

February 21, 2003

DOCKETED
USNRC

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

February 25, 2003 (11:31AM)

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
(Blended Low Enriched Uranium Project))	

**APPLICANT'S 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**

Applicant Nuclear Fuel Services, Inc. ("Applicant" or "NFS") files this answer to the request for a hearing of the Friends of the Nolichucky River Valley ("FONRV"), the State of Franklin Group of the Sierra Club ("Sierra Club"), the Oak Ridge Environmental Peace Alliance ("OREPA"), and the Tennessee Environmental Council ("TEC"), collectively "Petitioners,"¹ regarding NFS's second license amendment request for the Blended Low Enriched Uranium ("BLEU") Project. NFS submits this answer pursuant to 10 C.F.R. § 2.1205(g). NFS respectfully requests that the Presiding Officer deny Petitioners' request for a hearing for lack of standing and for failure to submit an admissible area of concern.

¹ 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, (Feb. 6, 2003) ("2d Req.").

I. FACTUAL AND LEGAL BACKGROUND

A. Procedural Background

On October 11, 2002, NFS requested a second amendment to Special Nuclear Material License No. SNM-124 to authorize modification to its special nuclear material processing operations in the BLEU Preparation Facility at its existing nuclear fuel fabrication and uranium recovery facilities in Erwin, Tennessee.² The amendment is the second of three amendments that will be necessary to support process operations associated with the portion of the BLEU Project that will be performed at NFS. *Id.* 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.³ Re-use of the HEU as low enriched uranium ("LEU") is the favored option of the DOE program because it converts nuclear weapons grade material into a form unsuitable for weapons, it allows the material to be used for peaceful purposes, and it allows the recovery of the commercial value of the material. *Id.*

On February 28, 2002, NFS submitted its first request for an amendment to its license to authorize the storage of LEU-bearing materials at the Uranyl Nitrate Building ("UNB"), to be constructed at NFS' Erwin facilities.⁴ That amendment request was the subject of several hearing petitions whose resolution is being held in abeyance by the Presiding Officer pending the expiration of the opportunity for hearing on NFS' third license amendment request. Nuclear Fuel Services, Inc. (Erwin, Tennessee), LBP-03-1, 57 NRC __, slip op. at 13 (Jan. 31, 2003). NFS anticipates submitting its third request, to

² Nuclear Fuel Services, Inc., Notice of Receipt of Amendment Request and Opportunity to Request a Hearing, 68 Fed. Reg. 796 (Jan. 7, 2003).

³ 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.

⁴ Environmental Statements; Availability, etc.: Nuclear Fuel Services, Inc., Notice of docketing, etc., 67 Fed. Reg. 66,172 (Oct. 30, 2002).

authorize the operation of a uranium dioxide conversion facility to be constructed at NFS' Erwin site, by May or June 2003.

On July 9, 2002, the NRC Staff published a notice in the Federal Register that it had prepared the EA for the entire BLEU Project, so as to avoid segmentation of the environmental review. *Environmental Assessment and Finding of No Significant Impact of License Amendment for Nuclear Fuel Services, Inc.* 67 Fed. Reg. 45,555, 45,558 (2002). The Staff also made a Finding Of No Significant Impact ("FONSI") for the first license amendment request. *Id.* The Staff noted that it will perform a separate safety evaluation and environmental review for each of the NFS license amendment requests. *Id.* at 45,555. If the Staff finds that the BLEU Project EA adequately assesses the environmental impacts of the proposed amendments, it may document those findings in another EA (without repeating the analysis in this EA), but no further assessment will be performed.

On January 21, 2003, Petitioners requested an injunction from the Commission to prohibit BLEU Project construction activities at the NFS site.⁵ Petitioners claimed that NFS was violating the National Environmental Policy Act ("NEPA") by constructing project facilities prior to the NRC Staff's completion of its environmental review. *Inj. Req.* at 1-2. NFS responded that, on the contrary, the NRC Staff had completed its environmental review by preparing the EA and that Petitioners' injunction request was meritless.⁶ NFS pointed out that, as reflected in the second license amendment request, NFS has made no changes to the BLEU Project. Nor will NFS make any changes to the project in connection with the third and final amendment request. *Inj. Ans.* at 6 & n.9. Thus, the NRC Staff's EA is and will remain valid.

⁵ "Petitioners' Emergency Request to Enjoin Construction by NFS of BLEU Project Facilities" (Jan. 21, 2003) ("Inj. Req.").

⁶ Applicant's Opposition to Petitioners' Emergency Request to Enjoin Construction by NFS of BLEU Project Facilities (Feb. 5, 2003) ("Inj. Ans.").

