RAS 8112

July 1, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE PRESIDING OFFICER

In the matter of	)	
Nuclear Fuel Services, Inc.	)	Docket No. 70-143
(Materials License SNM-124)	)	

RESPONSE BY SIERRA CLUB ET AL. TO NUCLEAR FUEL SERVICES' REQUEST FOR CLARIFICATION OF THE ISSUES TO BE HEARD AND STATEMENT OF POSITION ON THE SCOPE OF THE HEARING

Intervenors, the State of Franklin Group of the Sierra Club, Friends of the Nolichucky River Valley, Oak Ridge Environmental Peace Alliance, and Tennessee Environmental Council, hereby respond to Applicant's Request for Clarification of the Issues to be Heard and Statement of Position on the Scope of the Hearing (June 3, 2004) (hereinafter "Request for Clarification"). Nuclear Fuel Service ("NFS") seeks a ruling that the scope of issues admitted in LBP-04-05, Memorandum and Order (Ruling on Hearing Requests) (March 17, 2004) (hereinafter "LBP-04-05") does not include "the environmental effects of NFS's current or past operations at its Erwin facilities or elsewhere," or "the safety or the history of NFS's current or past operations at Erwin or elsewhere." Request for Clarification at 1. NFS requests the Presiding Officer to "limit the scope of the proceeding to only those matters concerning the activities that would take place under the requested BLEU [Blended Low Enriched Uranium] Project license amendments." Request for Clarification at 6. Thus, if NFS's request is granted,

Intervenors would be precluded from introducing evidence regarding NFS's past patterns of environmental contamination and permit violations with respect to Petitioners' concerns regarding the environmental impacts of the proposed BLEU Project and the question of whether the BLEU Project can and will be managed safely.

NFS's request should be denied because it seeks to revisit issues that have already been briefed and decided by the Presiding Officer, without justifying reconsideration. NFS also tries, impermissibly, to raise new issues that it could have raised earlier, but did not. In any event, NFS's arguments lack substantive merit.

I. NFS' ARGUMENTS ARE BARRED BY THE LAW OF THE CASE.

NFS advances three arguments in support of its Request for Clarification: that areas of concern may not raise issues relating to past or ongoing licensee activities, that unsupported allegations that a license applicant will violate its permit cannot form the basis for litigation, and that allegations concerning past violations or management character may not be considered unless they have a direct and obvious relationship with the licensing action in dispute. The Presiding Officer should not consider these arguments, because NFS has already made the first two arguments unsuccessfully, and the third argument is a new one that was not made in any of NFS's responses to Intervenors' hearing requests. As the Atomic Safety and Licensing Board ("ASLB") recognized in *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 139-40 (1994), "[g]enerally, when a tribunal decides an issue it is put to rest. This is necessary in order to avoid continuous argument between litigious parties about already resolved issues." Thus, the ASLB concluded, it is "sound law" that:

> [A] motion for leave to reargue or rehear a motion will not be granted unless it appears that there is some decision or some principle of law which would have a controlling effect and which has been overlooked or that there has been a misapprehension of the facts.

Id. at 140. *See also Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-32, 36 NRC 269, 283 (1992) ("The repose doctrine of law of the case acts to bar relitigation of the same issue in subsequent stages of the same proceeding.")

Moreover, a request for reconsideration may not include new arguments that could have been made earlier. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 360 (1993) (hereinafter "*Rancho Seco*").

The Presiding Officer should reject NFS's first two arguments, because they simply restate arguments that NFS has already made several times,[1] without showing that the Presiding Officer overlooked a principle of law or important fact that would change the result of his decision that all of Intervenors' concerns were "[m]anifestly germane" and that Intervenors' environmental concerns regarding NFS's history of past violations

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[1] Applicants' 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 at 25 and 28 (December 19, 2002) (hereinafter "Applicant's Answer to First Hearing Request"); Applicants' Answer to Second 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 at 20 and 22 (February 21, 2003); Applicants' Answer to Third 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 Regarding Nuclear Fuel Services' Proposed BLEU Project at 20, 27-29 (February 12, 2004).

were "at least marginally germane."[2] *Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5-6 (1980) (repetition of arguments previously presented does not present a basis for reconsideration). *See also Louisiana Energy Services, L.P.*, (Claiborne Enrichment Center), LBP-97-3, 45 NRC 99, 109 (1997). The Presiding Officer should also reject NFS's third argument, because it was not made by NFS in any of its three responses to Intervenors' hearing requests. *Rancho Seco*, CLI-93-12, 37 NRC at 360.

II. NFS'S ARGUMENTS LACK MERIT.

In any event, NFS's arguments lack merit. NFS's first argument, that Petitioners' claims are not germane because they relate to past and ongoing activities, misconstrues the case law on which it relies. Request for Clarification at 7-8. *Energy Fuels Nuclear*, LBP-94-33, 40 NRC 151 (1994), on which NFS principally relies, is simply inapposite. In that case, the ASLB excluded concerns regarding the archaeological impacts of an amendment to a source materials license. The ASLB found that concerns were inadmissible because they arose under the initial source material license, and were not implicated by the proposed license amendment. Here, in contrast, Intervenors have raised the concern that NFS's past practice of contaminating the environment and violating its permit reflect a lack of management competence and integrity, such that the violations will be perpetuated in the future. The legitimacy of such concerns is well-recognized by the NRC and the courts. *See Hamlin Testing Labs., Inc. v. AEC*, 357 F.2d

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[2] *Id.* at 19 and n.13. In general, the Presiding Officer also ruled that all of Intervenors' concerns are "truly relevant" and "germane ... beyond cavil." Id. at 18 (quoting *Fansteel, Inc.* (Muskogee, Oklahoma Facility), LBP-03-22, 58 NRC 363, 368 (2003)).

632, 638 (6th Cir. 1966) ("We can imagine no area requiring stricter adherence to rules and regulations than that dealing with radioactive materials, from the viewpoint of both public health and national security."); *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 120 (1995) (hereinafter "*Georgia Tech*") ("The past performance of management may help indicate whether a licensee will comply with agency standards.")

NFS also argues that Intervenors' concerns are inadmissible because "mere unsupported allegations that an NRC license applicant will violate regulations" cannot form the basis for concerns arguing that an NRC license should be denied. Request for Clarification at 12, citing *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 29 (2003). NFS has made this argument before, albeit citing a different case expounding the same holding. Applicant's Answer to First Hearing Request at 13, citing *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000) (hereinafter "*GPU*"). Intervenors continue to rely on the response they made then:

> *GPU* does not support NFS's argument. In that case, the Commission found that the petitioner had failed to provide "documentary support" for its assertion that the applicant was likely to violate safety regulations in the future. *Id.* Here, in contrast, the Petitioners have offered statements in the EA acknowledging that over a period of years, NFS has contaminated soil and groundwater on the NFS site. *See* Hearing Request at 5. In addition, a neighbor of the NFS-Erwin plant has charged that NFS has contaminated offsite areas. *Id.*, footnote 3. These concrete assertions regarding environmental contamination by NFS can hardly be characterized as "unfounded conjecture." *See* Applicant's Answer at 13, citing *International Uranium (USA) Corporation* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001). In fact, this case stands in sharp contrast to *White Mesa,* where the petitioner had failed to show that currently licensed activities "had caused seepage into the groundwater in the past or that activities to be authorized by the instant license amendment would create a greater likelihood of

> such contamination in the future." 54 NRC at 252. Here, Petitioners have demonstrated that operation of the NFS-Erwin plant has already caused environmental contamination. If NFS is allowed to process even greater quantities of radioactive material, and if it continues the practices that led to the now-existing environmental contamination, then it is reasonable to infer that levels of environmental contamination will increase.

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 at 3-4 (January 6, 2003).

Finally, NFS argues that Intervenors' statement of concerns does not meet the NRC's standard that allegations by a petitioner that past conduct shows an applicant's lack of integrity to manage a proposed nuclear operation must show a "direct and obvious relationship between the character issues and the licensing action in dispute." Request for Clarification at 9, quoting *Dominion Nuclear Connecticut, Inc.*, (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 365 (2001) (hereinafter "*Millstone*"). *Millstone* differs from the instant case in several important respects, however. First, the *Millstone* license amendment application concerned a "procedural change" to the Millstone license, which involved relocating "certain details" of the licensee's effluent management program from the technical specifications to an operational manual. *Id.* at 350-51. Here, in contrast, NFS's license amendment request seeks permission to add a major new operation to the Erwin facility, which would allow NFS to handle extremely dangerous materials. Second, the management of the nuclear plant had changed since the time of the violations raised by the petitioners. *Id.* at 366. Here, the management of NFS remains the same. Finally, petitioners in *Millstone* did not allege any ongoing violations. *Id.* In contrast, the violations alleged by Intervenors are

ongoing, and include events as recent as January 2004. *See* Third Hearing Request at 16 (noting report from NRC's Office of Investigations identifying an apparent violation). Finally, the contamination incidents and violations cited by Intervenors clearly relate to NFS's ability and commitment to safely contain dangerous radioactive and chemical materials. Thus, Intervenors' concerns have a demonstrably "rational connection" to the safety of the proposed operation under the test established by the Commission in *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-85-9, 21 NRC 1118, 1136-37 (1985) (hereinafter "*Three Mile Island*").

III. INTERVENORS' CLAIMS SHOULD BE ADMITTED FOR RESOLUTION ON THE MERITS.

The pleading burden in a 10 C.F.R. Part 2, Subpart L informal proceeding is intentionally "modest." *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 NRC 9, 16 (2001). NFS's effort to declare Petitioners' claims irrelevant to the proceeding, based only upon their permittedly modest pleadings, constitutes a thinly veiled attempt to decide the merits of this case before the hearing. The Presiding Officer has decided that Petitioners' claims are "'germane' ... to the license amendment at issue." LBP-05-04, slip op. at 18 (quoting *Fansteel,* 58 NRC at 368). Therefore, a hearing, not a request for clarification, is the appropriate means of deciding these claims. *See Sequoyah Fuels,* 53 NRC at 20 (refusing to exclude certain issues prior to a hearing through an interlocutory appeal). *See also Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-738, 18 NRC 177, 190 (1983) (refusing to make final judgment on the competence and integrity of management until the hearing phase so that an adequate record could be established).

IV. CONCLUSION

For the foregoing reasons, the Presiding Officer should deny NFS's motion for clarification and its request to reduce the scope of the hearing.

Respectfully submitted,

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July 1, 2004

CERTIFICATE OF SERVICE

I certify that on July 1, 2004, copies of Response by Sierra Cub et al. to Nuclear Fuel Services' Request for Clarification of the Issues to be Heard and Statement of Position on the Scope of the Hearing were served on the following by first-class mail, and by e-mail if so designated:

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