

September 14, 2007

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
NUCLEAR FUEL SERVICES, INC	)	Docket No. 70-143-CO
	)	
Special Nuclear Materials Facility	)	ASLBP No. 07-857-01-CO-BD01
(Confirmatory Order)	)	

NRC STAFF'S RESPONSE TO HEARING REQUEST OF THE  
SIERRA CLUB'S NATIONAL RADIATION COMMITTEE AND WE THE PEOPLE, INC.

INTRODUCTION

On February 20, 2007, the Nuclear Regulatory Commission (NRC) Staff issued a Confirmatory Order to Nuclear Fuel Services, Inc., an NRC licensee.<sup>1</sup> The Confirmatory Order was the result of an agreement reached during alternative dispute resolution (ADR) between the Staff and the Licensee to resolve apparent violations at the Licensee's facility in Erwin, Tennessee. Part VI of the Confirmatory Order states, "Any person adversely affected by this Confirmatory Order, other than the Licensee, may request a hearing within 20 days of its issuance." Although the Confirmatory Order was originally designated Official Use Only, the Staff later determined that the Order could be released publicly and published notice of the Order in the Federal Register. The Federal Register Notice, published July 30, 2007, states, "Requests for hearing from anyone other than the Licensee must be filed within 20 days of the date of publication of this Notice in accordance with Section VI of the Confirmatory Order."

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<sup>1</sup> Nuclear Fuel Services, Inc.; Notice of Publication of Confirmatory Order and Opportunity for Hearing, 72 Fed. Reg. 41,528 (July 30, 2007) ("Confirmatory Order" or "Order").

On August 20, 2007, the Sierra Club's National Radiation Committee and We The People, Inc. (Petitioners) filed a timely hearing request.<sup>2</sup> The Board should deny this hearing request. As the Staff will explain, the Petitioners fail to demonstrate that they will be adversely affected by the Confirmatory Order and, for that reason, are unable to establish that they have either standing to participate in a hearing or are able to proffer an admissible contention.

#### BACKGROUND

The Licensee is the holder of Special Nuclear Materials License No. SNM-124, issued by the NRC on July 2, 1999, pursuant to 10 C.F.R. Part 70. The license authorizes the possession and use of nuclear materials associated with operation of the Licensee's facility, in accordance with the conditions specified therein. The facility is located on the Licensee's site in Erwin, Tennessee.

NRC inspections at the Licensee's facility identified a number of apparent violations during the years 2005 and 2006. These violations involved failure to comply with numerous NRC requirements, including requirements pertaining to the use of personal protective equipment, the transfer and security of radiological materials, and physical security at the Licensee's facility. Based on these apparent violations, the Staff considered escalated enforcement actions against the Licensee. Subsequently, the Licensee accepted the option of entering into alternative dispute resolution (ADR). As the result of ADR sessions conducted on September 28 and November 30, 2006, the Staff and the Licensee agreed to a Confirmatory Order addressing the apparent violations.

Pursuant to the Confirmatory Order, the Licensee agreed to conduct, via a third party,

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<sup>2</sup> "Hearing Request of the Sierra Club's National Radiation Committee and We the People, Inc.," August 20, 2007. (ADAMS ML072400586).

independent safety culture assessments within the parameters described in Section V of the Order. The Licensee also agreed that within 60 days of the date of the Order it would submit for NRC approval a request to amend its license to revise its configuration management (CM) program. The amendment request would include a plan and schedule for implementation of the revised CM program. As part of the agreement reached in ADR, the Staff agreed that enforcement discretion is warranted for the apparent violations listed in Section II.A through F of the Confirmatory Order and that the apparent violations would not be cited.<sup>3</sup>

#### LEGAL STANDARD

An individual who requests a hearing before the Commission must demonstrate that he or she has standing to do so. 10 C.F.R. § 2.309(a). The individual must also set forth at least one admissible contention. *Id.* Where an enforcement order is at issue, as in the present case, “the threshold question—related to both standing and admissibility of contentions—is whether the hearing request is within the scope of the proceeding as outlined in the order.” *State of Alaska Department of Transportation and Public Facilities* (Confirmatory Order Modifying License) CLI-04-26, 60 NRC 399, 405 (2004) (“ADOT”) *citing*, *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157 (2004). The Commission has the authority to define the scope of the hearing, and this authority includes limiting the hearing to the question of whether the order should be sustained. *Bellotti v. N.R.C.*, 725 F. 2d 1380, 1381 (D.C. Cir., 1983), *aff’g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982). *See also*, ADOT, CLI-04-26, 60 NRC at 405; *FirstEnergy Nuclear Operating Company* (Davis-Besse Nuclear Power Station, Unit 1),

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<sup>3</sup> Nuclear Fuel Services, Inc.; Notice of Publication of Confirmatory Order and Opportunity for Hearing, 72 Fed. Reg. at 41,529.

CLI-04-23, 60 NRC 154, 157–58 (2004); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56 (2004).