B. The Second License Amendment Application

Pursuant to the second license amendment request and as described in the EA, NFS will downblend HEU-aluminum alloy and HEU metal to low-enriched uranyl nitrate at the existing BLEU preparation facility ("BPF") at NFS' site. EA at 1-2; see also 68 Fed. Reg. at 796.⁷ Process equipment previously used at NFS' [REDACTED] Complex at the Erwin site will be relocated to an existing but inactive production area in NFS' Building [REDACTED] to be designated as the BPF. EA at 2-1. Approximately [REDACTED] of HEU-aluminum alloy and [REDACTED] of HEU metal will be used to produce high-enriched uranyl nitrate solution. Id. This solution will be downblended with uranyl nitrate solution produced from 211.7 metric tons of natural uranium oxide to yield low-enriched uranyl nitrate solution in [REDACTED] batches. Id. That uranyl nitrate solution will then be transferred to and stored at NFS' UNB, whose operation was the subject of NFS' first license amendment request. EA at 1-2.

The EA found that the three proposed amendments for the BLEU Project would not result in significant adverse impacts to the environment. EA at 5-1. Normal operations are not expected to have a significant impact on air quality or water quality. See id. at 5-1 to 5-3. Specifically, discharges from the proposed action (the BLEU Project) are not expected to have a significant impact on the water quality in the Nolichucky River. Id. at 5-2. With respect to potential accidents, the EA found that the safety controls to be employed in plant processes for the BLEU Project will ensure that the processes are safe. Id. § 5.1.2. The environmental impacts of the second license amendment will be only part of the impacts caused by the BLEU Project as a whole. See id. at 2-10 to 2-11. Thus, the impacts of the amendment will also be insignificant.

⁷ NFS is already authorized to handle HEU at the BPF. 68 Fed. Reg. at 796.

C. Petitioners' Hearing Request

Pursuant to the Federal Register notice of opportunity for a hearing, Petitioners filed a hearing request on the second license amendment request on February 6, 2003. 2d Req. at 1. Petitioners incorporate by reference from their first hearing request their arguments that they have standing to participate in this proceeding. *Id.* at 2. They also assert standing on the basis of alleged errors in the BLEU Project EA and their claim that NFS will make "illegal discharges" to the environment. *Id.* at 3, 6.

The Request asserts six "areas of concern" allegedly germane to this proceeding: 1) NRC Staff completion of its environmental analysis; 2) impacts of BPF operations; 3) preparation of an EIS to address "credible" accidents; 4) impacts of "acts of malice or insanity;" 5) decommissioning funding; and 6) NFS' personnel qualifications, proposed equipment and facilities, and proposed operating procedures. *Id.* at 7-15.

NFS requests that Petitioners' hearing request be denied because Petitioners lack standing, in that they do not show that they would suffer any injury in fact from the granting of the license amendment. NFS also requests that the Request be denied because Petitioners have failed to articulate any areas of concern that warrant a hearing on the amendment.

II. ANALYSIS

Under the notice of opportunity for hearing, requests for a hearing on the NFS license amendment are to be evaluated under 10 C.F.R. Part 2, Subpart L. 68 Fed. Reg. at 796. Under Subpart L, a petitioner requesting a hearing must demonstrate the timeliness of its request, that it has standing, and that it has areas of concern "germane" to the subject matter of the proceeding. *Atlas Corp. (Moab, Utah Facility)*, LBP-97-9, 45 NRC 414, 422 (1997); 10 C.F.R. §§ 2.1205(e) and (h). The Commission does not permit "notice pleadings" with respect to standing and areas of concern. *Shieldalloy Metallurgical Corp. (Cambridge, Ohio Facility)*, CLI-99-12, 49 NRC 347, 353-54 (1999).

Rather, it “insist[s] on detailed descriptions of the Petitioner’s positions on issues going to both standing and the merits.” Id. at 354.

A. Petitioners Do Not Have Standing

In determining whether to grant a petitioner’s request to hold a hearing, the Presiding Officer must first determine whether the petitioner meets the judicial standards for standing and must consider, among other factors:

- 1) the nature of the requestor’s right under the [Atomic Energy] Act 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 on the requestor’s interest.

10 C.F.R. § 2.1205(h). This is the test for standing familiar in NRC proceedings. See, e.g., Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 NRC 9, 13 (2001). Since the Petitioners are organizations, however, they must also meet the test for organizational standing. See Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 n.10 (1994).

