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NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

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Before Administrative Judges:

Lawrence G. McDade, Chairman
Richard F. Cole
G. Paul Bollwerk, III

In the Matter of

Nuclear Fuel Services, Inc.

Special Nuclear Facility
(Confirmatory Order)

Docket No. 70-143-CO

ASLBP No. 07-857-01-CO-BD01

December 13, 2007

MEMORANDUM AND ORDER
(Denying Requests for Hearing)

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I. Introduction

Currently before the Licensing Board are six hearing requests (one purportedly on behalf of an organization) seeking to challenge a February 21, 2007 Confirmatory Order issued by the Nuclear Regulatory Commission (NRC) Staff to Nuclear Fuel Services, Inc. (NFS). That Confirmatory Order, which was effective immediately, modifies NFS's (10 C.F.R. Part 70) special nuclear materials license which authorizes operation of its Erwin, Tennessee uranium fuel fabrication facility by incorporating certain additional requirements agreed to by NFS and the Staff. According to the Order, these additional mandates were intended to address safety culture deficiencies identified as a result of recent NRC inspections and investigations associated with several safety-related incidents at the facility, including a March 2006 uranyl nitrate solution spill that could have resulted in a nuclear criticality accident.

Both NFS and the Staff oppose the grant of any of these hearing petitions. For the reasons set forth below, we find that the various petitioners lack standing and/or seek to raise issues outside the scope of this proceeding, and thus deny the hearing petitions.

II. A. Synopsis of Confirmatory Order

On February 21, 2007, the NRC Staff issued a Confirmatory Order to NFS, holder of Special Materials License No. SNM-124.¹ This license allows NFS to "receive, acquire, possess, and transfer byproduct, source, and special nuclear material," and use nuclear material in the course of its operations in accordance with the Atomic Energy Act (AEA), NRC regulations, and the conditions outlined in the NFS Part 70 license.² The Confirmatory Order was originally designated as "Official Use Only," but on July 30, 2007, the NRC released it for publication in the Federal Register and provided an opportunity for "[a]ny person adversely

¹ 72 Fed. Reg. 41,528, 41,528-29 (July 30, 2007).

² See, e.g., NFS SNM-124 Amendment 77, at 1 (May 9, 2007) (ADAMS Accession No. ML072630342); see also 72 Fed. Reg. at 41,529.

affected by this Confirmatory Order, other than the Licensee” to request a hearing within twenty days of its publication.³

The NRC specified that any person submitting a request for hearing “shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d) and (f).”⁴ Consistent with longstanding Commission precedent associated with the Bellotti v. NRC proceeding,⁵ the scope of any hearing in this matter was expressly limited to the issue of “whether th[e] Confirmatory Order should be sustained.”⁶

The Confirmatory Order was issued after two alternative dispute resolution sessions between the NRC and NFS concerning a number of apparent violations at NFS that were observed during NRC inspections, which included an inadequate response to a March 6, 2006 spill of high enriched uranyl nitrate solution.⁷ Based on an acknowledgment that (1) NFS had not developed “corrective actions capable of preventing recurrence of violations; (2) a deficient safety culture at NFS appeared to be a contributor to the recurrence of violations; and (3) a comprehensive, third party review and assessment of the safety culture at NFS” was necessary,⁸ the NRC Staff and NFS agreed that the following corrective actions would be taken:

1. . . . Within 60 days of the date of this Order, NFS will provide NRC written documentation of the reasons for the violations, the

³ 72 Fed. Reg. at 41,530.

⁴ Id. at 41,531.

⁵ Boston Edison Co. (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 45-46 (1982), aff’d, Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983).

⁶ 72 Fed. Reg. at 41,531.

⁷ Id. at 41,529.

⁸ Id.

corrective actions taken and planned to prevent recurrence, and the completion dates for each corrective action.

2. . . . Within 60 days of the date of the Order . . . , NFS will submit, for NRC approval, a request to amend the license to revise the [configuration management (CM)] program. The amendment request will include a plan and schedule for implementation of the revised program.

3. NFS will conduct, via a third-party, an independent safety culture assessment(s), which includes nuclear material security, within the [parameters outlined in Section V.3.a. through e. of the Confirmatory Order].⁹

In addition, the NRC noted it retained the authority to pursue “other potential escalated enforcement actions, including those that could result from issues previously identified in inspection reports and issues under review by the NRC’s Office of Investigations,” if deficiencies in NFS’s safety culture persisted.¹⁰

⁹ Id. at 41,530. Relative to item two above, in an August 24, 2007 letter, NFS represents that it filed its CM program pursuant to the Confirmatory Order on April 20, 2007. See Letter from B. Marie Moore, NFS Vice President, Regulatory and Safety, to Director, NRC Office of Nuclear Material Safety and Safeguards at 1 (Aug. 24, 2007) (ADAMS Accession No. ML072820133). The CM program is currently evolving as the NRC generates Requests for Additional Information on the CM program and NFS responds to those requests. See, e.g., Letter from B. Marie Moore, NFS Vice President, Regulatory and Safety, to Director, NRC Office of Nuclear Material Safety and Safeguards at 1-2 (Oct. 31, 2007) (ADAMS Accession No. ML073090652).

In connection with item 3, NFS complied with section V.3.a. of the Confirmatory Order when it timely submitted a May 22, 2007 letter outlining its independent safety culture assessment. Letter from Douglas M. Collins, Director, NRC Division of Fuel Facility Inspection, to D.B. Ferguson, Jr., NFS President and Chief Executive Officer, at 1 (Aug. 29, 2007) (ADAMS Accession No. ML072410378). The Staff required confirmation that NFS would make specific changes to the assessment and suggested additional changes for NFS to consider making to the assessment. Id. at 1-4. Thereafter, in a letter dated September 24, 2007, NFS requested an additional 90 days within which to allow the third party to conduct the independent safety culture assessment under section V.3.b. See Letter from B. Marie Moore, NFS Vice President, Regulatory and Safety, to Dr. William D. Travers, Regional Administrator, NRC Region II at 1 (Sept. 24, 2007) (ADAMS Accession No. ML072820542). If the Staff allows the extension, this would extend the third party’s current obligation to complete the assessment within 270 days of the date of issuance of the Confirmatory Order to 360 days. See id.; 72 Fed. Reg. at 41,530.

¹⁰ 72 Fed. Reg. at 41,530.

II. B. Requests for Hearing

As noted above, the NRC received six requests for hearing pursuant to the July 30, 2007 Federal Register Notice. These requests were received from (1) Ken Silver, filed on August 17, 2007; (2) Sierra Club and We the People, Inc., filed on August 20, 2007; (3) R. Feher, filed on August 20, 2007; (4) A. Christine Tipton, filed on August 27, 2007; (5) Barbara A. O'Neal, filed on August 27, 2007; and (6) Wanda Sue Kelley, filed on August 27, 2007.

On August 27 and 28, 2007, the Commission referred these requests for hearing to the Atomic Safety and Licensing Board Panel,¹¹ which established this Licensing Board on August 29, 2007.¹² As NRC regulations provide, the Board will grant a request for hearing to any petitioner who establishes standing and raises at least one admissible contention pursuant to the standards outlined in the agency's regulations.¹³

II. C. Standards Governing Standing

To establish standing, a Petitioner must show (1) an injury in fact; (2) fairly traceable to the challenged action; and (3) likely to be redressed by a favorable decision.¹⁴ "If the petitioner requests a remedy that is beyond the scope of the hearing, then the hearing request must be

¹¹ Secretary Hearing Referral Memorandum to Chief Administrative Judge, ASLBP (Aug. 27, 2007); Secretary Hearing Referral Memorandum to Chief Administrative Judge, ASLBP (Aug. 28, 2007).

¹² See 72 Fed. Reg. 50,991, 50,991 (Sept. 5, 2007).

¹³ 10 C.F.R. § 2.309(a).

¹⁴ Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 57 n.16 (2004) (citing Sequoyah Fuels Corp. & General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72 (1994)).

denied because redressability is an element of standing.”¹⁵ Accordingly, “it is unlikely that petitioners will often obtain hearings on confirmatory enforcement orders.”¹⁶

In the context of an enforcement proceeding, the scope of the proceeding is directly related to the issue of standing in that, to establish standing in such a proceeding, an individual or organization requesting a hearing must show that he, she, or it would be adversely affected by the enforcement order as it exists, rather than being adversely affected by the existing order as it might be compared to a hypothetical order that the petitioner asserts would be an improvement.¹⁷

II. D. Standards Governing Contention Admissibility

Section 2.309(f) of Title 10 of the Code of Federal Regulations sets out the requirements that must be met if a contention is to be admitted in an agency licensing or enforcement adjudication. An admissible contention must (1) provide a specific statement of the legal or factual issue sought to be raised; (2) “provide a brief explanation of the basis for the contention”; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) “[d]emonstrate that the issue raised . . . is material to the findings the NRC must make to support the action that is involved in the proceeding”; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner’s position and upon which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the

¹⁵ Alaska Dep’t of Transp. & Pub. Facilities (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399, 405 (2004).

¹⁶ Id. at 406 n.28.

¹⁷ Id. at 406.

case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.¹⁸

The purpose of the contention rule is to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”¹⁹ The Commission has stated that it “should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.”²⁰ The Commission has emphasized that the rules on contention admissibility are “strict by design.”²¹ Failure to comply with any of these requirements is grounds for the dismissal of a contention.²²

The application of these requirements has been further developed as summarized below:

1. Brief Explanation of the Basis for the Contention

A “brief explanation of the basis for the contention” is a necessary prerequisite of an admissible contention.²³ “[A] petitioner must provide some sort of minimal basis indicating the potential validity of the contention.”²⁴ The brief explanation helps define the scope of a

¹⁸ 10 C.F.R. § 2.309(f)(1)(i)-(vi).

¹⁹ 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004); see also Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54 (1978); BPI v. AEC, 502 F.2d 424, 428 (D.C. Cir. 1974); Philadelphia Elec. Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974).

²⁰ 69 Fed. Reg. at 2202.

²¹ Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), pet. for reconsideration denied, CLI-02-1, 55 NRC 1 (2002).

²² 69 Fed. Reg. at 2221; see also, Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); Arizona Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

²³ 10 C.F.R. § 2.309(f)(1)(ii).

²⁴ 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

contention – “[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases.”²⁵

2. Within the Scope of the Proceeding

A petitioner must “[d]emonstrate that the issue raised in the contention is within the scope of the proceeding,”²⁶ which is defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board.²⁷ Any contention that falls outside the specified scope of the proceeding must be rejected.²⁸

3. Materiality

To be admissible, a petitioner must demonstrate that the contention asserts an issue of law or fact that is “material to the findings the NRC must make to support the action that is involved in the proceeding.”²⁹ That is, the Petitioner must demonstrate that the subject matter of the contention would impact the decision on a pending matter.³⁰ “Materiality” requires that the petitioner show why the alleged error or omission is of possible significance to the result of the

²⁵ Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), aff’d sub nom. Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), cert. denied, 502 U.S. 899 (1991); see also Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002).

²⁶ 10 C.F.R. § 2.309(f)(1)(iii).

²⁷ Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985).

²⁸ Portland Gen. Elec. Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

²⁹ 10 C.F.R. § 2.309(f)(1)(iv).

³⁰ Id.

proceeding.³¹ This means that there must be some significant link between the claimed deficiency and either the health and safety of the public, or the environment.³²

4. Concise Allegation of Supporting Facts or Expert Opinion

Contentions must be supported by “a concise statement of the alleged facts or expert opinions which support the requestor’s/petitioner’s position on the issue . . . together with references to the specific sources and documents on which [it] intends to rely to support its position.”³³ It is the obligation of the petitioner to present the factual information and expert opinions necessary to support its contention adequately.³⁴ Failure to do so requires that the contention be rejected.³⁵

Determining whether the contention is adequately supported by a concise allegation of the facts or expert opinion is not a hearing on the merits.³⁶ The petitioner does not have to prove its contention at the admissibility stage.³⁷ The contention admissibility threshold is less

³¹ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179-80 (1998).

³² Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 75-76 (1996), rev’d in part on other grounds, CLI-96-7, 43 NRC 235 (1996); see also Pacific Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), petition for review denied, CLI-03-12, 58 NRC 185, 191 (2003).

³³ 10 C.F.R. § 2.309(f)(1)(v).

³⁴ Georgia Institute of Tech. (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, vacated in part and remanded on other grounds and aff’d in part, CLI-95-10, 42 NRC 1, and CLI-95-12, 42 NRC 111 (1995).

³⁵ Palo Verde, CLI-91-12, 34 NRC at 155.