In order to intervene in an enforcement proceeding, an individual must show that he or she has standing to intervene, which requires a showing of an “injury in fact’ that is . . . ‘fairly traceable to the challenged action’ and . . . is likely to be ‘redressed by a favorable decision.’” *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI-94-12, 40 NRC 64, 71-72 (1994). An individual cannot establish standing by arguing that the Staff should impose a stricter penalty on the licensee, because “allowing NRC hearings on claims for stronger enforcement remedies risks ‘turning focused regulatory proceedings into amorphous public extravaganzas.’” *ADOT*, CLI-04-26, 60 NRC at 404, *citing Bellotti*, 725 F. 2d at 1382. Further, an individual may not request a hearing in order to impose a stricter penalty on the licensee, because the individual is not injured by the lesser penalty in the Staff’s order. *See, Id.* at 405.

The mere fact that the Staff’s order does not improve the individual’s personal position does not establish standing. *ADOT*, CLI-04-26, 60 NRC at 406. To decide whether an individual’s hearing request should be granted, the relevant points of comparison are the individual’s positions with and without the Staff’s order—the question is not whether the individual’s position would be improved by some hypothetical substitute order. *Id.* An individual “simply is not adversely affected by a Confirmatory Order that improves the safety situation over what it was in the absence of the order.” *Id.* In essence, requests for relief going beyond the actions in an enforcement order are requests for relief that are outside the scope of the proceeding.

Because an individual must show he or she would be adversely affected by the Staff’s enforcement order, it should not be expected that individuals will routinely be made parties to hearings on such orders:

In practicality it is unlikely that petitioners will often obtain hearings on confirmatory enforcement orders. That's because such orders presumably enhance rather than diminish public safety. Nevertheless, the notice of opportunity for hearing provides the public a "safety valve" because an order conceivably may remove a restriction upon a licensee or otherwise have the effect of worsening the safety situation.

*ADOT*, CLI-04-26, 60 NRC at 406 n.28. This opportunity to obtain a hearing, while carefully circumscribed, is consistent with the rationale underlying *Bellotti*: "when a licensee agrees to make positive changes or does not contest an order requiring remedial changes, it should not be at risk of being subjected to a wide-ranging hearing and further investigation." *Id.* at 405.

Accordingly, in the present case the only matters at issue are the measures listed in the Confirmatory Order, and the Petitioners must show that they would be adversely affected by those measures. To the extent the Petitioners seek additional measures as a substitute for those imposed by the Staff, the Board should reject their request for hearing under the *Bellotti* doctrine.

#### DISCUSSION

Petitioners have not established standing to intervene in this proceeding. Petitioners' first claim that they have standing due to their intervention in earlier "license amendment applications."<sup>4</sup> This reliance is misplaced. The mere fact that a petitioner was granted standing in an earlier proceeding involving the same facility does not automatically confer standing in a new proceeding; the petitioner must again demonstrate its standing.<sup>5</sup> Additionally, the

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<sup>4</sup> Throughout the Petition, Petitioners refer to NRC actions regarding license amendments for the Licensee. See Petition at 1 (standing discussion and contention 1), 2 (Contentions 2 and 3). It should be noted, however, that the current proceeding is not a notice of opportunity for hearing regarding a license amendment. Instead, this is an enforcement action. The NFS license was amended due to an agreement following ADR, not because of an amendment the Licensee applied for.

<sup>5</sup> At the end of their Petition, the Petitioners also mention their close proximity to the Licensee's facility. In licensing actions involving applicants and licensees other than reactors, the Commission has typically applied a "proximity-plus" theory of standing, under which "a presumption of standing based on (continued. . .)

Petitioners cite their representation of “the general public’s interests where clean air, clean water and clean energy are threatened by NRC licensees,” as evidence of their standing. However, it is well established that an interest in a problem—no matter how longstanding the interest or how qualified the organization—is not enough, by itself, to confer standing. See, *Exelon Generation Co. (Peach Bottom Atomic Power Station, Units 2 & 3)*, CLI-05-26, 62 NRC 577, 580 n.8 (2005) citing *Sierra Club v. Morton*, 405 U.S. 727, 730 (1972).

Further, in an enforcement proceeding, “the threshold question—related to both standing and admissibility of contentions—is whether the hearing request is within the scope of the proceeding as outlined in the order.” *ADOT*, CLI-04-26, 60 NRC at 405. The Petitioners’ claims are clearly outside the scope of this proceeding. Petitioners’ contentions do not demonstrate that they are adversely affected by the Confirmatory Order, but instead demand that the NRC impose stricter requirements on the Licensee; this is clearly outside the scope of this proceeding. See, *Id.* at 405-06.

Petitioners’ first, second, third and fifth contentions all impermissibly seek to impose stricter requirements on the Licensee or seek to have the NRC analyze the Confirmatory Order. Petitioners’ first contention is that the NRC should have conducted an environmental assessment (EA) of the Confirmatory Order. Petitioners’ second contention is that even with the

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(. . .continued)

geographical proximity may be applied . . . where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.” *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75 n.22. However, where the proposed action is an enforcement order, petitioners must show that the order causes offsite consequences in the sense that it adversely affects the petitioner. *ADOT*, CLI-04-26, 60 NRC at 405. Here, the proposed action is the Confirmatory Order issued to the Licensee. The Petitioners do not explicitly or implicitly allege that the Confirmatory Order will cause any offsite consequences, nor any adverse consequences to them personally. Thus, despite the Petitioners’ proximity to the Licensee’s site, they would be unable to establish standing even under a “proximity-plus” theory.

Confirmatory Order, the Licensee is still in “serial non-compliance with NRC regulations.”<sup>6</sup>

Petitioners’ third contention claims that the NRC is improperly issuing license amendments “with blatant disregard for the public health and safety.” Petitioners further state that this Confirmatory Order “merely nibbles around the edges of effective regulation of this licensee.”<sup>7</sup> Finally, contention five mentions a recent Ninth Circuit opinion regarding terrorist attacks then states that the “Compensatory (sic) Order fails to protect the public’s interest in protection from terrorist attacks by not addressing the particular problem of slip-shod vehicle inspections in the ordered license amendment.”

Petitioners’ first, second, third and fifth contentions are inadmissible. The Commission has held that “petitioners may not seek additional measures going beyond the terms of the enforcement order triggering the hearing request.” See, *Maine Yankee*, CLI-04-5, 59 NRC at 58. Instead, Petitioners must demonstrate that they may suffer an injury which is “attributable to the Confirmatory Order.” *ADOT*, CLI-04-26, 60 NRC at 406 (emphasis in original). Petitioners’ first contention seeks to have the NRC perform an EA on the Order. This is outside the scope of this proceeding because Petitioners have not alleged that the Order will cause them any injury. Petitioners’ second, third and fifth contentions all seek stricter penalties against the Licensee. Petitioners may not base a contention on a request to provide a stricter penalty because an individual “simply is not adversely affected by a Confirmatory Order that

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<sup>6</sup> If the Petitioners feel that the Licensee is currently not in compliance with NRC regulations the proper manner in which to bring up these concerns is through a petition under 10 C.F.R. § 2.206.

<sup>7</sup> The Petitioners also fault the NRC for continuing to issue license amendments to the Licensee. This is not the proper forum to challenge license amendments granted to the Licensee. The NRC issues a notice of opportunity for hearing for each license amendment, 10 C.F.R. § 2.105, and Petitioners may seek to intervene in those proceedings.

improves the safety situation over what it was in the absence of the order.” *Id.* Because none of these contentions demonstrates that Petitioners are adversely affected by the Confirmatory Order and, instead, merely seek to impose stricter penalties on the Licensee, the contentions are inadmissible and are not sufficient to establish standing.

Petitioners’ fourth and sixth contentions are inadmissible because they do not demonstrate that the Petitioners are adversely affected by the Confirmatory Order; in fact, neither contention even mentions the Confirmatory Order. Petitioners’ fourth contention alleges the NRC’s “official use only” policy deprived the Agency for Toxic Substances and Disease Registry (ATSDR) of vital information for its public health assessment of Erwin in 2006. Petitioners further note that even “when cloaked in a shroud of secrecy woven willfully by the NRC and the DOE,” the ATSDR found the Licensee’s site to be an “indeterminate public health hazard.” Contention six is a demand that the NRC turn over a large amount of documentation to the Petitioners in order to “remedy this violation of the public’s right to know what its government is doing for and to it.”<sup>8</sup>

These contentions are outside the scope of this proceeding because Petitioners must demonstrate that they may suffer an injury which is “*attributable to the Confirmatory Order.*” *ADOT*, CLI-04-26, 60 NRC at 406 (emphasis in original). The Petitioners’ fourth and sixth contentions do not even mention the Confirmatory Order, and the Petitioners fail to explain how the Confirmatory Order will injure them. Consequently, these contentions are outside the scope of this proceeding.

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<sup>8</sup> It should be noted that on September 4, 2007, the NRC announced it will release approximately 1,900 documents relating to NFS and BWX Technologies generated since January 1, 2004 that are currently not publicly available. See <http://www.nrc.gov/reading-rm/doc-collections/news/2007/07-113.html> (September 4, 2007).

CONCLUSION

The Petitioners fail to explain how they would be adversely affected by the Confirmatory Order. The Petitioners seek to impose on the Licensee measures beyond those described in the Confirmatory Order, but whether or not such measures should be imposed is outside the scope of this proceeding. Therefore, the Board should deny the Petitioners' request for hearing.

Respectfully submitted,

***/RA by Jody C. Martin/***

Jody C. Martin  
Counsel for the NRC Staff

Dated at Rockville, Maryland  
this 14<sup>th</sup> day of September, 2007

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO HEARING REQUEST OF SIERRA CLUB AND WE THE PEOPLE, INC." in the above captioned proceeding have been served on the following persons by deposit in the United States Mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk(\*); and by electronic mail as indicated by a double asterisk (\*\*) on this 14<sup>th</sup> day of September, 2007.

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