Petitioners incorporate by reference their claims of standing and declarations from five members of the Petitioner organizations from Petitioners’ hearing request on NFS’ first license amendment application and their reply to NFS’ answer to their request. See 2d Req. at 2 & n.1.⁸ Petitioners also raise new claims of standing based on challenges to the EA. See id. at 3-7. Therefore, NFS hereby incorporates by reference its response to Petitioners’ claims of standing in NFS’ answer to Petitioners’ hearing request, which

⁸ See 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”).

includes NFS' discussion of the law on standing in NRC materials licensing cases.⁹ NFS also responds to the new claims of standing in Petitioners' reply to NFS' answer to their first hearing request (which Petitioners incorporated by reference) and Petitioners' second hearing request. We show that Petitioners fail to meet the applicable standards.

1. Petitioners' Cannot Derive Standing to Litigate This License Amendment Request Based on Injury Assertedly Arising From Other Requests

In their reply to NFS' answer to their hearing request on NFS' first license amendment request, Petitioners claim that they can derive standing to participate in hearings on NFS' one license amendment request from injury assertedly arising from the other two requests, claiming that such injury would be "fairly traceable" to the first request. Reply at 2-3 (citing Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 417 (2001)). Petitioners are incorrect. The asserted injury that gave rise to standing in Savannah River was potential harm from the transportation of fuel that would result if the fuel facility were licensed. Savannah River, LBP-01-35, 54 NRC at 417. There was no separate licensing proceeding for fuel transportation; the licensing of the facility was legally sufficient (and practically necessary) for the transportation to occur. See id. Effectively, the licensing of the facility would "cause" the transportation of the fuel and thus the asserted harm from transportation was traceable to the licensing action. Here, by contrast, separate license amendments are required for each part of NFS' participation in the BLEU Project. Therefore, unlike Savannah River, approval of one license amendment here is clearly not sufficient for the activities to be licensed under the other amendments to occur.¹⁰

⁹ See 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) at 6-21 ("Ans. to 1st").

¹⁰ Nor is approval of one amendment necessary for the activities to be licensed under the other amendments to occur. For example, upon approval of NFS' first license amendment request for operation of the UNB,

Therefore, one amendment cannot cause the asserted harms from the other amendments and hence the asserted harms from each amendment are not traceable to either of the other amendments. Thus, asserted harms from one NFS license amendment request do not provide Petitioners with standing to litigate either of the other two amendment requests.¹¹

2. Petitioners' Speculative Claims that NFS Will Violate Regulations Does Not Provide Them With Standing

Petitioners claim that they have standing because NFS will violate regulations pertaining to the release of contaminants into the environment, in that environmental contamination has occurred at the NFS site in the past. 2d Req. at 6-7. As NFS discussed in its Answer to Petitioners first request, Petitioners' claim is unrelated to the instant license amendments, conjectural, and contrary to NRC case law that holds that in licensing proceedings the NRC will not assume that applicants will violate applicable regulations. Ans. to 1st at 12-13. Petitioners' also have not provided credible accident scenarios and shown that the postulated accidents would have particular and concrete impacts upon them. *Id.* at 13. Contrary to Petitioners' argument, *see* Reply at 4 n.2, it is not "absurd" for Petitioners to provide such scenarios, rather, it is necessary to ensure that standing is founded upon facts rather than speculative hypotheses.

In their hearing request on NFS' second license amendment request, Petitioners argue further that they have standing because of, for example, localized groundwater concentrations of uranium and technetium and potential migration of existing

NFS may immediately begin receiving shipments of uranyl nitrate solution from the DOE Savannah River Site. *See* EA at 1-2.

¹¹ Indeed, "the requirement that a party demonstrate a direct and concrete injury in fact [to show standing] 'is designed to limit access to the courts to those who have a direct stake in the outcome, as opposed to those who would convert the judicial process into no more than a vehicle for the value interests of concerned bystanders.'" *Central and South West Services v. U.S. E.P.A.*, 220 F.3d 683, 701 (5th Cir. 2000). Thus, in order to litigate an NFS license amendment application, Petitioners must show a likelihood of harm from it, not some other action.

contaminants. 2d Req. at 6 (citing EA at 3-16 and 5-2). They claim that a standing determination “must take into account the potential that [future] illegal discharges . . . will compound the adverse health effects of legal discharges.” *Id.* They argue that they have standing based on the “[inability] to rule out as a matter of certainty the existence of a reasonable possibility” that the BLEU Project may adversely affect their members’ health.