³⁶ Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1654 (1982).

³⁷ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004).

than is required at the summary disposition stage.³⁸ Nevertheless, while a “Board may appropriately view Petitioners’ support for its contention in a light that is favorable to the Petitioner,”³⁹ the petitioner must provide some support for his or her contention, either in the form of facts or expert testimony.⁴⁰

In this regard, “[m]ere ‘notice pleading’ is insufficient. . . . A petitioner’s issue will be ruled inadmissible if the petitioner ‘has offered no tangible information, no experts, no substantive affidavits,’ but instead only ‘bare assertions and speculation.’”⁴¹ Further, if a petitioner neglects to provide the requisite support for its contentions, the Board should not make assumptions of fact that favor the petitioner, or supply information that is lacking.⁴² Any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny.⁴³ Likewise, providing any material or document as a basis for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of the contention.⁴⁴

³⁸ Compare 10 C.F.R. § 2.710(c). “[A]t the contention filing stage the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion.” 54 Fed. Reg. at 33,171.

³⁹ Palo Verde, CLI 91-12, 34 NRC at 155.

⁴⁰ Id.

⁴¹ Fansteel Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003) (citing GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)); see also Louisiana Energy Servs., L.P. (National Enrichment Facility), LBP-04-14, 60 NRC 40, 55 (2004).

⁴² Georgia Tech Research Reactor, LBP-95-6, 41 NRC at 305; see also Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001).

⁴³ Yankee Nuclear, LBP-96-2, 43 NRC at 90.

⁴⁴ See Fansteel, Inc., CLI-03-13, 58 NRC at 205.

In short, the information, facts, and expert opinions provided by the petitioner will be examined by the Board to confirm that they do indeed supply adequate support for the contention.⁴⁵ But at the contention admissibility stage, all that is required is that the petitioner provide “some alleged fact or facts in support of its position.”⁴⁶

5. Genuine Dispute Regarding Specific Portions of Application

All contentions must “show that a genuine dispute exists” with regard to the license application in question, challenge and identify either specific portions of, or alleged omissions from, the application, and provide the supporting reasons for each dispute.⁴⁷ Any contention that fails directly to controvert the application, or that mistakenly asserts that the application does not address a relevant issue, may be dismissed.⁴⁸

6. Challenges to NRC Regulations

In addition to the requirements set out above, with limited exceptions not applicable in this case, “no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding.”⁴⁹ By the same token, any contention that amounts to an attack on applicable statutory requirements or represents a challenge to the basic structure of the

⁴⁵ Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990).

⁴⁶ 54 Fed. Reg. at 33,170. “This requirement does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention.” 54 Fed. Reg. at 33,170.

⁴⁷ 10 C.F.R. § 2.309(f)(1)(vi).

⁴⁸ Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), review declined, CLI-94-2, 39 NRC 91 (1994); see also Texas Utilities Elec. Co. (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992), vacated as moot, CLI-93-10, 37 NRC 192, 205 (1993).

⁴⁹ 10 C.F.R. § 2.335(a); see also Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003).

Commission's regulatory process must be rejected.⁵⁰ Additionally, the adjudicatory process is not the proper venue for the evaluation of a petitioner's own view regarding the direction regulatory policy should take.⁵¹

Applying the above-stated standards, our rulings on the various contentions are outlined below.

III. A. Specific Request for Hearing – Silver

1. Hearing Request of Ken Silver

Dr. Ken Silver is an Assistant Professor of Environmental Health at East Tennessee State University in the College of Public and Allied Health, which is located in Johnson City, Tennessee.⁵² In his hearing request, Dr. Silver represents that he lives approximately seventeen miles from the NFS plant.⁵³ As grounds for his Petition, Dr. Silver cites a climate of “pervasive fear of discussing[,] in . . . public[,] issues related to plant health and safety” as the source of his concern, and explains that the purpose of his hearing request is to compel the NRC to hold a public hearing and issue a report on safety and health concerns at NFS in order to “lift the veil of unnecessary secrecy and bring [the NFS] facility into the modern era of community right to know about health and safety issues.”⁵⁴ In his Petition, Dr. Silver also asserts that he has standing based on his “interest in nuclear facilities like NFS,” his research

⁵⁰ Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982) (citing Peach Bottom, ALAB-216, 8 AEC at 20-21).

⁵¹ Peach Bottom, ALAB-216, 8 AEC at 21 n.33.

⁵² Hearing Request of Ken Silver (Aug. 17, 2007) at 1-2 [hereinafter Silver Request].

⁵³ Id. at 2.

⁵⁴ Id. at 1-2.

and publications, and the field experiences he provides for his students, in addition to his proximity to the NFS facility.⁵⁵

2. NRC Answer to Silver Hearing Request

The NRC Staff filed its Answer to the Hearing Request of Ken Silver on September 11, 2007.⁵⁶ In its response, the Staff notes that Dr. Silver filed a timely Request for Hearing, but urges the Board to deny his hearing request because “he fails to demonstrate he will be adversely affected by the Confirmatory Order”⁵⁷ and, accordingly, lacks standing and has not presented a contention that is admissible in this proceeding.

According to the Staff, the preliminary issue is whether petitioner Silver’s request is within the scope of the proceeding because, under the reasoning of Bellotti v. NRC, the Commission can limit the scope of a hearing on an enforcement order to the issue of “whether the order should be sustained.”⁵⁸ The Staff then argues that, in this proceeding, the Commission did so limit the proceeding in the Confirmatory Order.⁵⁹ The Staff further states that the issue of the scope of the proceeding is related to the issue of standing, and that in a proceeding such as this, to demonstrate standing an individual must show that he or she would be adversely affected by the enforcement order as it exists, rather than by the failure of the order to contain provisions the petitioner asserts are needed.⁶⁰ The Staff summarizes its position that: “[i]n essence, requests for relief going beyond the actions in an enforcement order

⁵⁵ Id. at 2.

⁵⁶ NRC Staff’s Response to Hearing Request of Ken Silver (Sept. 11, 2007) at 7 [hereinafter Staff Answer – Silver].

⁵⁷ Id. at 2.

⁵⁸ Id. at 3 (citing Bellotti v. NRC, 725 F.2d at 1381).

⁵⁹ Id. at 5.

⁶⁰ Id. at 3-4.

are requests for relief that are outside the scope of the proceeding,”⁶¹ and, in making such requests, an individual has not established injury-in-fact required for standing.⁶²

The Staff states that Dr. Silver’s expressed purpose of requesting a hearing to force the agency to publicize health and safety information about the NFS plant that had been previously held secret under the “Official Use Only” categorization policy is outside the scope of the proceeding because it goes beyond the actions in the enforcement order, which only addresses NFS’s response to specified safety violations, not the NRC’s release of (or decision not to release) information regarding those safety violations.⁶³ As an aside, the Staff further argues that Dr. Silver does not qualify for standing based on his proximity to the NFS facility because, although he lives near the plant, he has not alleged he would suffer any injury at that location stemming from the Order.⁶⁴

Accordingly, the Staff argues that Mr. Silver’s hearing request must be denied.⁶⁵

3. NFS Answer to Silver Hearing Request

On September 19, 2007, NFS filed an Answer to the hearing request of Dr. Silver.⁶⁶ In its Answer, NFS requests that the Board deny his Request for Hearing because Dr. Silver “has not demonstrated standing, raises issues entirely beyond the scope of the Confirmatory Order and has identified no admissible contentions.”⁶⁷ On the issue of standing, NFS argues that Dr.

⁶¹ Id. at 4.

⁶² See id. at 4-5.

⁶³ See id. at 5-6.

⁶⁴ Id. at 6 n.4.

⁶⁵ Id. at 7.

⁶⁶ Licensee’s Answer to Request for a Hearing of Ken Silver (Sept. 19, 2007) at 16 [hereinafter NFS Answer – Silver].

⁶⁷ Id. at 1.

Silver has not alleged an injury-in-fact,⁶⁸ and that his academic interest in the proceeding does not confer standing.⁶⁹ In addition, NFS argues that Dr. Silver's proximity to the NFS facility, without an additional showing of injury related to that proximity, does not establish standing.⁷⁰ Therefore, according to NFS, Dr. Silver has not met the requirements of 10 C.F.R. § 2.309(d) and his hearing request must be denied.⁷¹

On the issue of scope of the proceeding, NFS argues, as does the Staff, that the Commission, pursuant to the reasoning in Bellotti, limited the scope of the proceeding to "whether this Confirmatory Order should be sustained."⁷² NFS then notes that Dr. Silver's request was actually that the NRC publicly address the safety and health issues at the NFS facility, which is not within the scope of the proceeding.⁷³ Accordingly, NFS argues that, to the extent that Dr. Silver requested enforcement measures in addition to those outlined in the Confirmatory Order, his request is outside the scope of the proceeding as provided in Bellotti and its progeny.⁷⁴

NFS argues in the alternative, that even if Dr. Silver had standing, he has not proffered an admissible contention as required under 10 C.F.R. § 2.309(f) and the July 30, 2007 Federal Register Notice.⁷⁵ First, NFS argues that the threshold issue for admissibility of contentions is

⁶⁸ Id. at 4.

⁶⁹ Id. at 3.

⁷⁰ Id. at 3-4.

⁷¹ Id. at 2.

⁷² Id. at 4.

⁷³ Id. at 4-5.

⁷⁴ See id. at 5-9.

⁷⁵ Id. at 9.

whether the contention is within the scope of the proceeding.⁷⁶ As discussed in its prior standing analysis relating to the scope of the proceeding, NFS asserts that Dr. Silver's request that the NRC publicize the health and safety issues at the NFS plant is outside the scope of the proceeding and is therefore not an admissible contention.⁷⁷ Second, NFS references the requirements of 10 C.F.R. § 2.309(f), all of which must be met in order for a contention to be admitted.⁷⁸ Specifically, NFS argues that Dr. Silver failed to meet the requirements of 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), and (vi) by failing to support his assertion that "secrecy 'imperils public understanding of health risks,'" ⁷⁹ with facts, expert opinions, documents, or by providing any other factual basis for this assertion, and by failing to connect this assertion with the Confirmatory Order.⁸⁰ Therefore, NFS requests that the Board deny Dr. Silver's request for a hearing.⁸¹

4. Board Ruling on Hearing Request of Ken Silver⁸²

Dr. Silver's Request for Hearing is denied because he has not shown that he has standing, nor has he proffered an admissible contention. As discussed in Parts II.C and II.D above, the issue of standing in an enforcement proceeding is directly related to the issue of

⁷⁶ Id.

⁷⁷ Id. at 15.

⁷⁸ Id. at 12-15.

⁷⁹ Id. at 15 (quoting Silver Request at 1).

⁸⁰ Id.

⁸¹ Id. at 15-16.

⁸² Dr. Silver requested additional time within which to reply to the Staff Response to his Hearing Request. Silver Request for Extension of Deadline (Sept. 25, 2007) at 1. The Board granted that request in part, allowing Dr. Silver to reply to the NRC Staff's Response until October 15, 2007. Licensing Board Order (Granting In Part, Silver Request for Extension of Time) (Oct. 5, 2005) (unpublished). However, no reply from Dr. Silver to the NRC Staff Response to his Hearing Request was subsequently received by the Board.

whether a request for hearing raises allegations that are within the scope of the proceeding.⁸³

The individual is required to show that his or her request is within the scope of the proceeding by demonstrating that he or she will be adversely affected by the actual terms of the enforcement order as they exist, rather than as a consequence of the Order lacking certain provisions the petitioner claims are necessary.⁸⁴ If the individual fails to make such a showing of adverse effect, the hearing request must be denied for failure to meet the requirements of 10 C.F.R. § 2.309(a), (d), and (f).⁸⁵

As both NFS and the Staff correctly point out, Dr. Silver's hearing request fails to address how he will be adversely affected by the Confirmatory Order. Instead, Dr. Silver calls for the release of information such that the public would be able to openly discuss the health and safety issues at the NFS facility.⁸⁶ This request fails to confront the existence of the order itself or to address whether its existence adversely affects Dr. Silver. Moreover, to the extent that Dr. Silver's request for release of information seeks to enhance the enforcement measures already outlined by the Staff in the Confirmatory Order, this is also outside the scope of the proceeding.⁸⁷

⁸³ Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 405.

⁸⁴ Id. at 406.

⁸⁵ See 10 C.F.R. § 2.309(a) ("[T]he . . . Board designated to rule on the request for hearing and/or petition for leave to intervene will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section.").

⁸⁶ See supra Part III.A.1.

