not yet performed the combined safety evaluation/environmental review promised in the EA. Recently, NFS notified the Presiding Officer that it does not anticipate submitting the third license amendment request until May or June of 2003.<sup>8</sup>

Thus, NFS has not completed its combined safety and environmental review for any of the three license amendment applications related to the proposed BLEU Project.

### **C. Status of Construction Activities**

Sometime in late 2002, NFS cleared and graded the area outside the protected area where the UNB, OCB and EPB are to be located; and began construction on the UNB. Petitioners observed construction activities at the UNB during December and January. On or about January 14, 2003, Petitioners' counsel was informed by NRC Staff counsel, Jennifer Euchner, that construction of the UNB was well underway, and that NFS planned to commence construction of the OCB within a week or two.

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<sup>6</sup> The July 9, 2002 Federal Register notice offered an opportunity for a hearing on the EA, but failed to provide notice of a hearing on the first license amendment application. 67 Fed. Reg. 54,555. On October 30, 2002, the NRC Staff published a revised notice of hearing, which offered a hearing on the first license amendment application. 67 Fed. Reg. 66,172.

<sup>7</sup> The NRC published a notice of opportunity for a hearing on the second proposed license amendment at 68 Fed. Reg. 796 (January 7, 2003).

<sup>8</sup> Applicant's Response to Presiding Officer's Question Regarding Timing of Subsequent License Amendment Applications (December 18, 2002).

### III. ARGUMENT

Under a balancing of the four factors relevant to issuance of a preliminary injunction – likelihood of success on the merits, likelihood of irreparable harm, harm to other parties, and public interest – the Commission should enjoin construction of the BLEU Project facilities, pending completion of the NRC’s environmental review.

*Virginia Petroleum Jobbers v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). The “likelihood of success on the merits” factor is overwhelming here, where the NRC Staff has admitted that for all three license amendment applications, it has yet to complete the environmental review which will determine whether an EIS is required for the proposed BLEU Project. It would flagrantly violate NEPA to permit NFS to proceed with construction on a project for which the NRC Staff has yet to fulfill its NEPA obligations.

#### A. **Petitioners Have a Strong Likelihood of Prevailing on the Merits.**

##### 1. **Under NEPA, the Commission has authority to enjoin construction of the BLEU Project.**

The Commission should enjoin NFS’s construction of the BLEU Project because NFS’s construction activities illegally allow NFS to evade the NEPA review that the NRC must complete before the BLEU Project can proceed. While technically NFS’s building construction does not require federal action in the form of issuance of an NRC safety permit, the BLEU Project cannot “begin or continue without prior approval of a federal agency.” *Maryland Conservation Council v. Gilchrist*, 808 F.2d 1039, 1042 (4<sup>th</sup> Cir. 1986); *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 155 (D.C. Cir. 1985). Accordingly, in order to ensure compliance with NEPA, the Commission can treat NFS’s construction activities as a “federal action” and order NFS to suspend them.

In *Gilchrist*, the 4<sup>th</sup> Circuit ruled that the district court could enjoin a county government from building a highway up to the edge of a park that had been created with federal funds, because the highway could not be completed without a NEPA review of its impacts on the park. Similarly, in this case, the purpose of constructing the UNB, OCB, and EPB, or modifying the BPF, is to operate them under a permit granted by the NRC. Otherwise, these buildings would have no purpose or function. Moreover, the U.S. Department of Energy gave “prior approval” to construction of facilities for HEU conversion at the HEU site, by selecting NFS-Erwin as one of several alternative locations for downblending of the U.S. government’s inventory of surplus HEU.<sup>9</sup> Construction of the BLEU Project facilities will influence the NRC’s decisionmaking process regarding the proposed BLEU Project, by committing resources to a pre-ordained course of action before the agency has decided whether to prepare an EIS that evaluates the impacts of that course of action or reasonable alternatives. As the Court observed in *Gilchrist*:

[i]t is precisely this sort of influence on federal decision-making that NEPA is designed to prevent. Non-federal actors may not be permitted to evade NEPA by completing a project without an EIS and then presenting the responsible federal agency with a *fait accompli*.

808 F.2d at 1042. Therefore, the Commission should enjoin NFS from completing these construction activities unless and until the NRC Staff has completed its NEPA review.

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<sup>9</sup> See U.S. Department of Energy, *Disposition of Surplus Highly Enriched Uranium Final Environmental Impact Statement, Summary* at S-3 (June 1996) (hereinafter “GEIS for Surplus HEU Disposition”).

**2. The NRC Staff has not made the NEPA findings that are a necessary predicate to construction of the proposed BLEU Project facilities.**

NEPA requires federal agencies to examine the environmental consequences of their actions *before* taking those actions, in order to ensure “that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The primary method by which NEPA ensures that its mandate is met is the “action-forcing” requirement for preparation of an EIS, which assesses the environmental impacts of the proposed action and weighs the costs and benefits of alternative actions. *Id.*

As discussed above at pages 3-5, the NRC Staff has not completed its NEPA review for any aspect of the BLEU Project. While the NRC Staff did issue a FONSI for the UNB, the issuance of the FONSI was based on a preliminary environmental review. As discussed above at pages 3-4, the EA stated that for each license amendment application, the NRC Staff would perform an environmental review at the same time that it conducts its safety review.<sup>10</sup> This Staff has yet to complete this review for the first

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<sup>10</sup> Petitioners submit that the NRC had no other lawful choice but to postpone its final determination regarding the significance of the BLEU Project’s environmental impacts until after completion of its safety review of the three license amendment applications. In an EIS, the NRC must comply with NEPA “to the fullest extent possible” by taking a “hard look” at environmental impacts. *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972). Clearly, the environmental impacts of greatest concern to the NRC in a nuclear facility licensing case consist of the facility’s radiological emissions. The NRC Staff cannot possibly be deemed to have taken a “hard look” at the impacts of a proposed nuclear facility if it has not reviewed the facility’s compliance with NRC regulations for protecting the public from unsafe levels of exposure to radiation. *See Citizens for Safe Power v. NRC*, 524 F.2d 1291, 1299 (D.C.

license amendment, or for any other license amendment. Therefore, NEPA requires that the Commission order NFS to cease construction of all BLEU Project facilities until the NEPA review is complete and the Staff has determined whether an EIS is required.

NRC regulations at 10 C.F.R. § 70.23(a)(7) also contemplate that construction of a special nuclear materials facility should not begin until the NRC has completed its environmental review.<sup>11</sup> Here, the NRC Staff has yet to make a conclusive determination regarding the question of whether the proposed BLEU Project will have a significant impact on the environment. Therefore, construction should not be allowed to continue or commence.

**B. Construction of the BLEU Project Facilities Will Cause Irreparable Harm to Petitioners, But Would Not Harm NFS.**

Petitioners will suffer irreparable harm as a result of NFS's construction activities, because completion of the BLEU Project facilities will present the NRC with a *fait accompli* and foreclose consideration of alternatives and mitigative measures. *Gilchrist*, 808 F.2d at 1042. Petitioners are particularly concerned that, given NFS's history of violating its permits and contaminating the environment, *see* EA at 1-2, 3-13-3-19, the NRC should consider an array of alternatives for avoiding or mitigating further

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Cir. 1975) (requirements of the Atomic Energy Act cannot "be viewed separate and apart from NEPA considerations").

<sup>11</sup> Section 70.23(a)(7) requires, for any Part 70 activity which the Commission determines to have a significant impact on the human environment, that the Commission will not grant a license unless, *prior to the commencement of construction*, the Director of Nuclear Material Safety and Safeguards has determined, after weighing the costs and benefits of the proposed action and its alternatives, that "the action called for is the issuance of the proposed license, with any appropriate conditions to protect environmental values." Commencement of construction prior to this conclusion "is grounds for denial to possess and use special nuclear material in the plant or facility." *Id.*

environmental contamination by NFS. These alternatives would include other locations and licensees for the HEU downblending operation, or modifications to NFS's operation that would ensure that NFS would better contain its effluents. Such modifications could include changes to NFS's facilities. By committing resources to the construction of new facilities and modification of existing facilities at the NFS site, NFS would make such alternatives less feasible or attractive.

In comparison, enjoining construction activities on the BLEU Project, pending completion of the NRC's environmental review, would not harm NFS unduly. NFS will have no use for any of the individual BLEU Project buildings until operation of the entire BLEU Project is approved by the NRC. If NFS is not allowed to commence construction until after it receives approval for the entire BLEU Project, operation may be delayed for a few months while construction is completed. However, this delay is contemplated by 10 C.F.R. § 70.23. Moreover, it is necessary for compliance with NEPA.

**C. The Public Interest Favors an Injunction of Construction Activities.**

As discussed above, the purpose of NEPA is to make sure that federal agencies take environmental considerations into account before proceeding with actions that will affect the quality of the environment. By its own admission, the EA issued by the Staff in June of 2002 does not discharge this purpose. The public interest would be best served by a ruling from the Commission clarifying that the environmental review for the BLEU Project remains incomplete, and enjoining any further construction by NFS until NEPA compliance has been achieved.

Respectfully submitted,



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Dated: January 21, 2003

## CERTIFICATE OF SERVICE

I certify that on January 21, 2003, copies of Petitioners' Emergency Request to Enjoin Construction by NFS of BLEU Project Facilities were served on the following by first-class mail, and by e-mail:

<p>Alan S. Rosenthal, Presiding Officer Atomic Safety and Licensing Board Mail Stop T-3 F23 U.S. Nuclear Regulatory Commission Washington, D.C. 20555 By e-mail to: <a href="mailto:rosnthl@comcast.net">rosnthl@comcast.net</a> <a href="mailto:Sam4@nrc.gov">Sam4@nrc.gov</a> FAX: 301/415-5599</p>	<p>Office of Appellate Adjudication U.S. Nuclear Regulatory Commission Washington, D.C. 20555</p>
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