Petitioners’ argument is specious. The contamination in the ground described in the EA arose from operations at the NFS site over 25 years ago. See EA at 3-14, 3-16 (contamination near BLEU Project facility location arose from equipment storage in the 1960s; NFS site includes buildings and areas used for waste disposal from 1957 to 1978; contamination was identified near surface impoundment areas). Thus, it is simply irrelevant to the effects of this license amendment. Moreover, Petitioners do not show nor does the EA state that the contamination resulted from discharges that were unauthorized at the time they occurred. See, e.g., *id.* Nor do Petitioners show, nor does the EA state, that BPF operations will cause existing contaminants in the ground to migrate or to affect any migration that they claim is already occurring. The fact that this contamination exists in no way suggests that this license amendment (or the other BLEU Project amendments) will cause further contamination or result in illegal discharges to the environment.

3. Exposure to Very Small Radiation Doses Far Below Health and Safety Regulatory Limits and Background Levels Do Not Provide Petitioners With Standing

Petitioners claim that they are entitled to standing on the basis of potential harm from exposure to radiation even where their members’ potential exposure would only be a small fraction of health and safety regulatory limits. Reply at 5-6 (citing Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 247-48 (1996);

Savannah River, LBP-01-35, 54 NRC at 417). In Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC __ (Dec. 2, 2003), the licensing board recognized Yankee Nuclear and Savannah River but held that “simply showing the potential for any radiological impact, no matter how trivial, is not sufficient to meet the requirement of showing a ‘distinct and palpable harm’ [necessary for] standing.” Id., slip op. at 14.

4. Speculative Claims Concerning Potential Accidents Do Not Provide Petitioners With Standing

Petitioners assert standing based on “concerns expressed in the declarations of [Petitioners’ members]” that NFS’s alleged history of causing environmental contamination indicates that NFS may not be able to prevent accidents in the future and that accidental discharges to the environment may be greater than normal discharges. Reply at 6. These claims are insufficient. First, standing must be established on the basis of harms from the proposed action—the license amendment—not current operations or past history. International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 251 (2001). Second, standing may not be based on conjecture regarding the effects of accidents. Ans. to 1st at 8. “Statements consisting only of generic, unsubstantiated concerns for health [and] safety . . . are insufficient to [establish standing].” Diablo Canyon, LBP-02-23, 56 NRC at __, slip op. at 20.

5. The Alleged Cumulative Effects of Past and Current Operations Do Not Provide Petitioners With Standing

In addition to arguing without basis that NFS’ history makes it likely that unplanned releases of contaminants will occur that will impact them, Petitioners also improperly assert standing on the basis of the purported cumulative effects of the license amendment with current or past NFS operations. See Reply at 6 n.5. The Commission has stated repeatedly that “a petitioner seeking to intervene in a license amendment

proceeding must assert an injury-in-fact associated with the challenged license amendment, not simply a general objection to the facility.” Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 188 (1999) (emphasis in original). “[A] petitioner’s challenge must show that the amendment will cause a distinct new harm or threat apart from the activities already licensed.” White Mesa, CLI-01-21, 54 NRC at 251 (quotations omitted, emphasis added); see International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-01-8, 53 NRC 204, 219-20, aff’d, CLI-01-18, 54 NRC 27, 31-32 (2001).¹² Thus, Petitioners cannot rely on the alleged cumulative impacts of the proposed action and current or past operations to provide them with standing.

6. Unsubstantiated Concerns Over Effects on Property Values Do Not Provide Petitioners with Standing

In Petitioners’ Reply, they claim standing from their members’ concerns over the possible impact of the license amendment on their property values, “aris[ing] from human perceptions that are grounded in real life conditions.” Reply at 11. Petitioners assert that “the impact of nuclear facilities on property values is covered by [NEPA].” Id. (citing Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 108 (1998)).

Petitioners’ view of the law is incorrect. The alleged effects of public fears or perceptions lie outside the zone of interests of both the Atomic Energy Act and NEPA and hence they cannot provide Petitioners with standing. Ans. to 1st at 15 (citing cases). In Claiborne, the Commission did not hold to the contrary. Rather, the Commission

¹² In White Mesa, a small increase in the truck traffic carrying radioactive material to a mill was found not to provide the petitioner with standing. LBP-01-8, 53 NRC at 219-20. The determination of injury-in-fact was based on the number of trucks that were to be added by the proposed amendment, not the cumulative total of trucks that were traveling to the mill under the license plus those that were to have traveled to the mill under the amendment. Id.

explained that the property devaluation in that case did not turn on psychological effects stemming from fear, but rather “[would] flow directly from radiological and environmental impacts” associated with the facility. CLI-98-3, 47 NRC at 109 n.26.¹³

Petitioners’ claims of property value impacts here are inadequate because they are conjectural and not related to actual environmental impacts. The declarant for Petitioners merely states that she is “concerned that the value of [her] property will potentially decline as a result of public perception that increased contaminant levels in the Jonesborough drinking water supply pose a health risk.” Declaration of Ruth Gutierrez (Nov. 22, 2002) ¶ 6 (emphasis added). Such “[s]tatements consisting only of generic, unsubstantiated concerns for health, safety, and property devaluation are insufficient to [establish standing].” Diablo Canyon, LBP-02-23, 56 NRC at ___, slip op. at 20. Finally, given that the NFS facility has been in existence since 1957, it is hard to imagine that any property value effects stemming from fear of nuclear materials—even if they were cognizable—would not have already occurred as a result of operations since 1957. Such impacts from the pre-existing facility could not provide Petitioners with standing in this license amendment proceeding. Unsupported speculation as to further claimed effects is simply too “indirect and evanescent” to support standing.

7. Arguments Regarding Alleged Discrepancies in the EA Do Not Provide Petitioners With Standing

In their request for a hearing on NFS’ second license amendment request, Petitioners claim that there are discrepancies in the data underlying the EA which “undermine the credibility” of the statements in the EA that the discharges to the Nolichucky River from the BLEU Project will be extremely small. 2d Req. at 3; Reply at

¹³ See also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-08, 55 NRC 171, 188 n.34 (2002) (nongnizable, “indirect and evanescent” psychological effects are to be distinguished from cognizable, “direct and palpable” impacts), rev’d on other grounds, CLI-02-20, 56 NRC __ (Oct. 1, 2002).

7-9. 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, among other things, 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.

First, Dr. Makhijani's claims of errors in the EA are not the "concrete injury" that is necessary to provide Petitioners with standing. Alleged error, alone, is a procedural injury, which is distinct from the "concrete injury from the proposed agency action, which must still be shown apart from having any interest in having the procedures observed." Babcock and Wilcox, LBP-97-9, 45 NRC at 93. Petitioners unable to show concrete injury to legitimate health, safety, or environmental interests "are unable to establish their standing to pursue their concerns about the agency's compliance with NEPA's procedural requirements." Id. at 93-94. As the Supreme Court put it, an individual can assert procedural rights "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 n.8 (1992).

Second, Dr. Makhijani's claims regarding the dose from the BLEU Project are wrong. He claims, based on his assumptions regarding the relationship between emissions and dose, that the dose from BLEU Project plutonium effluent to water should be 2.7 mrem per year. Makhijani Dec. ¶ 8. Dr. Makhijani fails to note, however, that the RAI response he cites for the plutonium effluent data specifically states that the dose rate resulting from total liquid radioactive effluents to water (i.e., including plutonium and all

other effluents), from this license amendment (i.e., the BPF) will be 2.45 mrem per year.¹⁴

Third, even accepting Dr. Makhijani's claims regarding the dose from the BLEU Project arguendo, the dose rate remains a very small fraction of regulatory limits and an even smaller fraction of the natural background radiation dose rate. His dose claim of 2.7 mrem per year is little more than 10 percent of the 40 C.F.R. Part 190 regulatory limit of 25 mrem per year and it is still less than one percent of the natural background radiation dose rate of 360 mrem per year. As discussed above, such a small increase in dose rate relative to the natural background does not provide Petitioners with standing. See also Ans. to 1st at 8-9.

As discussed above, none of Petitioners arguments show that the identified members of the Petitioner groups have standing. Therefore, none of the groups have standing and their petition should be denied.

B. Petitioners Have Not Proffered an Admissible Area of Concern

To obtain a hearing under Subpart L, a petitioner must also "describe in detail" "areas of concern" about the licensing activity in question. 10 C.F.R. § 2.1205(e)(3); see Shieldalloy, CLI-99-12, 49 NRC at 354. Areas of concern must be "germane to the subject matter of the proceeding." 10 C.F.R. § 2.1205(h). If the proceeding concerns a license amendment, germane areas of concern are limited to activities to be authorized by the amendment and do not include those authorized by the underlying license. See Energy Fuels Nuclear, Inc. (Source Materials License No. SUA-1358), LBP-94-33, 40 NRC 151, 153-54 (1994).

¹⁴ Letter from B.M. Moore, NFS, to NRC, regarding "NFS Responses to NRC's Request for Additional Information to Support an Environmental Review for the BLEU Project" (March 15, 2002) (hereinafter "RAI Resp."), Attachment IV, ISA Source Term Data and Radioactive Estimates for the TVA Project, Attachment G, BLEU Preparation Facility (BPF) Radioactive Liquid Effluents, p. 4, Table, "Summary of Estimated BPF Liquid Effluents."

Areas of concern must have some factual basis. "Prior to acceptance of an area of concern, there must at least be a reference to some authority giving rise to the concern." Molycorp., Inc. (Washington, Pennsylvania), LBP-00-10, 51 NRC 163, 175 (2000). "Information and belief is patently inadequate." Id. Concerns must be particularized in some respect and show some significance so as to "appear that the concern is at least worthy of further exploration." See International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-02-06, 55 NRC 147, 153 (2002).

The concerns advanced by Petitioners here are inadmissible because they are devoid of particularity and factual basis, and in some respects, are not germane to the license amendment.

1. Environmental Assessment Concerns

Petitioners' claim that the EA prepared by the NRC Staff is inadequate to support the issuance of a license amendment for the BPF.

a. Completion of the NRC Safety Review

Petitioners claim that the EA is incomplete because the NRC Staff stated in the EA that it would perform an environmental review when it performed its safety review for the second license amendment request to determine whether "this EA effectively assesses the environmental effects of the proposed action," but that the Staff has not yet completed its safety review. 2d Req. at 8 (quoting EA at 1-1). Petitioners are wrong. The EA assessed the entire BLEU Project—including the effects of the second license amendment request—and concluded that the project "is not expected to result in significant adverse impacts to the environment." EA at 5-1. The review performed at the time of the safety review will be to confirm that this EA still effectively assesses the impacts of the amendment; if it does, "no further assessment will be performed." EA at 1-1.

An admissible concern under Subpart L “must be sufficient to establish that the issues the requester wants to raise regarding the licensing action fall generally within the range of matters that properly are subject to challenge in such a proceeding.”¹⁵ Here, Petitioners incorrectly challenge the EA on the grounds that the NRC Staff has not yet completed its safety review. A safety review is not required for the Staff to complete its environmental assessment. See Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 220-21 (2002). The Staff was permitted to complete its assessment based on the environmental information NFS submitted to it. Id.; see EA at 1-1 (citing information). Indeed, in certain NRC proceedings (e.g., on Part 52 early site permits), the environmental review is performed before an application to construct or operate a facility is even submitted. Savannah River, CLI-02-7, 55 NRC at 221 n.43. The fact that the Staff here will perform a further environmental review at the time it performs its safety review to confirm that the EA still assesses the impacts of the amendment does not render this EA incomplete.¹⁶ Thus, this concern should be dismissed.

b. Allegedly Significant Impacts

Petitioners claim that the NRC Staff must prepare an EIS for the BLEU Project because the operation of the BPF will involve activities “with potentially significant environmental impacts.” 2d Req. at 8. However, Petitioners concerns do not allege any impacts of this amendment that will in fact be significant.

¹⁵ Informal Hearing Procedures for Materials Licensing Adjudications, Final Rule, 54 Fed. Reg. 8269, 8272 (1989).

¹⁶ If Petitioners come to believe that new environmental information has emerged and that the Staff has not properly accounted for it in the EA, Petitioners could assert a new area of concern on the basis of the new information. They have not done so.

(1) Quantities of Material and Risks

Petitioners claim that an EIS must be prepared because the activities at the BPF “involve storage, handling, and processing of very large quantities of radioactive and toxic materials.” *Id.* Petitioners imply that the effects of BPF operation will be significant because the EA states that uncontrolled releases of materials from accidents “could pose a risk to the environment” and the EA describes the potential hazards of BPF operations. *Id.* at 9 (quoting EA at 5-7 and 5-8).

This concern should be dismissed because Petitioners provide no reason to believe that the risks of BPF operations will amount to significant environmental impacts. An EIS is not required for actions that will not have a significant effect on the environment. See 10 C.F.R. § 51.20(a). The passages that Petitioners quote from the EA state that risks exist, but Petitioners provide nothing to show that the probabilities and the consequences of accidents will amount to a potentially significant impact that must be assessed in an EIS.¹⁷ Contrary to Petitioners’ claim, the EA states that based on the information that NFS supplied to the NRC regarding safety controls, BPF processes can be executed safely. EA at 5-7 to 5-8. Petitioners’ conclusory assertions that risks are significant—without providing anything to show that they are—do not give rise to admissible concerns. See *White Mesa*, LBP-02-06, 55 NRC at 153; *Molycorp*, LBP-00-10, 51 NRC at 175.

(2) New and Allegedly Unanalyzed Activities

Petitioners claim that because some of the processes to be used at the BPF are new and “have not been evaluated in any previous EIS or EA” that “further NEPA

¹⁷ See *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-90-7, 32 NRC 129, 131 (1990) (“remote” accidents do not require EIS); *Baltimore Gas and Electric Co.* (Calvert Cliffs Independent Spent Fuel Storage Installation), DD-93-14, 38 NRC 69, 73-74 (1993) (potential accidents with insignificant consequences do not require preparation of EIS); *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), LBP-85-34, 22 NRC 481, 511 (1985) (same).

evaluation is required.” 2d Req. at 10 (emphasis added). This concern should be dismissed as not germane because it does not even suggest a deficiency in the BLEU Project EA. Indeed, Petitioners do not claim that this EA did not evaluate the possible environmental impacts of BPF processes.

The EA clearly states that “[p]otential hazards associated with new operations were evaluated during the NRC review.” EA at 5-8. The EA also concluded that the BPF operations that were not new were safe based on “operational experience and history” and the fact that they were “very similar to corresponding processes presently licensed under [NFS’ special nuclear material license.]” Id. at 5-7 to 5-8. The fact that the EA relied on operational experience and history (including operations under NFS’ current license), rather than some previous environmental review, provides no reason to believe that the EA’s conclusion is incorrect. Nor do Petitioners cite any requirement that this EA’s conclusions must be based on other EAs or EISs. Therefore, this concern should be dismissed as Petitioners have provided nothing to show that it is worthy of further consideration. See White Mesa, LBP-02-06, 55 NRC at 153; Molycorp, LBP-00-10, 51 NRC at 175.

c. Possible Accidents

Petitioners claim that the NRC Staff assumed without a factual basis that accidents involving HEU and/or hazardous chemicals were not credible and that therefore the NRC should prepare an EIS for the BLEU Project. 2d Req. at 11; see id. at 12. Petitioners are incorrect.

(1) Completion of the Environmental Review

Petitioners first assert that the Staff’s assumption has no basis because the Staff has not yet completed its safety review. Id. at 11. As shown above, there is no legal requirement that the NRC wait until completing its safety review before completing its

environmental review. See Savannah River, CLI-02-7, 55 NRC at 220-21. Petitioners ignore the fact that the EA's conclusions are based on the environmental documentation that NFS submitted to the NRC. See EA at 5-9 (citing references). Therefore, this concern should be dismissed as meritless on its face without further inquiry.

(2) Possible Accidents

Next Petitioners claim that an EIS is required because the EA states that accidents are possible. 2d Req. at 11-12. Petitioners claim that “[o]nly if the probability of accidents is so low as to be remote and speculative can the NRC avoid the obligation to prepare an EIS.” Id. at 12.

On the contrary, the mere fact that accidents may be possible does not require the preparation of an EIS; it is the probability and the consequences that determines the potential significance of the environmental effects of accidents. See supra note 17. The NRC has prepared many EAs in which it has discussed possible accidents but it has nonetheless concluded that they do not pose a significant risk to the environment.¹⁸ Therefore, the Petitioners' claim that the EA discusses possible accidents, without more, does not give rise to an admissible concern because it does not even tend to show the EA is in some way deficient.

This concern is also invalid in that it is completely unparticularized. See Shieldalloy, CLI-99-12, 49 NRC at 354 (citing 10 C.F.R. §§ 2.1211(b), 2.714(a)(2)). Petitioners do not specify which accidents would purportedly pose a significant risk to the environment or say how they would do so.

¹⁸ See, e.g., Calvert Cliffs, DD-93-14, 38 NRC at 73-74; North Anna, LBP-85-34, 22 NRC at 488, 511; Kelley v. Selin, 42 F.3d 1501, 1518-19 (6th Cir. 1995).

(3) History of NFS Operations

Petitioners claim that soil and groundwater contamination at the NFS site “demonstrate a serious risk that NFS will continue to pollute the environment.” 2d Req. at 12-13. Petitioners also claim that NFS is responsible for environmental contamination at West Valley, New York. This concern should be dismissed because it is germane to past operations, not the proposed license amendment. See Energy Fuels Nuclear, LBP-94-33, 40 NRC at 153-54.

As discussed above in response to Petitioners’ claim of standing, the contamination at the NFS site resulted over 25 years ago from equipment storage in the 1960s and waste disposal between 1957 and 1978. See EA at 3-14, 3-16. Contamination at West Valley is in no way related to the proposed action here and it also occurred over 20 years ago. Moreover, Petitioners do not show nor does the EA state that the contamination resulted from discharges that were unauthorized at the time they occurred. See, e.g., EA at 3-14, 3-16. Thus, the contamination cited by Petitioners simply does not suggest that this license amendment (or the remainder of the BLEU Project) will cause further contamination or result in illegal discharges to the environment.

This concern is also invalid as unparticularized. See Shieldalloy, CLI-99-12, 49 NRC at 354. It does not say how or why the proposed license amendment will pollute the environment or how (or why) NFS would “violate its permit.”

(4) Acts of Malice or Insanity

Petitioners claim that the NRC should prepare an EIS to address the risk of intentional destructive acts or the theft of HEU. 2d Req. at 13-14. Petitioners candidly acknowledge, however, that this concern is barred by the Commission’s recent decision in Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC ___, (Dec. 18, 2002). Id. n.12. Therefore, it should be dismissed.

2. Safety Concerns

Petitioners assert two safety concerns regarding the second license amendment application: decommissioning funding and compliance with substantive safety regulations. 2d Req. at 14.

a. Decommissioning Funding

Petitioners assert that NFS has not “demonstrated that it has made adequate arrangements to fund the decommissioning of the BPF at the end of the facility’s life, and thus has not demonstrated compliance with 10 C.F.R. § 70.23(a)(5) or § 70.25.” 2d Req. at 14. Petitioners claim that consideration of the adequacy of financial assurance for decommissioning should account for NFS’ liability for cleaning up existing contamination at the Erwin site and at West Valley, New York, and that the NRC should not allow the expansion of operations at NFS until it has assurance that NFS has the resources to clean up both existing contamination and any contamination resulting from the operation of the BPF. Id.

This concern should be rejected because Petitioners have not asserted any deficiency in NFS’ decommissioning funding arrangements for this amendment or the BLEU Project. Nor have Petitioners shown that NFS has decommissioning obligations at the West Valley site—indeed, it does not. In any event, NRC decommissioning regulations require that funding provided for decommissioning for each licensed action can only be spent on decommissioning for that action, not for any other purposes. See 10 C.F.R. §§ 70.25(f) (financial assurance methods require decommissioning funding remain outside licensee’s administrative control). Therefore, this concern should be dismissed as simply conclusory and lacking reference to anything giving rise to the concern.

Molycorp, LBP-00-10, 51 NRC at 175.

b. Substantive Safety Regulations

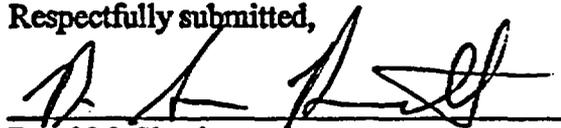
Petitioners claim that "NFS has not demonstrated that it can and will comply with 10 C.F.R. §§ 70.23(a)(2), (3), or (4) in operating the BPF." 2d Req. at 14. Those sections concern applicant qualifications by training and experience, the applicant's proposed equipment and facilities, and the applicant's proposed safety procedures. 10 C.F.R. §§ 70.23(a)(2), (3), and (4). Petitioners claim that NFS has a "long history of contaminating the soil and groundwater at the NFS site" and is alleged to have caused off-site contamination. 2d Req. at 15. NFS has been cited for "violations of its permit." Id. These incidents allegedly reflect inadequacies in management, procedures, and equipment. Id.

This concern is invalid because it is not the least bit specific. It does not describe in any respect the ways in which the Petitioners believe that the NFS license amendment application(s) do not meet the Commission's requirements. Thus, it does not even rise to the level of "notice pleading" that the Commission has rejected as insufficient to state a valid area of concern. Shieldalloy, CLI-99-12, 49 NRC at 353-54. Furthermore, concerns over past or ongoing operations are not valid with respect to proceedings on license amendment applications. Energy Fuels Nuclear, LBP-94-33, 40 NRC at 153-54; 10 C.F.R. § 2.1205(g).

III. CONCLUSION

For the foregoing reasons, the Presiding Officer should deny Petitioners' request for a hearing on the license amendment.

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: February 21, 2003

CERTIFICATE OF SERVICE

I hereby certify that copies of Applicant's Answer to Request for Hearing and Leave to Intervene by Kathy Helms-Hughes on NFS' Second License Amendment Request and Applicant's 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 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 21st day of February, 2003.

***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@comcast.net; 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: rfcl@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; jme@nrc.gov;**

**Louis Zeller
Blue Ridge Environmental Defense League
P.O. Box 88
Glendale Springs, NC 28629
Email: 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**

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
(original and two copies)

*Kathy Helms-Hughes
P.O. Box 58
Hampton, TN 37658
Email: Khelms@mounet.com

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

A handwritten signature in black ink, reading "D. Sean Kelly". The signature is written in a cursive style with a long horizontal line extending from the end of the name.

Document #: 1284032 v.1

* by U.S. mail only

** by facsimile and U.S. mail only