⁸⁷ See Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 404.

It is well established that “Boards are not to consider whether [enforcement] orders need strengthening.”⁸⁸ Therefore, having failed to demonstrate that his hearing request is within the scope of this enforcement proceeding, Dr. Silver has not established the requisite standing to be admitted as a party to a hearing before this Board.

Furthermore, Dr. Silver’s reliance on his proximity to the NFS facility is insufficient to meet the standing requirements in this case. Although a proximity presumption has been invoked when resolving issues of standing for cases involving reactor licensing,⁸⁹ in a case such as this one involving an enforcement order, the standing requirement is also based on the Confirmatory Order itself and the adverse effect of the Confirmatory Order.⁹⁰ Therefore, something in addition to the distance of the individual from the facility is necessary to establish standing – a link between the Confirmatory Order and the alleged harm to the individual.⁹¹ As described above, Dr. Silver has not made this connection between the Confirmatory Order and any alleged harm he will suffer.

Because Dr. Silver has not established his standing, it is unnecessary for the Board to review in great detail the factors in the NRC regulations governing the admissibility of contentions. It is apparent, however, that all six contention admissibility requirements under 10 C.F.R. § 2.309(f)(1) must be met in order for a contention to be admitted.⁹² Moreover, one of

⁸⁸ Id.

⁸⁹ Sequoyah Fuels Corp. & General Atomics, CLI-94-12, 40 NRC at 75 n.22.

⁹⁰ Alaska Dep’t of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 406.

⁹¹ Id. (determining that the injury must be “attributable to the Confirmatory Order” to establish standing) (emphasis in original)). Proximity undoubtedly would be a pertinent consideration if a petitioner asserted that the activities contemplated in the challenged order would result in circumstances that would generate particular off-site impacts (e.g., radiation releases) at the relevant distance, a showing Dr. Silver certainly has not made in this instance.

⁹² 10 C.F.R. § 2.309(a), (f)(1).

the main requirements for admission of contentions is that they be within the scope of the proceeding, or within the scope of the issues the Board is permitted to review.⁹³ As discussed above, Dr. Silver's request to foster a public discussion about health and safety issues surrounding NFS is not within the narrow issue (as defined in the Staff's July 30, 2007 Federal Register Notice) of whether the Confirmatory Order should be sustained.⁹⁴ Having clearly failed to meet the third requirement governing contention admissibility, Dr. Silver is unable to proffer an admissible contention.

Dr. Silver has not shown that he has standing and has not proffered an admissible contention. Therefore, his Request for Hearing is denied.

III. B. Specific Request for Hearing – Sierra Club

1. Hearing Request of the Sierra Club and We the People, Inc.

In a Petition to Intervene, the Sierra Club, joined by We the People, Inc., likewise seeks a hearing on the Confirmatory Order. The hearing petition was submitted by Linda Modica, who represents that she is acting on behalf of the national Sierra Club as the Chair of the Sierra Club's national Radiation Committee, and that she lives ten miles from the NFS facility in Jonesborough, Tennessee.⁹⁵

The Sierra Club asserts that it has organizational standing to request a hearing based on a prior grant of standing in NFS's license amendment applications regarding the NFS Blended Low Enriched Uranium (BLEU) project and based on its interest in serving "the general

⁹³ 10 C.F.R. § 2.309(f)(1)(iii).

⁹⁴ See 72 Fed. Reg. at 41,531.

⁹⁵ Hearing Request of the National Sierra Club (Aug. 20, 2007) at 1, 3 [hereinafter Sierra Club Request].

public's interests . . . [in] clean air, clean water and clean energy.”⁹⁶ In addition, the Sierra Club asserts that it has third-party standing through the interests of its members in “clean air, clean water, clean energy, clean land . . . [and] public health and safety.”⁹⁷ Moreover, the Petition represents that Ms. Modica, a Sierra Club member, lives in proximity to the NFS facility.⁹⁸

The Sierra Club outlines the ways in which it and its members are adversely affected by the Confirmatory Order as follows:⁹⁹

1. The NRC did not make an assessment of the environmental impacts of the Confirmatory Order. If an assessment was made, but categorized as “Official Use Only,” it should now be produced to the public.
2. NFS remains in “serial non-compliance with NRC regulations” and the Confirmatory Order is insufficient to address those violations, particularly the March 2006 spill and its impacts.
3. The Confirmatory Order harms the public interest because it fails to regulate NFS effectively, a continuation of Region II’s previous failures that include granting NFS prior license amendments and in issuing Findings of No Significant Impact.
4. The categorization of documents as “Official Use Only” harmed the public because it prevented the Agency for Toxic Substances and Disease Registry from gaining a complete understanding of the hazards at NFS when it performed its Public Health Assessment at the NFS site.
5. The Confirmatory Order does not sufficiently address the security violation at NFS (“two security officers [who] willfully failed to conduct a vehicle search”), which is a problem because a Ninth Circuit decision requires the NRC to “consider the impacts of terrorist attacks to a licensed facility.” Therefore, the Confirmatory Order does not adequately protect the public from terrorist attacks.
6. The categorization of documents as “Official Use Only” harmed the public because it violated the public trust.

⁹⁶ Id. at 1.

⁹⁷ Id.

⁹⁸ See id. at 3.

⁹⁹ Id. at 1-2.

The Sierra Club concludes its hearing request by demanding the release of certain categories of documents between the NRC, NFS, and the Department of Energy regarding the NFS facility that had been previously categorized as “Official Use Only.”¹⁰⁰

2. NRC Answer to Hearing Request of the Sierra Club and We the People, Inc.

The NRC Staff filed an Answer to the hearing request of the Sierra Club on September 14, 2007,¹⁰¹ in which it urges the Board to deny the Sierra Club’s Request for Hearing because the Sierra Club “fails to demonstrate that they will be adversely affected by the Confirmatory Order,” and therefore cannot establish standing or proffer an admissible contention.¹⁰²

First, the NRC Staff contends that the Sierra Club failed to demonstrate that it has standing to intervene.¹⁰³ The Staff argues that the Sierra Club cannot rely on the fact that it had standing in a prior NFS proceeding to show that it has standing in the Confirmatory Order proceeding.¹⁰⁴ In addition, the Staff argues that the Sierra Club’s general interests in clean air, clean water, and clean energy are insufficient to confer standing.¹⁰⁵ As an aside, the Staff claims that, to the degree that the Sierra Club seeks to establish its representative standing based on Ms. Modica’s proximity to the NFS facility, she does not provide the requisite showing

¹⁰⁰ Id. at 2-3.

¹⁰¹ NRC Staff’s Response to Hearing Request of the Sierra Club’s National Radiation Committee and We the People, Inc. (Sept. 14, 2007) at 9 [hereinafter Staff Answer – Sierra Club].

¹⁰² Id. at 2.

¹⁰³ Id. at 5.

¹⁰⁴ Id.

¹⁰⁵ Id. at 5-6.

for such standing because, although she lives near the plant, she has not alleged any injury stemming from the Order.¹⁰⁶

Second, the Staff argues that the Sierra Club's hearing request should be denied because the Sierra Club did not meet "the threshold question" of "whether the hearing request is within the scope of the proceeding as outlined in the order."¹⁰⁷ According to the Staff, this is because the Sierra Club's contentions either demand stricter enforcement measures than those set out in the Confirmatory Order (contentions one, two, three, and five), which is outside the scope of the proceeding under Bellotti, or because the Sierra Club's contentions do not even relate to or mention the Confirmatory Order (contentions four and six).¹⁰⁸ Because the Sierra Club has not established that it has standing or proffered an admissible contention, the Staff argues that the Board should deny the Sierra Club's request for a hearing.

3. NFS Answer to Hearing Request of the Sierra Club and We the People, Inc.

NFS filed an Answer to the Sierra Club's Request for Hearing on September 19, 2007.¹⁰⁹ In its Answer, NFS argues that the Board should deny the Sierra Club's hearing request because the Sierra Club "has not demonstrated standing, raises issues entirely beyond the scope of the Confirmatory Order, and has identified no admissible contentions."¹¹⁰ On the issue of standing, NFS enumerates four arguments as to why the Sierra Club has failed to

¹⁰⁶ Id. at 5-6 n.5.

¹⁰⁷ Id. at 6 (quoting Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 405).

¹⁰⁸ Id. at 6-8.

¹⁰⁹ Licensee's Answer to Request for a Hearing of the Sierra Club National Radiation Committee (Sept. 19, 2007) at 20 [hereinafter NFS Answer – Sierra Club].

¹¹⁰ Id. at 1.

demonstrate it has standing for a hearing before this Board.¹¹¹ NFS contends that (1) the Sierra Club's reliance on the grant of standing for the proceeding involving NFS' BLEU project is insufficient; (2) the Sierra Club has not demonstrated that one of its members has standing to establish third-party, representational standing; (3) the Sierra Club has not demonstrated that, as an organization, it has standing; and (4) "the Sierra Club's claim 'to serve the general public's interest in clean air, water, and energy' is insufficient to confer standing."¹¹²

On the issue of the scope of the proceeding, NFS explains that the Commission, as it has the authority to do under Bellotti, limited the scope of the proceeding to "whether this Confirmatory Order should be sustained."¹¹³ NFS then states that all six contentions, which NFS characterizes as challenges to the NRC's regulation of NFS and the NRC's "Official Use Only" policy, are proffers that refer to matters outside of the Confirmatory Order or involve requests for additional enforcement measures that should be taken against NFS.¹¹⁴ NFS thus argues that the Board should deny the Sierra Club's request for hearing because its claims are outside the scope of the proceeding.¹¹⁵

Finally, on the contention admissibility issue, NFS asserts that the Sierra Club's hearing request should be denied because the Sierra Club has not proffered an admissible contention under 10 C.F.R. § 2.309(f).¹¹⁶ As discussed in its prior analysis of the scope of the proceeding, NFS asserts that the Sierra Club's challenges to NRC regulatory policy regarding NFS do not

¹¹¹ Id. at 3-5.

¹¹² Id.

¹¹³ Id. at 5.

¹¹⁴ Id. at 6-12.

¹¹⁵ Id. at 5, 12.

¹¹⁶ Id. at 12-13, 15.

meet the “fundamental requirement” that the contention “address[] matters within the scope of the proceeding and . . . not seek to attack NRC regulations governing the proceeding.”¹¹⁷ NFS also challenges the Sierra Club’s contentions based on the six contention admissibility factors provided in 10 C.F.R. § 2.309(f)(i)-(vi) and, in general, argues that the Sierra Club does not support their assertions with facts, expert opinions, documents, or any other factual basis, and fails to connect these assertions with the Confirmatory Order.¹¹⁸ Accordingly, NFS requests that the Board deny the Sierra Club’s request for a hearing.¹¹⁹

4. Reply of the Sierra Club and We the People, Inc.

The Sierra Club filed a Reply to the NRC Staff’s Answer to the Sierra Club’s Request for Hearing on October 15, 2007.¹²⁰ In its Reply, the Sierra Club reiterates that it has demonstrated organizational standing because of its past involvement in nuclear issues and notes that it has made public statements about the recent safety issues at the NFS facility.¹²¹ The Sierra Club argues that it has demonstrated third-party standing because “[We the People, Inc. Executive Director] Ann Harris and [Ms. Modica] have participated in NRC meetings at NFS, prior and

¹¹⁷ Id. at 12-13.

¹¹⁸ Id. at 12-19.

¹¹⁹ Id. at 19.

¹²⁰ Sierra Club Reply to NRC Staff’s Response to Hearing Request of the Sierra Club’s National Radiation Committee and We the People, Inc. (Oct. 15, 2007) at 1 [hereinafter Sierra Club Reply]. The Sierra Club’s original deadline for reply to the NRC Staff’s response was September 21, 2007. Licensing Board Order (Granting In Part, Sierra Club’s Request for Extension of Time) at 1-2 (Oct. 5, 2007) (unpublished). However, the Sierra Club requested an extension of time to reply on September 26, 2007. See Sierra Club Request for Extension of Deadline to Reply to NRC Staff’s Response to Hearing Request of the Sierra Club’s National Radiation Committee and We the People, Inc. (Sept. 26, 2007) at 1. In an October 5, 2007 Order, the Board granted the Sierra Club’s request for an extension of time, permitting the Sierra Club to file its reply on or before October 15, 2007. Licensing Board Order (Granting In Part, Sierra Club’s Request for Extension of Time) at 3-4 (Oct. 5, 2007) (unpublished).

¹²¹ Sierra Club Reply at 2-3.

current interventions regarding NFS license amendments,” as well as other public and private meetings regarding the NFS facility.¹²² The Sierra Club emphasizes:

like the hundreds of other members of Sierra Club and We The People who vote, pay taxes, reside, hike, fish, paddle, raft, eat, drink, breathe, shop, visit friends, go to movies &/or attend festivals near NFS, Ann Harris and [Ms. Modica] are personally harmed by the Confirmatory Order at issue in this Proceeding.¹²³

The Sierra Club explains that it and its members are harmed by the Confirmatory Order because the NRC, in essence, takes an inadequate “honor-system approach to regulation”¹²⁴ as exemplified by the Confirmatory Order, the fact that NFS operations pose (and have posed in the past) health and safety issues the extent of which the NRC is seemingly unaware,¹²⁵ and the NRC’s failure to issue an Environmental Impact Statement during the previous NRC licensing of NFS’ BLEU project.¹²⁶ As a remedy for these alleged harms, the Sierra Club requests that the NRC suspend NFS’s Special Materials License SNM-124, release all documents categorized under the “Official Use Only” policy, conduct an Environmental Impact Study for the BLEU process, and ensure that “a bona fide Safety Culture is in place.”¹²⁷

5. Board Ruling on Hearing Request of the Sierra Club and We the People, Inc.

The Sierra Club’s hearing request is denied because it has not demonstrated that it has standing and has not raised any admissible contentions. As discussed in Parts II.C and II.D

¹²² Id. at 3.

¹²³ Id.

¹²⁴ Id.

¹²⁵ Id. at 4-6.

¹²⁶ Id. at 6-7.

¹²⁷ Id.

above, the issue of standing in an enforcement proceeding is closely intertwined with the issue of whether a request for hearing raises allegations that are within the scope of the proceeding.¹²⁸ The individual must show that his request is within the scope of the proceeding by demonstrating that he will be adversely affected by the enforcement order as it exists, not as measured in comparison to a hypothetical order the petitioner would like to see implemented. If the individual fails in making this showing of adverse effect, the hearing request must be denied for failure to meet the requirements under 10 C.F.R. § 2.309(a), (d), and (f).¹²⁹

NFS and the Staff are correct in pointing out that the Sierra Club has not sufficiently addressed how its organization or its members will be harmed by the Confirmatory Order. Even though the Sierra Club represents in both its Request for Hearing and its Reply that it and its members are adversely affected by the Confirmatory Order,¹³⁰ its assertions do not show that the Sierra Club or its members will be worse off if the Confirmatory Order is implemented (*i.e.*, they will affirmatively be harmed if the NFS enforcement issues are addressed by the safety measures instituted by the NRC), which, as the Bellotti and Alaska Department of Transportation & Public Facilities cases instruct, is the fundamental issue when determining standing and contention admissibility in a proceeding involving an enforcement order.¹³¹

¹²⁸ Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 405.

¹²⁹ See 10 C.F.R. § 2.309(a) (“[T]he . . . Board designated to rule on the request for hearing and/or petition for leave to intervene will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section.”).

¹³⁰ See Sierra Club Request at 1 (stating that the Sierra Club’s interests “are adversely affected by the Confirmatory Order in a number of particular ways”); Sierra Club Reply at 3 (stating that “Ann Harris & [Ms. Modica] are personally harmed by the Confirmatory Order at issue in this Proceeding”).

¹³¹ Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 405 (citing Bellotti v. NRC, 725 F.2d at 1381).

Instead, the Sierra Club raises allegations that attack the NRC's regulatory policy regarding NFS, and urges that greater enforcement measures should be taken against NFS (including suspension of its Special Materials License).¹³² In its request, the Sierra Club attempts to re-litigate its concerns regarding the licensing of NFS's BLEU project, and refers to matters other than whether the Confirmatory Order should be sustained. Accordingly, the issues raised by the Sierra Club are outside the scope of this proceeding.¹³³ The Board simply does not have the authority under the agency's regulations or the terms of the referral specified in the July 30, 2007 Federal Register Notice to grant a hearing based on these issues.

Moreover, the Sierra Club's arguments that it has standing because it had standing in past licensing actions involving the NFS facility or because of its participation in public statements about the recent safety issues at NFS are insufficient to meet the three-part framework the Board uses for standing inquiries. Under this three-part test, a petitioner must show (1) an injury-in-fact (2) that is fairly traceable to the challenged action and (3) is likely to be redressed by a favorable decision.¹³⁴ This inquiry is conducted by reviewing the alleged injury stemming from the regulatory action at issue, not that asserted to arise generally from the facility or the Licensee involved in the proceeding.¹³⁵

The Sierra Club's generalized statements concerning its experience with issues regarding NFS and its members' proximity to the NFS facility do not address the issue of

¹³² See, e.g., Sierra Club Reply at 6-7.

¹³³ See supra Parts III.B.1 and III.B.4.

¹³⁴ Maine Yankee Atomic Power Co., CLI-04-5, 59 NRC at 57 n.16 (2004) (citing Sequoyah Fuels Corp. & General Atomics, CLI-92-12, 40 NRC at 71-72).

¹³⁵ See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-92-27, 36 NRC 196, 198 (1992) ("[M]erely because a petitioner may have had standing in an earlier proceeding does not automatically grant standing in subsequent proceedings, even if the scope of the earlier and later proceedings is similar.").

whether it or its members has suffered an injury-in-fact linked to the agency action at issue – the Confirmatory Order. Although the Sierra Club alleges that its members are at risk living and conducting their daily lives near the NFS facility, it has failed to link this to the existence of the Confirmatory Order. The Sierra Club is unable to show that its claimed injuries are capable of being redressed by a favorable Board decision because, as analyzed above, it has not raised any issues that the Board has the authority to review.

Furthermore, even assuming that the Sierra Club were able to demonstrate standing, the Sierra Club's Request for Hearing fails because the Sierra Club is unable to raise an admissible contention. Under 10 C.F.R. § 2.309(f)(1), all six factors for contention admissibility must be met in order for the Board to admit a contention.¹³⁶ Just as it has relevance to the matter of standing, the concept of the scope of the proceeding is also intertwined with the matter of contention admissibility.¹³⁷ Title 10 of the Code of Federal Regulations, Section 2.309(f)(1)(iii), requires that the Petitioner "[d]emonstrate that the issue raised in the contention is within the scope of the proceeding."¹³⁸ The Sierra Club is unable to meet this third contention admissibility factor because its claims, which in essence attack the NRC's regulatory policy regarding NFS by requesting enforcement measures stricter than those taken in the Confirmatory Order, are outside the scope of this proceeding. And because the Sierra Club likewise does not meet the requisite showing under the third contention admissibility factor, it therefore cannot meet all six contention admissibility requirements so as to have its contentions admitted.

¹³⁶ 10 C.F.R. § 2.309(a), (f)(1).

¹³⁷ See 10 C.F.R. § 2.309(f)(1)(iii); see also Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 405.

¹³⁸ Id.

The Sierra Club's Request for Hearing is denied, having failed to demonstrate that it has standing or to raise an admissible contention as is required for a hearing under 10 C.F.R. § 2.309(a).

III. C. Specific Request for Hearing – R. Feher

1. Hearing Request of R. Feher

In his Petition, Mr. Feher represents that he is a resident of Jonesborough, Tennessee, who lives “just over the mountain from NFS.”¹³⁹ Mr. Feher argues that, in addition to his proximity to the NFS facility, he has standing to request a hearing because he and his family drink water taken from the Nolichucky River, which is processed through the Jonesborough Water Treatment Plant that he alleges “NFS pollutes” “from its ‘normal’ operations,” “spills and other accidents,” and because he lives near the NFS firing range where NFS security guards are trained.¹⁴⁰ Mr. Feher further argues that he is adversely affected by the Confirmatory Order because (1) “the Order does not at all address the impact on [his] drinking water that the secret March 6, 2006 [uranyl nitrate] spill had, or how the NRC is going to protect [his] . . . family’s health through the Order”;¹⁴¹ (2) the Order did not include a fine against NFS that, as a small business owner, he would have been subjected to in similar situation;¹⁴² (3) the Order did not address “the noise and stray bullet hazards” from the nearby NFS firing range;¹⁴³ and (4) the Order does not address “the problem of water pollution threats” from the NFS firing range.¹⁴⁴

¹³⁹ See Hearing Request of R. Feher (Aug. 20, 2007) at 1 [hereinafter Feher Request].

¹⁴⁰ Id. at 1-2.

¹⁴¹ Id. at 1.

¹⁴² Id. at 1-2.

¹⁴³ Id. at 2.

¹⁴⁴ Id.

Mr. Feher also questions the ability of NFS to develop a safety culture under the Confirmatory Order.¹⁴⁵

2. NRC Answer to Hearing Request of R. Feher

The NRC Staff filed an Answer to the hearing request of Mr. Feher on September 14, 2007.¹⁴⁶ The NRC Staff argues that the Board should deny Mr. Feher's hearing request because he "fails to demonstrate he will be adversely affected by the Confirmatory Order and, for that reason, is unable to establish that he has either standing to participate in a hearing or is able to proffer an admissible contention."¹⁴⁷

First, the Staff claims that Mr. Feher has not met the standing requirements because he has not demonstrated how he would be injured by the Order.¹⁴⁸ As the Staff explains its position, in a case involving an enforcement order, "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."¹⁴⁹ The Staff emphasizes, "[a]n 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.'"¹⁵⁰ The Staff then argues that Mr. Feher does not make this required showing because his claims invoke a

¹⁴⁵ Id.

¹⁴⁶ NRC Staff's Response to Hearing Request of R. Feher (Sept. 14, 2007) at 7 [hereinafter Staff Answer – Feher].

¹⁴⁷ Id. at 2.

¹⁴⁸ Id. at 5.

¹⁴⁹ Id. at 4 (citing Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 406).

¹⁵⁰ Id. (quoting Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 406).

hypothetical order, or what he would like to see added to the Confirmatory Order, rather than the Order as it exists.¹⁵¹

Further, the Staff argues, Mr. Feher's reliance on his proximity to the NFS facility to establish standing is insufficient.¹⁵² The Staff explains that a proximity theory applies in proceedings that do not involve reactor licensing where, as here, the Petitioner must provide a showing of adverse consequences stemming from the Confirmatory Order.¹⁵³ And, according to the Staff, because the Petitioner has not made a showing that there are any adverse consequences relevant to his position with and without the Order, he has not made the appropriate showing under a proximity theory.¹⁵⁴ The Staff thus claims that the Board should deny Mr. Feher's hearing request because the matters he complains about and the relief he seeks for that purported injury does not show he is adversely affected by the Confirmatory Order, and so is insufficient to demonstrate standing.¹⁵⁵

Second, the NRC Staff argues that Mr. Feher's hearing request should be denied because "each of his concerns is outside the scope of this proceeding."¹⁵⁶ The limited issue for consideration, the NRC Staff asserts, is whether the enforcement order should be sustained, not whether it should be strengthened.¹⁵⁷ The NRC Staff points out that Mr. Feher "seeks to impose additional measures on [NFS]" by requiring that the Order address his specific public

¹⁵¹ See id. at 5-6.

¹⁵² Id.

¹⁵³ Id. at 6 & n.4.

¹⁵⁴ Id.

¹⁵⁵ Id. at 6.

¹⁵⁶ Id.

¹⁵⁷ Id. (citing Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 404).

health and safety concerns involving the NFS facility and the NFS firing range, and that the NRC impose a fine on NFS.¹⁵⁸ Therefore, the NRC Staff argues, Mr. Feher's requests are outside the scope of the proceeding, and accordingly, Mr. Feher's hearing request should be denied.¹⁵⁹

3. NFS Answer to Hearing Request of R. Feher

NFS filed its Answer to the hearing request of Mr. Feher on September 19, 2007.¹⁶⁰ In its Answer, NFS argues that Mr. Feher's hearing request should be denied "because Mr. Feher has not demonstrated standing, raises issues entirely beyond the scope of the Confirmatory Order and has identified no admissible contentions."¹⁶¹

NFS first argues that Mr. Feher's hearing request fails because he has not shown that he has standing. Similar to the Staff's proximity argument, NFS declares that Mr. Feher has not alleged an injury-in-fact as required for a showing of standing because he relies on his proximity to the NFS facility without also demonstrating "'a causal link between the distance [he] reside[s] from the facility and injury to [his] legitimate interests.'"¹⁶² NFS further claims that the injuries Mr. Feher does allege are unrelated to the Confirmatory Order.¹⁶³ According to NFS, Mr. Feher concedes that the alleged water pollution and firing range hazards he raises were present

¹⁵⁸ Id. at 5.

¹⁵⁹ Id. at 7.

¹⁶⁰ Licensee's Answer to Request for a Hearing of R. Feher (Sept. 19, 2007) at 17 [hereinafter NFS Answer – Feher].

¹⁶¹ Id. at 1.

¹⁶² Id. at 3 (quoting Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 84 (1993)).

¹⁶³ Id. at 4.

before the existence of the Confirmatory Order and, therefore, the harm they might cause cannot stem from the Confirmatory Order so as to provide a basis for standing.¹⁶⁴

NFS also maintains that Mr. Feher's request that NFS receive a fine fails to achieve the injury-in-fact element required for standing.¹⁶⁵ To the extent Mr. Feher alleges he has suffered a competitive economic injury based on his claim that, as a small business owner, he likely would receive a fine instead of a type of settlement agreement in a similar situation, NFS declares that Mr. Feher has failed to establish a basis for his standing in that he has not shown that a competitive economic injury "falls within the protections of the AEA or [the National Environmental Policy Act]."¹⁶⁶

Finally, NFS asserts that Mr. Feher's contentions are inadmissible because they are outside the scope of the proceeding.¹⁶⁷ NFS states that the NRC limited the scope of this proceeding to "whether the order should be sustained," as it has the authority to do under Bellotti, thereby excluding requests to increase the enforcement measures in the Confirmatory Order.¹⁶⁸ Mr. Feher's proffered contentions regarding water pollution, firing range hazards, and the lack of a fine are, NFS maintains, all requests for increased enforcement measures.¹⁶⁹ Therefore, following Bellotti and its progeny, Mr. Feher's proffered contentions are outside the scope of the proceeding and should be denied.¹⁷⁰ NFS also reviews the six standards

¹⁶⁴ Id.

¹⁶⁵ Id.

¹⁶⁶ Id. at 4-5.

¹⁶⁷ Id. at 5.

¹⁶⁸ Id. at 5-9

¹⁶⁹ Id. at 9.

¹⁷⁰ Id.

governing the admissibility of contentions under 10 C.F.R. § 2.309(f)(1)(i)-(vi), and declares that Mr. Feher's contentions fail by not meeting all of the six standards.¹⁷¹ Because Mr. Feher has not demonstrated that he has standing and is unable to proffer an admissible contention, NFS urges the Board to deny Mr. Feher's Request for Hearing.¹⁷²

4. Board Ruling on Hearing Request of R. Feher

Mr. Feher's Request for Hearing also is denied because he has not demonstrated that he has standing and has not raised any admissible contentions. As discussed in Parts II.C and II.D above, the issue of standing in an enforcement proceeding is closely related to the issue of whether a request for hearing raises allegations that are within the scope of the proceeding.¹⁷³ The individual must show that his request is within the scope of the proceeding by demonstrating that he will be adversely affected by the enforcement order as it exists, rather than as compared to an order that the petitioner would like to have implemented. If the individual fails to make this showing, the hearing request will be denied for failure to meet the requirements under 10 C.F.R. § 2.309(a), (d), and (f).¹⁷⁴

NFS and the NRC Staff are correct in pointing out that Mr. Feher has not sufficiently addressed how he will be adversely affected by the Confirmatory Order. Even though Mr. Feher claims he is adversely affected by the Confirmatory Order in his Request for Hearing,¹⁷⁵ he has

¹⁷¹ Id. at 10-16.

¹⁷² Id. at 17.

¹⁷³ Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 405.

¹⁷⁴ See 10 C.F.R. § 2.309(a) ("[T]he . . . Board designated to rule on the request for hearing and/or petition for leave to intervene will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section.").

¹⁷⁵ See Feher Request at 1.

not shown he will be harmed by the terms of the Confirmatory Order (i.e., that in addressing the NFS enforcement issues, the measures instituted by the NRC are contrary to the public health and safety), which, as the Bellotti and Alaska Department of Transportation & Public Facilities cases instruct, is the fundamental issue when determining standing and contention admissibility in a proceeding involving an enforcement order.¹⁷⁶ Instead, Mr. Feher's Request for Hearing consists of requests to the NRC that would involve increased enforcement measures taken against NFS outside of the Confirmatory Order. Mr. Feher asks that the NRC address the potential for water pollution and hazards from the NFS firing range where NFS security guards are trained and that the agency impose a fine against NFS for the enforcement violations addressed in the Confirmatory Order.¹⁷⁷

It is well established that "Boards are not to consider whether [enforcement] orders need strengthening."¹⁷⁸ These claims do not address whether the Confirmatory Order should be sustained, and are therefore outside the scope of the proceeding. The Board does not have the authority under NRC regulations or the terms of the referral specified in the July 30, 2007 Federal Register Notice to grant a hearing based on these claims.

Furthermore, Mr. Feher's purported proximity to the NFS facility is insufficient to meet the standing requirement in this case. Although the Board has used a proximity presumption when resolving issues of standing for cases involving reactor licensing,¹⁷⁹ in a case involving an enforcement order, such as this one, the standing requirement is based on the Confirmatory Order itself, and the petitioner must show that he will be adversely affected by the Confirmatory

¹⁷⁶ Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 405 (citing Bellotti v. NRC, 725 F.2d at 1381).

¹⁷⁷ See supra Part III.C.1.

¹⁷⁸ Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 404.

¹⁷⁹ Sequoyah Fuels Corp. & General Atomics, CLI-94-12, 40 NRC at 75 n.22.

Order.¹⁸⁰ Simple closeness to the facility is not sufficient to establish standing. The petitioner must also demonstrate a link between the Confirmatory Order and the alleged harm to himself or herself.¹⁸¹ Because Mr. Feher has not alleged a harm stemming from the Confirmatory Order, he is unable to demonstrate that the proximity presumption has been met.

Additionally, even assuming Mr. Feher were able to demonstrate standing, his Request for Hearing fails because he has not raised an admissible contention. Under 10 C.F.R. § 2.309(f)(1), all six factors for contention admissibility must be met for the Board to admit a contention.¹⁸² The scope of the proceeding issue, just as it is intertwined with the standing issue, is also relevant to the issue of contention admissibility.¹⁸³ Title 10 of the Code of Federal Regulations, Section 2.309(f)(1)(iii) requires the petitioner to “[d]emonstrate that the issue raised in the contention is within the scope of the proceeding.”¹⁸⁴ Mr. Feher does not meet this third contention admissibility factor because his claims, which in essence request that the NRC take additional enforcement action against NFS, are outside the scope of this proceeding. And because Mr. Feher has not provided the requisite showing under the third contention admissibility factor, he cannot meet all six contention admissibility requirements so as to have his contentions admitted.

Having failed to demonstrate he has standing or raise an admissible contention as is required for admission as a party pursuant to 10 C.F.R. § 2.309(a), Mr. Feher’s Request for Hearing is denied.

¹⁸⁰ Alaska Dep’t of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 406.

¹⁸¹ Id. (determining that the injury must be “attributable to the Confirmatory Order” to establish standing) (emphasis in original).

¹⁸² 10 C.F.R. § 2.309(a), (f)(1).

¹⁸³ 10 C.F.R. § 2.309(f)(1)(iii).

¹⁸⁴ Id.

III. D. Specific Request for Hearing – A. Christine Tipton

1. Hearing Request of A. Christine Tipton

In her Request for Hearing, A. Christine Tipton represents that she is a resident of Erwin, Tennessee, and lives one mile from the NFS facility.¹⁸⁵ She alleges that she has standing to request a hearing because of her proximity to the site, and because “[a]ccidents with radioactive elements, human failures at a nuclear facility and NRC violations definitely affect myself, my family, my property, my community and my well being and peace of mind.”¹⁸⁶ Ms. Tipton raises the following concerns regarding the Confirmatory Order: (1) the “Official Use Only” information-withholding policy led to a loss of the public trust in NFS; (2) the “Official Use Only” policy prevents her and others in her community from knowing of and protecting themselves from possible danger at the NFS facility;¹⁸⁷ and (3) she is skeptical that NFS will adhere to the requirements of the Confirmatory Order and other applicable NRC Regulations.¹⁸⁸ Accordingly, she requests a hearing to address these concerns.¹⁸⁹

2. NRC Answer to Hearing Request of A. Christine Tipton

The Staff filed an Answer to Ms. Tipton’s hearing request on September 19, 2007.¹⁹⁰ In its response, the Staff first argues that Ms. Tipton’s hearing request should be denied because it

¹⁸⁵ Hearing Request of A. Christine Tipton (Aug. 27, 2007) at 2 [hereinafter Tipton Request].

¹⁸⁶ Id.

¹⁸⁷ Id. at 3.

¹⁸⁸ Id. at 2-4.

¹⁸⁹ Id. at 4.

¹⁹⁰ NRC Staff’s Response to Hearing Request of A. Christine Tipton (Sept. 19, 2007) at 8 [hereinafter Staff Answer – Tipton].

was not timely filed.¹⁹¹ Second, the Staff asserts that the Board should deny Ms. Tipton's request because she "fails to demonstrate that she will be adversely affected by the Confirmatory Order and, for that reason, is unable to establish that she has either standing to participate in a hearing or is able to proffer an admissible contention."¹⁹²

The Staff claims that Ms. Tipton's hearing request was not timely filed because she filed it more than twenty days after the Notice of Opportunity for Hearing was published and did not request an extension of time to file her hearing request beyond the twenty days.¹⁹³ The NRC Staff explains, the Notice of Opportunity for Hearing set the deadline for hearing requests within twenty days of the issuance of the hearing notice, or within twenty days of July 30, 2007, which was August 20, 2007.¹⁹⁴ According to the Staff, having been submitted seven days after the filing deadline without requesting an extension of time, Ms. Tipton's hearing request should be denied as nontimely.¹⁹⁵

The Staff further argues that Ms. Tipton has not demonstrated standing or raised an admissible contention because she has not shown how she is adversely affected by the Confirmatory Order. The Staff explains that "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."¹⁹⁶ In this case, the Staff declares, to demonstrate the

¹⁹¹ Id. at 2.

¹⁹² Id.

¹⁹³ Id. at 5-6.

¹⁹⁴ Id. at 5.

¹⁹⁵ Id. at 6.

¹⁹⁶ Id. (quoting Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 405).

hearing request is within the scope of the proceeding, this petitioner must demonstrate that she is adversely affected by the Confirmatory Order.¹⁹⁷

In that regard, the Staff maintains that Ms. Tipton “never even alleges that she is adversely affected by the Order,” instead raising “generalized grievances” regarding NFS’s current operations and ability to conform to the Confirmatory Order rather than an injury stemming from the Confirmatory Order itself.¹⁹⁸ Because she has not demonstrated that her request is within the scope of the proceeding, she has not demonstrated standing.¹⁹⁹ In addition, the NRC Staff notes that Ms. Tipton’s proximity to the NFS facility is insufficient to establish standing since in an enforcement action, the relevant inquiry is injury from the Order, which requires a showing of more than proximity.²⁰⁰

The NRC Staff concludes that because Ms. Tipton failed to demonstrate that her request is within the scope of the proceeding, she has not demonstrated her standing or proffered an admissible contention.²⁰¹ The NRC Staff thus requests that the Board deny Ms. Tipton’s hearing petition.²⁰²

¹⁹⁷ Id.

¹⁹⁸ Id. at 6-7.

¹⁹⁹ Id.

²⁰⁰ Id. at 6-7 & n.6.

²⁰¹ Id. at 7-8.

²⁰² Id.

3. NFS Answer to Hearing Request of A. Christine Tipton

NFS filed an Answer to Ms. Tipton's hearing request on September 19, 2007.²⁰³ In its Answer, NFS asks that the Board deny Ms. Tipton's Request for Hearing because she "did not file within the time allowed, has not demonstrated standing, raises issues entirely beyond the scope of the Confirmatory Order and has identified no admissible contentions."²⁰⁴

As was the case with the Staff, NFS first argues that Ms. Tipton's hearing request was not timely filed because she submitted it seven days after the deadline for petitions without requesting an extension of time to file.²⁰⁵ NFS further argues that Ms. Tipton did not discuss the eight-factor balancing test under 10 C.F.R. § 2.309(c)(1), which must be addressed by a petitioner if the Board is to consider the merits of a nontimely intervention petition.²⁰⁶ Therefore, NFS argues, the Board should deny Ms. Tipton's hearing request as nontimely.²⁰⁷

Second, NFS argues that Ms. Tipton's statement that she lives near the NFS facility is insufficient to establish standing without a demonstration of injury-in-fact stemming from the Confirmatory Order.²⁰⁸ NFS argues that Ms. Tipton's alleged injuries are not related to the Confirmatory Order and, therefore, Ms. Tipton is unable to establish standing because she

²⁰³ Licensee's Answer to Request for a Hearing of A. Christine Tipton (Sept. 19, 2007) at 17 [hereinafter NFS Answer – Tipton].

²⁰⁴ Id. at 1.

²⁰⁵ Id. at 2-3.

²⁰⁶ Id.

²⁰⁷ Id. at 3.

²⁰⁸ Id. at 4.

cannot show causation and redressability, the second and third prongs of the standing inquiry.²⁰⁹

Third, NFS claims that Ms. Tipton's Request for Hearing is outside the scope of the proceeding.²¹⁰ This is because her petition amounts to a challenge to the NRC's enforcement of its regulations and the former "Official Use Only" policy, both of which are unrelated to the Confirmatory Order.²¹¹ Further, NFS alleges Ms. Tipton did not address the issue of whether the Confirmatory Order should be sustained, and to the extent that she implies that the Order should be more stringent, her allegations are outside the scope of the proceeding.²¹²

Fourth, NFS argues that Ms. Tipton has not proffered an admissible contention.²¹³ NFS states that Ms. Tipton has not met the requirements of 10 C.F.R. § 2.309(f)(1) because her contentions are not within the scope of the proceeding and are not supported with facts, expert opinions, documents, or any other factual basis.²¹⁴ Accordingly, NFS requests that the Board deny Ms. Tipton's hearing request.²¹⁵

²⁰⁹ Id. at 3-5.

²¹⁰ Id. at 5.

²¹¹ Id. at 5-6.

²¹² Id. at 5-10.

²¹³ Id. at 10.

²¹⁴ Id. at 10-16.

²¹⁵ Id. at 17.

4. Board Ruling on Hearing Request of A. Christine Tipton

Ms. Tipton's hearing request must be denied. Even though Ms. Tipton's hearing request was seven days late, which alone would be enough to deny her request,²¹⁶ the Board also finds that Ms. Tipton's hearing request cannot be admitted on its merits. As is the case with the other Petitioners discussed above, she has not demonstrated standing and has not raised an admissible contention.

As was noted in Parts II.C and II.D above, the issue of standing in an enforcement proceeding is closely related to the issue of whether a hearing request raises allegations that are within the scope of the proceeding.²¹⁷ The individual is required to show that his or her request is within the scope of the proceeding by demonstrating that he or she will be adversely affected by the enforcement order as it exists, as opposed to how asserted adverse effects arise because the order does not contain revised or additional provisions that the petitioner considers necessary.²¹⁸ If the individual fails to make this showing, the hearing request will be denied for failure to meet the requirements of 10 C.F.R. § 2.309(a), (d), and (f).²¹⁹

As both NFS and the Staff correctly point out, Ms. Tipton's hearing request fails to address how she will be adversely affected by the Confirmatory Order. Instead, Ms. Tipton expresses generalized concerns about the "Official Use Only" policy and her ability to find out about and prepare for future safety and health hazards as well as NFS's ability to conform to the

²¹⁶ See 10 C.F.R. § 2.309(c).

²¹⁷ Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 405.

²¹⁸ Id. at 406.

²¹⁹ See 10 C.F.R. § 2.309(a) ("[T]he . . . Board designated to rule on the request for hearing and/or petition for leave to intervene will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section.").

terms of the Confirmatory Order.²²⁰ Although Ms. Tipton's concerns have some relationship to the Confirmatory Order in the sense that they address some of the circumstances in which the Confirmatory Order was issued, they nonetheless are not relevant to the issue in this proceeding – whether she is worse off with the Confirmatory Order in place. Further, to the extent Ms. Tipton's concerns regarding NFS's ability to conform to the Confirmatory Order imply that further enforcement measures should be taken, this is outside the scope of the proceeding.²²¹ It is well established that "Boards are not to consider whether [enforcement] orders need strengthening."²²² Therefore, Ms. Tipton has not demonstrated that her hearing request is within the scope of this proceeding, and thus has not established the requisite standing to be admitted as a party to a hearing before this Board.

Furthermore, Ms. Tipton's proximity to the NFS facility is insufficient to fulfill the standing requirement in this case. Although the Board has used a proximity presumption when resolving issues of standing for cases involving reactor licensing,²²³ in a case involving an enforcement order, such as this one, the standing requirement is based on the Confirmatory Order and the petitioner's showing that he or she will be adversely affected by the Confirmatory Order.²²⁴ Therefore, something more than distance from the facility is necessary to establish standing, i.e., a link between the Confirmatory Order and the alleged harm to the individual.²²⁵ As

²²⁰ See supra Part III.D.1.

²²¹ Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 404.

²²² Id.

²²³ Sequoyah Fuels Corp. & General Atomics, CLI-94-12, 40 NRC at 75 n.22.

²²⁴ Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 406.

²²⁵ Id. (determining that the injury must be "attributable to the Confirmatory Order" to establish standing) (emphasis in original)).

discussed above, Ms. Tipton has not made the requisite connection between the Confirmatory Order and any alleged harm she will suffer.

Even assuming that Ms. Tipton had been able to demonstrate standing, however, her Request for Hearing must also fail because she has not raised an admissible contention. Under 10 C.F.R. § 2.309(f)(1), all six factors for contention admissibility must be met for the Board to admit a contention.²²⁶ As noted above, Title 10 of the Code of Federal Regulations, Section 2.309(f)(1)(iii) requires the Petitioner to “[d]emonstrate that the issue raised in the contention is within the scope of the proceeding.”²²⁷ Ms. Tipton does not meet this third contention admissibility factor because her claims, which in essence touch only on the circumstances in which the order was issued – rather than on the order itself – are outside the scope of this proceeding. Having thus failed to meet the required showing under the third contention admissibility factor, Ms. Tipton cannot meet all six contention admissibility requirements so as to have her contentions admitted.

Ms. Tipton has not demonstrated that she has standing or raised an admissible contention as is required for a hearing under 10 C.F.R. § 2.309(a). Ms. Tipton’s Request for Hearing therefore must be denied.

III. E. Specific Request for Hearing – Barbara A. O’Neal

1. Hearing Request of Barbara A. O’Neal

In her Request for Hearing Barbara A. O’Neal declares that she is a resident of Erwin, Tennessee.²²⁸ Ms. O’Neal further represents that she lives less than half a mile from the NFS

²²⁶ 10 C.F.R. § 2.309(a), (f)(1).

²²⁷ 10 C.F.R. § 2.309(f)(1)(iii).

²²⁸ Hearing Request of Barbara A. O’Neal (Aug. 27, 2007) at 1 [hereinafter O’Neal Request].

facility.²²⁹ Ms. O’Neal argues that she has standing based on her proximity to the facility and that she is adversely affected by the Confirmatory Order in the following ways: (1) the secrecy of the March 6, 2006 uranyl nitrate spill caused a loss of taxpayer dollars and loss of the public trust; (2) the public is not sufficiently informed about the safety of the air and water because the Agency for Toxic Substances and Disease Registry could not conduct a full assessment of the community without knowledge of the spill; (3) NFS is not sufficiently protected from terrorist attacks; (4) NFS has not established a plan for public safety or evacuation in the event of an accident; (5) the secrecy of the March 6, 2006 spill prevented Ms. O’Neal from making an informed personal decision regarding her health and whether to remain near the NFS facility; and (6) NFS’s history of accidents and violations makes it psychologically stressful to live near the facility.²³⁰ In addition, Ms. O’Neal questions the Staff’s determination that with the Confirmatory Order, “the public health and safety are reasonably assured,”²³¹ requesting that the NRC release aerial photographs of her home, and demanding that the NRC “tell [her], with particularity, how [she] was or could have been harmed by this March 6, 2006 spill, or any other violations, and how it is going to insure [her] safety in the future.”²³²

2. NRC Answer to Hearing Request of Barbara A. O’Neal

The Staff filed its Answer to the hearing request of Barbara A. O’Neal on September 19, 2007.²³³ The Staff requests that the Board deny Ms. O’Neal’s hearing request because Ms. O’Neal “fails to demonstrate that she will be adversely affected by the Confirmatory Order and,

²²⁹ Id.

²³⁰ Id. at 1-3.

²³¹ Id. at 2 (emphasis omitted).

²³² Id. at 3 (emphasis omitted).

²³³ NRC Staff’s Response to Hearing Request of Barbara A. O’Neal (Sept. 19, 2007) at 9 [hereinafter Staff Answer – O’Neal].

for that reason, is unable to establish that she has either standing to participate in a hearing or is able to proffer an admissible contention.”²³⁴

On the issue of standing, the NRC Staff states, “[Ms. O’Neal]’s geographic proximity to the Licensee’s facility and her alleged injury from the Licensee’s activities are not sufficient to establish standing in this type of proceeding.”²³⁵ This is because, the Staff explains, in an enforcement proceeding the injury must derive from the Confirmatory Order, so that proximity alone is not enough to establish standing.²³⁶ Arguing that Ms. O’Neal does not show she will be injured by the steps taken in the Confirmatory Order that are designed to improve the safety culture at NFS, the Staff concludes that Ms. O’Neal has not established standing.²³⁷

The Staff further argues that all of Ms. O’Neal’s concerns – the “Official Use Only” policy, the impact of the March 6, 2006 spill, and the treatment of future health and safety issues at NFS – are outside the scope of the proceeding because they did not address the narrow issue of whether the order should be sustained.²³⁸ The “additional safety measures that she wants

²³⁴ Id. at 2. The Staff, along with NFS, also urged the Board to deny Ms. O’Neal’s hearing request because, having been submitted seven days after the deadline set by the hearing notice without a request for an extension of time, it was untimely. Id. at 2, 5-6; Licensee’s Answer to Request for a Hearing of Barbara A. O’Neal (Sept. 19, 2007) at 2-3 [hereinafter NFS Answer – O’Neal]. In an October 5, 2007 Order, the Board determined that Ms. O’Neal’s hearing request was timely filed. See Licensing Board Order (Determining that O’Neal Request for Hearing Was Timely Filed) at 1-2 (Oct. 5, 2007) (unpublished). Because this issue has already been decided relative to Ms. O’Neal, the Board need focus here only on the parties’ standing and contention admissibility arguments.

²³⁵ Staff Answer - O’Neal at 7.

²³⁶ Id.

²³⁷ Id.

²³⁸ Id. at 7-8.

NFS to implement,”²³⁹ the Staff declares, are also outside the scope of the proceeding.²⁴⁰

Having not established standing or raised an admissible contention within the scope of the proceeding, the NRC Staff urges that Ms. O’Neal’s hearing request be denied.²⁴¹

3. NFS Answer to Hearing Request of Barbara A. O’Neal

NFS filed its Answer to the hearing request of Barbara A. O’Neal on September 19, 2007.²⁴² In its Answer, NFS urges the Board to deny Ms. O’Neal’s hearing request because she “has not demonstrated standing, raises issues entirely beyond the scope of the Confirmatory Order and has identified no admissible contentions.”²⁴³

NFS argues that Ms. O’Neal has not established that she has standing because she has not alleged an injury-in-fact caused by the Confirmatory Order.²⁴⁴ NFS explains that Ms. O’Neal’s reliance on her proximity to the NFS facility is insufficient to confer standing in proceedings other than those involving reactors, and that the harms she alleges are not caused by the Confirmatory Order.²⁴⁵ NFS further states that because Ms. O’Neal’s allegations are unrelated to the Confirmatory Order, they are not redressable in this proceeding involving the

²³⁹ Id. at 8.

²⁴⁰ Id.

²⁴¹ Id. at 9.

²⁴² NFS Answer – O’Neal at 18.

²⁴³ Id. at 1. As discussed above in Part III.E.2, supra note 234, NFS also argued that Ms. O’Neal’s hearing request should be dismissed because it was not timely, but the Board has already decided that issue, ruling that the O’Neal request was timely filed.

²⁴⁴ NFS Answer – O’Neal at 4.

²⁴⁵ Id. at 4-5.

issue of whether the Order should be sustained.²⁴⁶ NFS thus argues Ms. O'Neal has not established standing so that her Request for Hearing should be denied.²⁴⁷

Reiterating its claim that Ms. O'Neal does not address whether the Confirmatory Order should be sustained, NFS argues that Ms. O'Neal's hearing request is outside the scope of the proceeding and must be denied on that basis.²⁴⁸ NFS also makes the related claim that since she has not shown that her Request for Hearing is within the scope of the proceeding, she is unable to meet the contention admissibility requirements of 10.C.F.R. § 2.309(f)(1)(iii).²⁴⁹ Further, NFS states that Ms. O'Neal cannot meet any of the other five contention admissibility requirements under 10 C.F.R. § 2.309(f)(1) because she has not provided support for her contentions with facts, expert opinions, documents, or any other factual basis,²⁵⁰ or shown that her contentions are "material to the findings that the NRC must make."²⁵¹ Accordingly, NFS requests that the Board deny Ms. O'Neal's hearing request.²⁵²

4. Reply of Barbara A. O'Neal

On October 12, 2007, Ms. O'Neal filed a Reply to the Staff and NFS Answers to her Request for Hearing.²⁵³ In her Reply, Ms. O'Neal reasserts that she has standing based on her

²⁴⁶ Id. at 5.

²⁴⁷ Id. at 3, 5.

²⁴⁸ Id. at 5-10.

²⁴⁹ Id. at 10-11.

²⁵⁰ Id. at 12-17.

²⁵¹ Id. at 11.

²⁵² Id. at 18.

²⁵³ Petitioner Barbara A. O'Neal's Additional Response to Request for a Public Hearing (Oct. 12, 2007) at 1 [hereinafter O'Neal Reply]. Ms. O'Neal requested an extension of time to file her reply on September 28, 2007. See Petitioner Barbara A. O'Neal's Response to NRC

proximity to the NFS facility and because her “interest is adversely affected.”²⁵⁴ Ms. O’Neal’s concerns are summarized below:

1. The Confirmatory Order was not released to the public after it was issued on February 21, 2007 due to the “Official Use Only” policy, so she and the public were denied due process because they were not aware of a right to request a hearing at that time.²⁵⁵
2. NFS has had a number of safety violations over the years and the NRC has not effectively regulated NFS to ensure that these violations will not continue to occur.²⁵⁶
3. The non-public (under the “Official Use Only” policy) license amendments that NFS received from September 13, 2004, through March 1, 2007, violated the public’s due process rights because they were unable to determine whether these amendments “pose a threat to [their] health, safety, and environment.”²⁵⁷ Additionally, these amendments may require that environmental impact studies be performed.²⁵⁸
4. She and the public do not have a full understanding of the environmental impact of the BLEU facility because an EIS was never performed when the NRC granted NFS a license amendment for the BLEU facility.²⁵⁹
5. The public’s rights were violated when the NRC and NFS engaged in alternative dispute resolution for the Confirmatory Order because they “had no place at the table and no input.”²⁶⁰

Staff Response to Hearing Request (Sept. 28, 2007) at 1. In the same October 5, 2007 Order in which the Board determined that Ms. O’Neal’s Request for Hearing was timely filed, the Board extended Ms. O’Neal’s deadline for filing her reply to October 15, 2007. See supra note 234. Ms. O’Neal’s October 12, 2007 Reply was timely filed because it was within the deadline set by the Board.

²⁵⁴ O’Neal Reply at 2.

²⁵⁵ Id.

²⁵⁶ Id. at 2-6.

²⁵⁷ Id. at 7.

²⁵⁸ Id.

²⁵⁹ Id. at 2, 7.

²⁶⁰ Id. at 2.

Ms. O'Neal further requests that (1) NFS inform the public of the composition of NFS's proposed "Safety Culture Board of Advisers" and allow the public to "meet with them periodically";²⁶¹ (2) the NRC vacate the Confirmatory Order;²⁶² and (3) the NRC "go back and address the Special Nuclear Material License 124 to determine whether it is adequate to protect the public's welfare."²⁶³ The NRC should also perform "a full Environmental Impact Study (EIS)" and include a review of "Studsvik, Inc. co-located with NFS on NFS property" to determine the "cumulative impact . . . on the air (especially), as well as the soil, surface and ground water, and vegetation."²⁶⁴

5. Board Ruling on Hearing Request of Barbara A. O'Neal

Ms. O'Neal's Request for Hearing is denied because she has not demonstrated that she has standing and has not raised any admissible contentions.

As discussed in Parts II.C and II.D above, the issue of standing in an enforcement proceeding and the issue of whether a request for hearing raises allegations that are within the scope of the proceeding are closely related.²⁶⁵ The individual is required to show that his or her request is within the scope of the proceeding by demonstrating that he or she will be adversely affected by the existing terms of the enforcement order, with any purported "adverse" effects arising by reason of the order's failure to include revised or additional provisions sought by a petitioner deemed irrelevant for this purpose.²⁶⁶ If the individual fails to make a showing

²⁶¹ Id. at 5.

²⁶² Id. at 7.

²⁶³ Id.

²⁶⁴ Id. (emphasis omitted).

²⁶⁵ Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 405.

²⁶⁶ Id. at 406.

regarding such adverse effects, the hearing request will be denied for failure to meet the requirements of 10 C.F.R. § 2.309(a), (d), and (f).²⁶⁷

NFS and the Staff correctly point out that Ms. O'Neal has not addressed how she will be adversely affected by the Confirmatory Order. Even though Ms. O'Neal claims in both her Request for Hearing and her Reply that she is adversely affected by the Confirmatory Order,²⁶⁸ she does not show that she will be worse off with the Confirmatory Order in place, which, as the Bellotti and Alaska Department of Transportation & Public Facilities cases instruct, is the fundamental issue when determining standing and contention admissibility in a proceeding involving an enforcement order.²⁶⁹ Instead, Ms. O'Neal's claims amount to unrelated challenges to the NRC's "Official Use Only" policy and its regulatory policy with regard to NFS, assertions that greater enforcement measures are required to be taken against NFS, and an attempt to re-litigate twenty-eight prior amendments to the NFS license, including the licensing of the BLEU project that was subject to another Atomic Safety and Licensing Board proceeding.²⁷⁰ These claims refer to matters that go far beyond the issue of whether the Confirmatory Order should be sustained and, therefore, are outside the scope of this proceeding.

²⁶⁷ See 10 C.F.R. § 2.309(a) ("[T]he . . . Board designated to rule on the request for hearing and/or petition for leave to intervene will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section.").

²⁶⁸ See O'Neal Request at 1-2; O'Neal Reply at 2.

²⁶⁹ Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 405 (citing Bellotti v. NRC, 725 F.2d at 1381).

²⁷⁰ See supra Parts III.E.1 and III.E.4; see also, e.g., Nuclear Fuel Services (Erwin, Tennessee), LBP-04-5, 59 NRC 186 (2004) (BLEU proceeding). Additionally, Ms. O'Neal's concerns regarding the prior license amendments that she raises in her Reply are not properly before this Board because they were not raised in her hearing request. A petitioner's "reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer." 69 Fed. Reg. at 2203. Given this new argument is also outside the scope of the proceeding, the Board rejects it on that basis as well.

Furthermore, Ms. O'Neal's requests in her Reply that the Confirmatory Order be vacated and the NRC perform a review of NFS's Special Material License miss the point. The scope of this proceeding is narrow so that "the pertinent time contrast is between the petitioner's position with and without the order in question – not between the disputed order and a hypothetical substitute order."²⁷¹ Her requests invoke a hypothetical order or additional enforcement action that would, in Ms. O'Neal's eyes, improve public health and safety. She does not suggest in her pleadings that the enforcement action that the NRC took against NFS in the Confirmatory Order would diminish the public health and safety, only that it was not enough. The Board does not have the authority under NRC regulations or the terms of the July 30, 2007 Confirmatory Order that established the scope of this proceeding to grant a hearing based on these allegations or requests.

Moreover, Ms. O'Neal's argument that she has standing because she lives "less than a half-mile from NFS"²⁷² is insufficient to meet the standing requirement in this case. Although the Board has used a proximity presumption when resolving issues of standing for cases involving reactor licensing,²⁷³ in a case involving an enforcement order, such as this one, the standing requirement is based on the Confirmatory Order itself, and the petitioner must show that he or she will be adversely affected by the Confirmatory Order.²⁷⁴ Therefore, something more than distance from the facility, i.e., a link between the Confirmatory Order and the alleged harm to the individual, is necessary to establish standing.²⁷⁵ As described above, Ms. O'Neal has not made

²⁷¹ Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 406.

²⁷² O'Neal Reply at 2.

²⁷³ Sequoyah Fuels Corp. & General Atomics, CLI-94-12, 40 NRC at 75 n.22.

²⁷⁴ Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 406.

²⁷⁵ Id. (determining that the injury must be "attributable to the Confirmatory Order" to establish standing) (emphasis in original)).

the appropriate connection between the Confirmatory Order and any alleged harm she will suffer.

Finally, even assuming Ms. O'Neal were able to demonstrate standing, her Request for Hearing fails because she has not set forth an admissible contention. Under 10 C.F.R. § 2.309(f)(1), all six factors for contention admissibility must be met before the Board can admit a contention.²⁷⁶ Title 10 of the Code of Federal Regulations, Section 2.309(f)(1)(iii) requires that the Petitioner "[d]emonstrate that the issue raised in the contention is within the scope of the proceeding."²⁷⁷ Ms. O'Neal does not meet this third contention admissibility factor because her claims, as discussed above, are outside the scope of this proceeding. And, because Ms. O'Neal does not meet the required showing under the third contention admissibility factor, she cannot meet all six contention admissibility requirements so as to have her contentions admitted.

Ms. O'Neal has not demonstrated that she has standing or raised an admissible contention as required for a hearing under 10 C.F.R. § 2.309(a). Ms. O'Neal's Request for Hearing therefore must be denied.

²⁷⁶ 10 C.F.R. § 2.309(a), (f)(1).

²⁷⁷ 10 C.F.R. § 2.309(f)(1)(iii).

III. F. Specific Request for Hearing – Wanda Sue Kelley

1. Hearing Request of Wanda Sue Kelley

Wanda Sue Kelley is a resident of Erwin, Tennessee.²⁷⁸ She represents that she lives three miles from the NFS facility.²⁷⁹ Ms. Kelley argues that (1) the public was denied due process as required under AEA section 189 when the Confirmatory Order was not released to the public on February 21, 2007 because the public's "rightful place at the table was denied"; (2) the secrecy of the Confirmatory Order prevented the Agency for Toxic Substances and Disease Registry from performing "its job thoroughly during a . . . health assessment" that followed the March 6, 2006 spill; (3) the news coverage of this proceeding increases the risk that NFS will be the target of a terrorist attack; and (4) the "NRC is failing in its 'mission'" in its regulation of NFS, considering NFS's repeated violations "with little or no consequences from the NRC."²⁸⁰ She "request[s] that the NRC hold a meeting (hearing) in this area to explain to the public why the serious spill of highly enriched uranium in March 2006 was kept secret from the local community and why it was classified,"²⁸¹ and explain "what the Commission is doing about it now, and what the Commission intends to do about it in the future."²⁸² She concludes, "[t]he bottom line is that I am afraid for my health and safety and the health and safety of my family and friends and everyone living remotely close to this city including the animals."²⁸³

²⁷⁸ Hearing Request of Wanda Sue Kelley (Aug. 27, 2007) at 1 [hereinafter Kelley Request].

²⁷⁹ Id.

²⁸⁰ Id. at 1-2.

²⁸¹ Id. at 1.

²⁸² Id. at 2.

²⁸³ Id.

2. NRC Answer to Hearing Request of Wanda Sue Kelley

The Staff filed its Answer to the hearing request of Ms. Kelley on September 21, 2007.²⁸⁴

The Staff requests that the Board deny Ms. Kelley's hearing request because she "fails to demonstrate she will be adversely affected by the Confirmatory Order and, for that reason, is unable to establish she has either standing to participate in a hearing or any admissible contention."²⁸⁵

The Staff argues that Ms. Kelley has not established that she has standing and has not raised an admissible contention because her request is devoid of any claim that she would be adversely affected by the Confirmatory Order.²⁸⁶ According to the Staff, "the Petitioner is seeking a hearing primarily to obtain additional information about chemical spills at the Licensee's facility and the NRC's responses to those incidents."²⁸⁷ Further, characterizing Ms. Kelley's Request for Hearing, the Staff states that "the Petitioner seems to be advocating that the Commission hold something more in the style of a public legislative hearing involving NRC policy issues than an adjudicatory hearing focused on any perceived harm to the Petitioner resulting from the Confirmatory Order."²⁸⁸ Because her Request for Hearing does not address how she is adversely affected by the Confirmatory Order, the Staff asserts that her request is outside the scope of the proceeding and, therefore, she does not have standing (despite her

²⁸⁴ NRC Staff's Response to Hearing Request of Wanda Sue Kelley (Sept. 21, 2007) at 7 [hereinafter Staff Answer – Kelley].

²⁸⁵ Id. at 2.

²⁸⁶ Id. at 6.

²⁸⁷ Id.

²⁸⁸ Id.

proximity to the NFS facility) and has not raised an admissible contention.²⁸⁹ Accordingly, the Staff urges the Board to deny Ms. Kelley's Request for Hearing.²⁹⁰

3. NFS Answer to Hearing Request of Wanda Sue Kelley

NFS filed its Answer to Ms. Kelley's Request for Hearing on September 19, 2007.²⁹¹ In that Answer NFS likewise asks that the Board deny Ms. Kelley's hearing request on the grounds that "Ms. Kelley has not demonstrated standing, raises issues entirely beyond the scope of the Confirmatory Order and has identified no admissible contentions."²⁹²

Initially, NFS argues that Ms. Kelley lacks standing because she has not alleged an injury-in-fact caused by the Confirmatory Order.²⁹³ According to NFS, Ms. Kelley's allegations are "remote and speculative hypotheses" that are unrelated to the Confirmatory Order, and are insufficient to show a cognizable injury-in-fact.²⁹⁴ Furthermore, NFS argues that "[b]ecause the alleged injuries also do not relate to the Confirmatory Order, they cannot be redressed by the Confirmatory Order."²⁹⁵ NFS thus declares that, having failed to demonstrate her standing, Ms. Kelley's hearing request should be denied.²⁹⁶

²⁸⁹ Id.

²⁹⁰ Id. at 7.

²⁹¹ Licensee's Answer to Request for a Hearing of Wanda Sue Kelley (Sept. 19, 2007) at 16 [hereinafter NFS Answer – Kelley].

²⁹² Id. at 1.

²⁹³ Id. at 2-3.

²⁹⁴ Id. at 4.

²⁹⁵ Id.

²⁹⁶ Id.

NFS next argues that Ms. Kelley's hearing request is outside the scope of the proceeding.²⁹⁷ NFS explains that the Federal Register Notice defined the scope of the proceeding as "whether this Confirmatory Order should be sustained."²⁹⁸ NFS again notes that Ms. Kelley's hearing request is unrelated to the Confirmatory Order and also points out that her petition does not otherwise address whether the Confirmatory Order should be sustained.²⁹⁹ NFS asserts that Ms. Kelley's hearing request can be denied on this basis as well.³⁰⁰

Finally, NFS asserts that Ms. Kelley has not proffered an admissible contention.³⁰¹ Since she has not shown that her Request for Hearing is within the scope of the proceeding, NFS maintains she is unable to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(iii).³⁰² Additionally, NFS argues she cannot meet any of the other five requirements under 10 C.F.R. § 2.309(f)(1) because she has not provided factual support for her contentions³⁰³ or shown that her contentions are "material to the findings that the NRC must make."³⁰⁴ This failure to proffer an admissible contention is, NFS maintains, further grounds for denying Ms. Kelley's hearing request.³⁰⁵

²⁹⁷ Id. at 4.

²⁹⁸ Id. (quoting 72 Fed. Reg. at 41,531).

²⁹⁹ Id. at 4-9.

³⁰⁰ Id. at 5.

³⁰¹ Id. at 9.

³⁰² Id. at 9-10.

³⁰³ Id. at 9-16.

³⁰⁴ Id. at 9-10.

³⁰⁵ Id. at 16.

4. Replies of Wanda Sue Kelley

Ms. Kelley filed a timely Reply to NFS's Answer to her hearing request on September 28, 2007,³⁰⁶ and a timely Reply to the Staff's Answer to her hearing request on October 24, 2007.³⁰⁷

a. Reply of Wanda Sue Kelley to NFS Answer

In her Reply to the NFS Answer, Ms. Kelley asserts that she has standing under AEA section 189 in that twenty-eight prior proceedings to amend the Part 70 license for the NFS facility occurred under the "Official Use Only" policy of which she was not aware, each of which affected her interests.³⁰⁸ In addition, Ms. Kelley argues that because the public was not informed of these amendments, she has standing given that the public's due process rights were violated by not being able to participate in a hearing regarding these amendments.³⁰⁹

Ms. Kelley also alleges that she has suffered an injury sufficient to afford her standing because information about the March 6, 2006 spill was not released to the public when it occurred, and she remains unaware of "the extent, effect, harm or damages possibly incurred by th[is] accident."³¹⁰ She further declares that the concerns she raises in her hearing request

³⁰⁶ Reply to Licensee's Answer of Wanda Sue Kelley (Sept. 28, 2007) at 1 [hereinafter Kelley Reply to NFS].

³⁰⁷ Petitioner Wanda Sue Kelley's Reply to NRC Staff's Response to Hearing Request (Oct. 24, 2007) at 1 [hereinafter Kelley Reply to Staff]. In a letter dated October 5, 2007, Ms. Kelley requested an extension of time to reply to the Staff's Answer. Kelley Request for Extension of Time at 1 (Oct. 5, 2007). In an October 15, 2007 Order, the Board granted Ms. Kelley an extension of time to file her reply on or before October 24, 2007. Licensing Board Order (Granting in Part Motion for Extension of Time to File Reply) at 2 (Oct. 15, 2007) (unpublished). Ms. Kelley's reply was timely because it was filed by the deadline set by the Board.

³⁰⁸ Kelley Reply to NFS at 2-3.

³⁰⁹ Id. at 2.

³¹⁰ Id. at 1-2.

regarding the health of those who reside near the NFS facility stem from data she has reviewed regarding increased cancer rates among those who live in the area.³¹¹ Nor did NRC and NFS address her concerns sufficiently at the two September 17, 2007 meetings the NRC held in Erwin, Tennessee to discuss the public's concerns, which Ms. Kelley describes as "self-serving to NFS and NRC and not the public."³¹²

In addition, Ms. Kelley questions whether the Confirmatory Order is sufficient to address NFS's safety practices given the history of violations at NFS.³¹³ She states that "[she has] absolutely no idea whether the Confirmatory Order improves the licensee's health and safety conditions or if they can even – if ever – be improved."³¹⁴ She also wants the NRC to explain whether an Environmental Impact Statement will be done "to check . . . air quality, water and the environment after th[e] accident of March 6, 2006."³¹⁵ And in order for her to obtain this relief, Ms. Kelley maintains that the Board must hold a public hearing on the Confirmatory Order.³¹⁶

³¹¹ Id. at 3.

³¹² Id. at 4.

³¹³ Id. at 5.

³¹⁴ Id.

³¹⁵ Id.

³¹⁶ Id. at 1.

b. Reply of Wanda Sue Kelley to NRC Staff Answer

For the most part, in her Reply to the Staff's Answer to her hearing request, Ms. Kelley reiterates her Reply to the NFS Answer.³¹⁷ As in her Reply to NFS, she alleges that she has standing by reason of (1) the harm she suffered due to her inability to request a hearing for over a year on the originally non-public Confirmatory Order; (2) the "Official Use Only" policy that "kept [her] in the dark"; and (3) the "government's repeated failure to protect [her] from this hazardous company."³¹⁸ She reasserts that she and the public were denied due process under the AEA and the U.S. Constitution when NFS was granted twenty-eight amendments to its license without public knowledge of those revisions.³¹⁹ In addition, Ms. Kelley alleges she was "harmed by the Confirmatory Order because it was negotiated behind closed doors [without] the involvement of any elected officials who represent [her]."³²⁰

And just as she does in her Reply to NFS's Answer, she again questions the adequacy of the Confirmatory Order given the history of safety issues at NFS and criticizes the NRC's handling of these safety issues.³²¹ Ms. Kelley states that "[she] continue[s] to be harmed by the Confirmatory Order because it let NFS continue to operate in an unsafe manner. . . . As a result, this poses a serious harm to [her] health caused by worrying about what the NRC will let happen next at NFS."³²² She elaborates further, stating that "[t]his is not an issue of the Confirmatory Order being an insufficient enforcement action. But instead, it's a matter of the

³¹⁷ See generally Kelley Reply to Staff at 2-10.

³¹⁸ Id. at 2.

³¹⁹ Id. at 3.

³²⁰ Id. at 4.

³²¹ See generally id. at 2-10.

³²² Id. at 4.

NRC failing to really study [NFS history] before it agreed to the [Confirmatory Order].”³²³

Accordingly, Ms. Kelley requests that the Confirmatory Order “be vacated and the NRC return and address the SNM License 124 with a comprehensive Environmental Impact Statement to determine if it is adequate to protect the public’s health and welfare,”³²⁴ including a consideration of the impacts “of a terrorist attack on NFS, Studsvik[,] or [the] CSX [railroad].”³²⁵

5. Board Ruling on Hearing Request of Wanda Sue Kelley

Ms. Kelley’s Request for Hearing must be denied because she has not demonstrated that she has standing and has not raised an admissible contention. As discussed in Parts II.C and II.D above, the issue of standing in an enforcement proceeding is closely intertwined with the issue of whether a request for hearing raises allegations that are within the scope of the proceeding.³²⁶ In an enforcement proceeding, the individual is required to show that his or her request is within the scope of the proceeding by demonstrating that he or she will be adversely affected by the enforcement order as it exists, without regard to any assertions of harm by the petitioner associated with the agency’s failure to adopt additional provisions that the petitioner contends should be imposed.³²⁷ If the individual fails to make such a showing, the hearing request will be denied for failure to meet the requirements of 10 C.F.R. § 2.309(a), (d), and (f).³²⁸

³²³ Id. Relative to her claims about NFS history, Ms. Kelley encloses as an attachment to her Reply a time line of news coverage of the NFS facility from 1957 to 2007. See id. attach. (News Timelines – Nuclear Fuel Services (as of Oct 18, 2007)).

³²⁴ Kelley Reply to Staff at 9.

³²⁵ Id. at 7.

³²⁶ Alaska Dep’t of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 405.

³²⁷ Id. at 406.

³²⁸ See 10 C.F.R. § 2.309(a) (“[T]he . . . Board designated to rule on the request for hearing and/or petition for leave to intervene will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of

NFS and the Staff correctly point out that Ms. Kelley does not address how she will be adversely affected by the Confirmatory Order. Even though Ms. Kelley claims in both her Request for Hearing and in her Replies that she is adversely affected by the Confirmatory Order,³²⁹ she does not show that she will be worse off by reason of the Confirmatory Order's provisions (i.e., the safety measures that were instituted by the NRC will affirmatively cause her harm), which, as the Bellotti and Alaska Department of Transportation & Public Facilities cases instruct, is the fundamental issue when determining standing and contention admissibility in a proceeding involving an enforcement order.³³⁰ Instead, Ms. Kelley's claims challenge the NRC's "Official Use Only" policy and its regulatory policy with regard to NFS, request the imposition of greater enforcement measures to be taken against NFS, and attempt to re-litigate twenty-eight past amendments to the NFS license.³³¹ These claims refer to matters outside the scope of whether the Confirmatory Order should be sustained, and are therefore outside the scope of this proceeding.

By the same token, Ms. Kelley's requests in her Replies that the Confirmatory Order be vacated and the NRC perform a review of NFS's Special Material License miss the point of this proceeding. By Commission design, the scope of this proceeding is narrow so that "the pertinent time contrast is between the petitioner's position with and without the order in question

this section.").

³²⁹ See Kelley Request at 1; Kelley Reply to NFS at 2; Kelley Reply to Staff at 2.

³³⁰ Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 405 (citing Bellotti v. NRC, 725 F.2d at 1381).

³³¹ See supra Parts III.F.1 and III.F.4. Additionally, the concerns that Ms Kelley raises in her Reply regarding the prior license amendments and whether an Environmental Impact Study will be performed are not properly before this Board because they were not raised in Ms. Kelley's hearing request. A petitioner's "reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer." 69 Fed. Reg. at 2203. However, since these new arguments are also outside the scope of the proceeding, the Board addresses them on the merits.

– not between the disputed order and a hypothetical substitute order.”³³² Her requests invoke a hypothetical order or additional enforcement action that would, in Ms. Kelley’s eyes, improve public health and safety. She does not suggest in her pleadings that the enforcement action the NRC took against NFS in the Confirmatory Order would diminish the public health and safety, only that it was not enough. The Board simply does not have the authority under agency regulations or the terms of the July 30, 2007 Federal Register Notice establishing the scope of this proceeding to grant a hearing based on these allegations or requests.

By the same token, Ms. Kelley’s argument that she has standing because she lives three miles from the NFS facility is insufficient to meet the standing requirement in this case. