

RAS 10217

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

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Before Administrative Judges:

Lawrence G. McDade, Chairman
E. Roy Hawken
Dr. Peter S. Lam

In the Matter of

ANDREW SIEMASZKO

Docket No. IA-05-021-EA

ASLBP No. 05-839-02-EA

August 2, 2005

MEMORANDUM AND ORDER

(Ruling Denying the Request for Hearing of Ohio Citizen Action / Union of Concerned Scientists and Requesting Briefs on the Appropriateness of Discretionary Intervention)

On April 21, 2005, the Nuclear Regulatory Commission (NRC) Staff issued an Order to Andrew Siemaszko which, inter alia, prohibited his involvement in NRC-Licensed activities for a period of five (5) years from the effective date of the Order.¹ The following day, on April 22, 2005, Mr. Siemaszko requested a hearing.² On May 18, 2005, this Atomic Safety and Licensing Board was established,³ and on May 19, 2005, this Board granted Mr. Siemaszko's request for a Hearing.⁴

¹ See In the Matter of Andrew Siemaskzo; Order Prohibiting Involvement in NRC-Licensed Activities, 70 Fed. Reg. 22,719 (May 2, 2005).

² See Request for Hearing in Response to Order Prohibiting Involvement in NRC-Licensed Activities, *In the Matter of Andrew Siemaszko*, IA-05-021 (Apr. 22, 2005).

³ See In the Matter of: Siemaszko: Establishment of Atomic Safety and Licensing Board (May 18, 2005).

⁴ See Licensing Board Order (Granting Licensee's Hearing Request) (May. 19, 2005) (unpublished).

On May 13, 2005, Mr. David Lochbaum, acting on behalf of two public interest groups, Ohio Citizen Action and Union of Concerned Scientists (OCA/UCS),⁵ filed a request for a hearing in the Siemaszko matter pursuant to 10 C.F.R. § 2.202.⁶ This Board now denies OCA/UCS's request for a hearing because it lacks standing to participate in this enforcement proceeding as a party, as a matter of right. See 10 C.F.R. § 2.309(d).

OCA/UCS are nonprofit, public interest groups who have demonstrated an interest in the consistent enforcement of Nuclear Regulatory Commission (NRC) regulations in order to strengthen the NRC's oversight processes, and thereby foster safety in the nuclear industry. In this proceeding, they seek to intervene in order "to correct programmatic problems with the NRC's enforcement policy and its implementation."⁷ More specifically, they seek to intervene because, in their view, "[t]his misguided enforcement action has a very real potential for undermining worker and public confidence in the NRC's oversight capability."⁸ As articulated by Petitioners, their interest "is in fair, unbiased, and consistent implementation of the NRC's enforcement policy,"⁹ and their goal in seeking to intervene in this proceeding is to secure a "fair accountability for violations that contributed to the Davis-Besse problems."¹⁰ Petitioners contend that it would be a miscarriage of justice to allow the NRC to single out Mr. Siemaszko, and thereby create the false impression

⁵ Because Ohio Citizen Action and Union of Concerned Scientists filed a single Request for Hearing, in this Memorandum and Order we will generally refer to OCA/UCS in the singular.

⁶ See OCA/UCS Request for Hearing in Response to Order (IA-05-021) Barring Andrew J. Siemaszko from Involvement in NRC-Licensed Activities (May 13, 2005) [hereinafter OCA/UCS Request for Hearing].

⁷ See id. at 3.

⁸ See id. at 4.

⁹ See Reply of OCA/UCS to NRC Staff Response to Hearing Request (June 24, 2005) at 2 .

¹⁰ See id. at 16.

that Mr. Siemaszko alone caused the problems at Davis-Besse.¹¹ Therefore, according to Petitioners, they seek to prevent an injustice to Mr. Siemaszko, and thereby correct programmatic problems with the NRC enforcement policy.¹²

In order to establish standing, however, a petitioner must demonstrate “injury in fact.” That is, the petitioner must show that some injury has occurred to it, or will probably occur to it, as a result of the agency action. Moreover, the demonstrated injury must be both concrete and particularized, not conjectural or hypothetical, O’Shea v. Littleton, 414 U.S. 488, 494 (1974), and the petitioner must demonstrate that the injury is traceable to the proposed action, and that a favorable decision in the proceeding will redress the alleged injury. National Wildlife Federation v. Hodel, 839 F.2d 694, 705 (D.C. Cir. 1988). Indeed, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 US 555, 560-61 (1992). An academic interest in the matter, without direct impact on the person or organization asserting it, does not confer standing. See Public Service Co. of Indiana, (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 439 (1980).

In determining whether OCA/UCS has demonstrated standing, we must determine whether a cognizable interest of the petitioner will be adversely affected if the proceeding has one outcome rather than another. Sequoia Fuels Corp. (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 69 (1994); Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978). More specifically, we must determine whether OCA/UCS has demonstrated such a personal stake in the outcome of this enforcement action against Mr. Siemaszko as to show that a concrete adverseness exists between it (OCA/UCS) and the NRC that will sharpen the presentation of issues. Duke Power Co. v. Carolina Environmental Study Group,

¹¹ See OCA/UCS Request for Hearing at 2.

¹² See id. at 3.

Inc., 438 U.S. 59, 72 (1978) ; see also Baker v. Carr, 369 U.S. 186, 204 (1962).

OCA/UCS, like all residents of this country, has a clear interest in effective and efficient regulation of the nuclear power industry. Moreover, unlike most residents, it has repeatedly engaged the NRC regarding agency enforcement actions, and has shown a keen interest in and understanding of NRC enforcement proceedings. What OCA/UCS has not shown, however, is that it would suffer a concrete and particularized harm if the sanction proposed by the NRC against Mr. Siemaszko were to be upheld. See International Uranium Corp. (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 (1998). It has not shown that an adverse ruling by this Board in this proceeding would result in an “injury in fact” to it or to its members. Consumers Power Co. (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 112-13 (1979). It has not established that it, or its members, have a “direct stake” in the outcome of this proceeding that is greater than that of any other resident of the United States. See Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 448 (1979), aff’d, ALAB-549, 9 NRC 644 (1979); see also Sierra Club v. Morton, 405 U.S. 727, 740 (1972).

An allegation of “special interest” without a showing of “particularized harm” is insufficient to establish standing. Puget Sound Power & Light Co. (-----Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 983 (1982). Thus, OCA/UCS’s interest in nuclear safety, “no matter how long standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render [it] ‘adversely affected’” Sierra Club v. Morton, 405 U.S. 727, 739-40 (1972). See also Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 421-22 (1976).

Nor does the fact that OCA/UCS has spent time, effort, and money in preparing its petition to intervene in this case give it standing. Most persons and organizations who file petitions to intervene in NRC adjudicatory proceedings have expended significant time, energy, and money in

the preparation of their petitions. If we were to find that such action established standing, it would render Section 2.309(d) meaningless. Accordingly, we hold that OCA/UCS has not met the standing requirements of 10 C.F.R. § 2.309(d).

While OCA/UCS lacks standing to intervene in this enforcement proceeding as a matter of right, it could be possible to grant the petition to intervene as a matter of discretion based on a finding that its participation in this proceeding “may reasonably be expected to assist in developing a sound record.” 10 C.F.R. § 2.309(e).¹³ In its most recent pleading, OCA/UCS seemed to be requesting discretionary intervention pursuant to 10 C.F.R. § 2.309(e).¹⁴ Moreover, it appears that the NRC Staff understood OCA/UCS’s pleading as a request for discretionary intervention.¹⁵

Given that this Board perceives some ambiguity on the part of OCA/UCS regarding discretionary intervention, and given that this matter has been delayed for several weeks at the request of the NRC Staff,¹⁶ we believe that it is appropriate to allow OCA/UCS, the NRC Staff, and Mr. Siemaszko the opportunity to focus on this issue. Accordingly, we ask that, no later than August 15, 2005, OCA/UCS file with the Board, and serve on the NRC Staff and Mr. Siemaszko, its position on discretionary intervention. This pleading must include an unequivocal statement whether Petitioner wishes the Board to consider discretionary intervention and if so, the pleading must set out arguments in support, referencing the factors set out at 10 C.F.R. § 2.309(e), with

¹³ While this factor (significant ability to contribute on substantial issues of fact) would, of course, have to be weighed with all of the factors set out in 10 C.F.R. § 2.309(e), the ability of the petitioner to assist in developing a sound record is the paramount factor. See Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 617 (1976). See also 69 Fed. Reg. 2182, 2201 (Jan. 14, 2004) (Commission adopts the Pebble Springs standard when promulgating the current rule on discretionary intervention -- 10 C.F.R. § 2.309(e)).

¹⁴ “[OCA/UCS] seek[s] to be allowed to participate in the proceeding at the Panel’s discretion.” Reply of OCA/UCS to NRC Staff Response to Hearing Request (June 24, 2005) at 1.

¹⁵ See NRC Staff Response to Issues Raised at the Pre-Hearing Conference by [OCA/UCS] (June 24, 2005) at 6-7.

¹⁶ See Licensing Board Memorandum and Order (Granting the NRC Staff’s Motion for a 120-Day Delay of Proceedings and Setting Case Schedule) (July 22, 2005) (unpublished).

particular emphasis on the ability to assist in developing a sound record in this proceeding. The NRC Staff and Mr. Siemaszko shall then have until August 29, 2005, to serve and file any reply.

In deciding whether to seek discretionary intervention, OCA/UCS should consider that participants in NRC enforcement proceedings may not seek additional measures going beyond the terms of the order which triggered the hearing. See Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983); See also Sequoia Fuels Corp. (Gore Oklahoma Site), CLI-97-13, 46 NRC 195, 206 (1997). Specifically, as established by the Commission's Order which initiated this proceeding,¹⁷ and as expressly articulated in an earlier Order of this Board,¹⁸ these proceedings will be limited to a determination of whether, in or about April, 2000, Mr. Siemaszko engaged in deliberate misconduct (10 C.F.R. § 50.5) that caused FirstEnergy Nuclear Operating Company (FENOC) to be in violation of the NRC requirements to maintain materially complete and accurate information (10 C.F.R. § 50.9).¹⁹ More specifically, the Board must determine whether, in preparing CR No. 2000-1037 and Work Order No. 00-001846-000, Mr. Siemaszko intentionally provided an incomplete and inaccurate description of the work activities and corrective actions taken relative to the presence of boric acid deposits on the RPV head knowing that by doing so he would cause FENOC to be in violation of NRC Regulations. Further, in the event that the Board concludes that the NRC Staff has proven that Mr. Siemaszko did engage in deliberate misconduct, this proceeding would then involve a determination of whether, in light of all relevant aggravating, extenuating, and mitigating circumstances, the proposed sanction, a 5-year suspension, should be imposed as requested by

¹⁷ See Order Prohibiting Involvement in NRC-Licensed Activities: Andrew Siemaskzo, 70 Fed. Reg. 22,719 (May 2, 2005).

¹⁸ See Order granting the NRC Staff's Motion for Delay of Proceeding at 2 (June 22, 2005).

¹⁹ By materially complete we mean that the failure of the records to be complete and accurate had a natural tendency or capacity to influence agency (NRC) action. Virginia Elec. & Power Co., (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480, 491 (1976), aff'd, 571 F.2d 1289 (4th Cir. 1978).

the NRC Staff or whether, in the alternative, it should be mitigated or remitted.²⁰

Thus, if discretionary intervention were to be sought by and granted to OCS/UCS, the scope of the proceedings would not be expanded. Whether to bring enforcement actions against others would be outside the scope of this proceeding.²¹ The only issue that would be litigated in this case would be whether to uphold the Order barring Mr. Siemaszko from the nuclear industry for a period of 5 years.

Finally, the NRC Staff raised an issue regarding representation based on 10 C.F.R. § 2.314(b).²² The Staff correctly noted that organizations can only be represented by a member, an officer, or an attorney. They then argued that, based on the record before us, Mr. Lochbaum can only represent the Union for Concerned Scientists, not Ohio Citizen Action.

Here, these organizations appear to be proceeding as a single consolidated entity. Accordingly, we ask that OCA/UCS submit with its next pleading a clear statement regarding representation. 10 C.F.R. § 2.314(b). In addition, we request that in their next pleading all participants state their position on whether it would be appropriate for this Board, for the purposes

²⁰ Thus, if admitted to this proceeding pursuant to 10 C.F.R. § 2.309(e), OCA/UCS would not be litigating their contentions as drafted, but rather would be limited to litigating the following:

Contention 2: Whether the facts support the conclusion that Andrew Siemaszko deliberately provided incomplete and inaccurate information in Condition Report No. 2000-1037 and Work Order No. 00-001846-000.

Contention 3: Whether the facts support the finding that Andrew Siemaszko intentionally provided an incomplete and inaccurate description of the work activities and corrective actions taken relative to the presence of boric acid deposits on the RPV head knowing that by doing so he would cause FENOCO to be in violation of NRC Regulations.

Contention 5: Whether the 5 year suspension of Mr. Siemaszko, in light of all relevant aggravating, mitigating, and extenuating circumstances, is an appropriate sanction in this matter.

²¹ To the degree that OCA/UCS believes that NRC's enforcement policy requires programmatic corrections or that enforcement action should be taken against other individuals, this adjudicative proceeding is not the proper procedural vehicle in which to pursue those goals. See 10 C.F.R. § 2.206.

²² See NRC Staff Response at 5 (June 24, 2005).

of this proceeding, to consolidate the Union for Concerned Scientists and Ohio Citizen Action pursuant to 10 C.F.R. § 2.316, and allow them to proceed jointly with a single representative.

If any participant in this matter has any objection to any aspect of this Order, that/those objection(s) must be served on all other participants via e-mail, and filed no later than August 12, 2005.

IT IS SO ORDERED.²³

FOR THE ATOMIC SAFETY AND LICENSING BOARD

/RA/

LAWRENCE G. McDADE, Chairman
Administrative Judge

Rockville, Maryland
August 2, 2005

²³ Copies of this order were sent this date by Internet e-mail transmission to: (1) counsel for Mr. Siemaszko, (2) the Union of Concerned Scientists; (3) Ohio Citizen Action; and (4) counsel for the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
ANDREW SIEMASZKO) Docket No. IA-05-021
)
)
(Enforcement Action))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING DENYING THE REQUEST FOR HEARING OF OHIO CITIZEN ACTION/UNION OF CONCERNED SCIENTISTS AND REQUESTING BRIEFS ON THE APPROPRIATENESS OF DISCRETIONARY INTERVENTION) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 2nd day of August 2005