

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE THE PRESIDING OFFICER

In the Matter of

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Docket No. 30-36239-ML

CFC LOGISTICS, INC.

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ASLBP No. 03-814-01-ML

(Materials License)

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NRC STAFF BRIEF ON STANDING AND AREAS OF CONCERNI. INTRODUCTION

In accordance with the Presiding Officer's "Prehearing Order (Scheduling Additional Findings and Possible Oral Argument)," ("Prehearing Order"), dated August 13, 2003, the NRC Staff (Staff), files the following brief on the issues of the standing of Petitioners Concerned Citizens of Milford Township ("CCMT") and the sufficiency of their "areas of concern".

II. STANDING

The right of a petitioner to participate in a Commission licensing proceeding stems from section 189a of the AEA. See 42 U.S.C. § 2239(a)(1)(A). In turn, the Commission's regulations for Subpart L set out the informal hearing procedures governing the adjudication of materials licensing proceedings, such as the license application at issue here. 10 C.F.R. § 2.1201 *et. seq.* Specifically, section 2.1205(e) identifies the required content of a hearing request submitted in a Subpart L proceeding. According to the Commission's regulations, the request must describe "in detail" (1) the interest of the requestor in the proceeding; (2) how that interest might be affected by the results of the proceeding, with particular reference to the factors set out in subparagraph (h) of the section; (3) the requestor's areas of concern about the licensing activity that is the subject matter of the proceeding; and (4) that the request for a hearing is timely. 10 C.F.R. § 2.1205(e). Section 2.1205(h) of Subpart L invests the Presiding Officer with the duty of determining both that the areas

of concern specified in the hearing request are germane to the subject matter of the proceeding and that the “judicial standards for standing” have been met by the hearing requestor. 10 C.F.R. § 2.1205(h).

In order to determine whether or not a petitioner has adequately demonstrated its standing to participate as a party in a proceeding adjudicated under the informal licensing procedures of 10 C.F.R. Part 2, Subpart L, the Presiding Officer must consider, among others, the following factors: (1) the nature of the requestor’s right under the AEA to be made a party to the proceeding; (2) the nature and extent of the requestor’s property, financial, or other interest in the proceeding; and (3) the possible effect of any order that may be entered in the proceeding upon the requestor’s interest. See 10 C.F.R. § 2.1205(h).

In determining whether or not a petitioner has sufficient interest in a proceeding to be entitled to standing, the Commission has long looked to “contemporaneous judicial concepts of standing.” *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983), citing *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). A contemporary delineation of judicial concepts of standing appears in an often cited 1997 Supreme Court decision, *Bennett v. Spear*, 520 U.S. 154 (1997). In pertinent part, the Court stated that the “irreducible constitutional minimum” requirements for standing are that the litigant (1) may suffer an “injury-in-fact,” that is “actual or imminent, not conjectural or hypothetical,” (2) that there is a causal connection between the alleged injury and the action complained of, and (3) that the injury will be redressed by a favorable decision. 520 U.S. at 167. See also, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1991). In addition, the petitioner must meet the “prudential” requirement that the complaint arguably falls within the zone of interests of the governing law. *Id.* at 175.

A. Petitioners Have Established Standing

Injury in fact may be small and unlikely, yet satisfy the requirement for standing. For example, in a license renewal application for a non-power research reactor, the licensee asserted that even a worst-case accident at the reactor, as depicted in the Safety Analysis Report, could not affect public health and safety beyond a 100-meter radius. Notwithstanding, the Commission affirmed the Licensing Board's finding that, for threshold standing purposes, it was neither "extravagant" nor "a stretch of the imagination" to presume that some injury, "which wouldn't have to be very great," could occur within 1/2 mile (800 meters) of the research reactor, based on the possibility that noble gases could disperse beyond the reactor site boundary. The applicant's Safety Analysis Report postulated three independent failures would be necessary to produce a release of noble gases. However, the Commission held that assuming three simultaneous independent failures was "not irrational" for purposes of determining standing. See *Georgia Institute of Technology* (Georgia Tech Research Reactor), 42 NRC 111, 117 (1995).

Petitioner need not establish certainty that injury will occur. For example, a petitioner sought to intervene in an enforcement action to assure adequate financial assurance to complete decommissioning of a fuels facility site. Petitioner asserted that a groundwater flow path might exist between the contaminated site and petitioner's property. The licensee did not challenge petitioner's testimony that the testing performed at the site did not rule out the possibility of an unmeasured flow path along deeper groundwater flow paths than examined by the licensee. Petitioner did not establish with certainty that any such flow paths actually existed, but the Commission held that "certainty is not required at this threshold stage" to establish standing. *Sequoyah Fuels Corporation and General Atomics* (Gore, Oklahoma Site), 40 N.R.C. 64, 74 (1994).

Here, CCMT asserts that leakage of Cobalt-60 into the air stream flowing through the source rod could result in a release of Cobalt-60 into the air, resulting in injury due to the relatively

short distance to the nearest petitioner's residence, approximately 600 meters. Because certainty is not required at the threshold stage of standing, the injury may be small, and the assertion of leakage from a source is not irrational, CCMT has identified a potential injury in fact.

The causal link between the injury and the proceeding stems from the requirement to obtain an NRC license in order to possess and use the source in the applicant's facility.

The injury is redressible by a decision in favor of CCMT, since rejection of the license application would remove the possibility of injury by barring use of the source at the applicant's facility.

Finally, petitioners assert injury from radiation emitted by material regulated by the NRC. This falls within the zone of interests protected by the AEA.

B. Petitioners Timely Filed Their Hearing Request

In this case, no formal Federal Register notice was required or published, so no definitive date of notice can be identified. Notwithstanding, the applicant urges rejection of CCMT hearing request on the basis of untimeliness. Applicant asserts that it is "reasonable" to conclude that members of CCMT received actual notice more than 30 days before they filed their hearing request. To support its claim, applicant conjectures that some of the Petitioners may have heard about the license application at a town meeting in Milford Township, or read about it in various newspaper articles published after the town meeting. However, to prevail with this argument, applicant would have to prove that all the Petitioners had actual notice some time before June 19, 2003. The applicant has not provided any evidence to sustain its argument.

In the absence off any proof to the contrary, there is no reason to reject CCMT's statement that the hearing request was filed within 30 days of the time Petitioners received actual notice.

AREAS OF CONCERN

A Subpart L petitioner must also file “areas of concern” about the licensing activity that is the subject matter of the proceeding. See 10 C.F.R. § 2.1205. In ruling on a petitioner’s request for hearing the Presiding Officer must determine that the specified areas of concern are germane to the subject matter of the proceeding. See 10 C.F.R. § 2.1205(h). To be germane, an area must be relevant to whether the license should be denied or conditioned and need only be sufficient to establish that the issues a petitioner seeks to raise fall generally within the range of matters properly subject to challenge in the proceeding. See *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning) LBP-99-46, 50 NRC 386, 395 (1999); *Atlas Corp Moab, Utah* LBP 00-4, 51 NRC 53, 59 (2000). The Petitioner must only state his areas of concern with enough specificity so that the Presiding Officer may determine whether the concerns are truly relevant to the license amendment at issue. See *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning) CLI 01-2, 53 NRC 2, 6 at n16 (2001). The question of whether the concern is meritorious is left for later determination. See *International Uranium (IUSA) Corp.* White Mesa Uranium Mill, LBP 02-6, 55 NRC 147, 151-152 (2002).

The Staff has applied this threshold criterion to a termination of which of CCMT’s areas of concern should be considered to meet the test for invoking a hearing on this matter. The Staff has only opposed those areas of concern which are either on their face legally inapplicable to the facility sought to be licensed or are stated in such an unclear manner that they are not understandable and, therefore, not litigable.

The first area of concern set forth by CCMT is titled “General Substantiation of Grounds of Concern; Lack of Information.” This area of concern does not set forth an issue for litigation in this proceeding, but rather is a notice to Presiding Officer and Parties that there are materials that have not yet been disclosed to CCMT which CCMT considers necessary to develop their areas of concern. Included within this first area of concern is a statement of “effects” on page 2 of the

CCMT "Specification of Areas of Concern" ("Specifications"), dated August 14, 2003, Operational on page 3 of the Specifications. The "Effects" and "Operational" Statements clearly appear to be part of CCMT's initial statement and the Staff will not further address them because the Presiding Officer has directed that the parties work out the matter of providing these documents to CCMT.

The next set of areas of concern is first titled "Air Dispersion" and then proceeds with a number of specific areas of concern under that. The paragraph entitled Air Dispersion is not stated clearly enough for it to be litigable on its own in this proceeding. Specifically it makes reference to a concern about air dispersion "because of low level plans and construction." The Staff does not understand the reference to "low level plans and construction." See page 3 of the Specification. The Staff opposes admission of this paragraph because of its lack of clarity.

The first specific concern under Section 1 is Section 1.1 "Cracking of Vessel containing Cobalt-60". The asserted event is that "the vessel containing the Cobalt 60 which require continual water cooling may crack from loss of coolant." The Staff does not object to the admission of this area of concern.

Section 1.2 "Neighbors Air Circulation". The asserted event is that "air circulation around the vessel containing the Cobalt-60 could emit radiation into the air." The Staff finds this statement of area of concern to be sufficiently concrete and germane to be admitted.

Section 1.3 "Radioactive Waste". The asserted event is that "storage of radioactive waste at the facility may emit radiation into the air." The Staff finds this statement of concern to be sufficiently clear and germane to the subject matter of this proceeding to be admitted.

Section 1.4 "Rods" The asserted event is that "Mishandling of Cobalt 60 Rods could emit radiation into the air." See Specification, 5. The staff finds this statement of area of concern to be sufficiently clear and germane to the subject matter of this proceeding to be admitted.

Section 1.5 "Loss of Electricity" The asserted event is that "a loss of electricity could compromise Cobalt 60 and emit radiation into the air. See Specification, 6. The staff finds this

area of concern to be sufficiently clear and germane to the subject matter of this proceeding to be admitted.

Section 1.6 "Damaged Air Line" The asserted event is that "a damaged airline could comprise Cobalt 60 and emit radiation into the air." See Specification, 6. The staff finds this area of concern to be sufficiently clear and germane to the subject matter of this proceeding to be admitted.

Section 1.7 "Ozone Dispersion" The asserted event is that "irradiation facilities generate high levels of ozone that is particularly harmful because of its close proximity to the ground. See Specification, 7. This area of concern makes no reference to the application and therefore provides no basis for the assertion that the facility will generate high levels of ozone. Accordingly the staff opposes the admission of this area of concern as not being germane to the subject matter of this proceeding.

Section 1.8 "Installation and Assembly" The asserted event is that "plans for assembly and installation are new, untried on a large scale, and have not been made available for safety review. See Specification, 7-8. The Staff does not consider this area of concern area of concern to be admissible at this time in that the substantiation stated for is applicants claim of trade secret. Pursuant to the Boards order of August 27 2003 the Staff presumes that the documents in question will be provided to petitioners, and if it still has an area of concern with regard to these matters it can so assert in its response to the staff's pleading.

2. Neighbors Security

Section 2.1 The asserted event is that "irradiation Facility is inadequately regulated and secured no security data is available. Security issues are serious with generalized effect." Pursuant to the Board's order of August 27, 2003 The Staff will offer to provide pages which have been withheld to date and with the staff have determined are safeguard information-modified and

the petitioners after review of those pages still believe that they have an area of concern in this area they may articulate it in response to this pleading

Section 2.2 "Security plan is not adequate and cannot be made adequate." The asserted event is that "CFC has not made any security measures and procedures publicly available." See Specification, 9. This area of concern appears to be based upon a lack of information provided to the petitioners. The Staff as discussed with respect to Area of Concern 2.1 will be offering to make Safeguards/modified Information available to the Petitioners and if the Petitioners still have an area of concern after a review of those pages they may insert that in their response to this pleading.

3 Exposure to irradiation facility workers (air and water)

Section 3.1 The asserted event is that "irradiation facility workers may be exposed to dangerous levels of radiation." See Specification, 9. The staff opposes the admission of this area of concern in that it has not been demonstrated to be germane to this proceeding. The substantiation stated for this area of concern is an event that occurred in June 1988 at a completely different facility. Additionally the Petitioners make no reference to anything the application which they believe supports this area of concern.

4. Neighbors water dispersion

The asserted event is that "public water system may be accidentally, recklessly, or intentionally contaminated with Cobalt 60 due to leakage into groundwater." See Specification, 10. The Staff opposes the admission of the area of concern as not being demonstrated as germane to this facility the substantiation for the area of concern is examples of intentional dispersal of water contaminated with Cobalt 60 into the public water system at a facility in Dover, NJ in June 1986 and in Parsippany, NJ in June 1974. The Petitioners make no reference to the application for this facility and rely completely on past events at other facilities.

5 Transportation of hazardous radioactive material (air/water/ground)

Section 5.1 "Accident" - The asserted event is that "the Irradiation facility must be regularly replenished with Cobalt-60, thereby increasing transportation hazards both locally and nationally." The Staff opposes at this time the admission of this area of concern. To begin with it is extremely generalized and nevertheless asserts an area of concern both locally and nationally. When one looks at the substantiation for this area of concern one finds that it is based upon the fact that the Petitioners believe they have not yet been provided pages that describe the emergency procedures for accidents in loading and unloading sources. See Specification, 11. Pursuant to the Presiding Officer's Order of August 27, 2003 these emergency procedures, which have been previously withheld should be provided to the Petitioners. If the Petitioners there-after continue to have an area of concern it can be raised in their response to this pleading. However we would note that the area of concern appears to be much more limited than the event stated. That is to say a broad concern about transportation hazards and is rather related more narrowly to a possibility of an accident in loading and unloading sources.

Section 5.2 "Terrorism". The asserted event is that "the irradiation facility must be regularly replenished with Cobalt 60, thereby increasing transportation hazards (locally and nationally) and the risk of sabotage or terrorism." See Specification, 11. The substantiation for this area of concern is that the license application as provided to the petitioners does not describe the emergency procedures, certain emergency procedures relevant to the area of concern. Pursuant to the Presiding Officer's Order of August 27, 2003 the Staff believes that the Petitioners will be provided with certain pages from application which are designated as safeguards information/modified and certain emergency procedures of the applicant that have previously been withheld. If after reviewing these pages the petitioners still have an area of concern they may so state in their response to this pleading.

6. Experimental Design

The asserted event is that “the facility is a first of a kind, a scale up from an experimental operation of 17000k of Cobalt 60 to 1,000,000 k) and is a-typical of other radiation - source irradiators in America”. See Specifications, 12. The Staff does not oppose the admission of this area of concern on the basis that it is sufficiently clear and germane to the subject matter of this proceeding. The Staff notes that the substantiation and source for this area of concern is stated to be the preliminary for R. Alvarez attached to the Petitioner's reply of July 17, 2003. See specification of areas of concern p 12.

7 General - Air, Water

The asserted event is that “the applicant does not have a cost estimate for decommissioning. 10 C.F.R. § 30.35(e) states, “each decommissioning funding plan must contain a cost estimate for decommissioning...” See specification of areas of concern p 12-13. The Staff opposes the admission of this area of concern in that it is legally inapplicable to this facility. In this connection we would direct the Presiding Officer and Parties to 10 C.F.R. § 36.13, which is the specific requirement for what needs to be included in a license application for a part 36 irradiator. In that Section there is no reference to information needing to be provided regarding decommissioning financial assurance the reason for that is that the applicable requirements for decommissioning financial assurance for this facility are not as stated in the area of concern but are rather a specific amount which is \$75,000 of financial assurance under 30.35(d). The category of materials that are required to have this amount of funding assurance are described in that regulation as “greater than 10 to the 10 power times the applicable quantities of appendix b to parts 30 in seal sources or plated foils.” The Cobalt to be used in this facility is entirely contained in sealed sources and otherwise meets the qualifications for this preset financial assurance amount. If the Petitioners wish a further explanation of how this amount does apply to this facility the Staff is available to provide them with that additional specification. However because the Staff has gone

through this calculation and has found that the \$75,000 bond amount is the applicable financial assurance we oppose on a legal basis the admission this area of concern.

The Presiding Officer has also directed the Staff to address whether, for purposes of standing and areas of concern, the Cobalt-60 sources are to be considered to be shielded or in the words of Applicant's counsel, in unshielded "isolation." Prehearing Order, p. 2. CCMT has the burden at this stage to allege a reasonably believable event that could cause the loss of the double encapsulation of the sources. Nothing asserted by CCMT to date meets that standard. Accordingly, based on what has been asserted to date, the Presiding Officer should assume that the sources remain in a shielded state.

CONCLUSION

The Presiding Officer should find that CCMT has established standing and has set forth certain areas of concern that support its admission as an Intervenor in this proceeding.

Respectfully Submitted

/RA/

Stephen H. Lewis
Counsel for NRC Staff

Dated at Rockville, Maryland
this 27th day of August, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the matter)	
)	Docket No. 302-362339-ML
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF BRIEF ON STANDING AND AREAS OF CONCERN" have been served upon the persons listed below by 1st class U.S. mail, or through deposit in the Nuclear Regulatory Commission's internal mail system as indicated with an asterisk this 27th day of August, 2003.

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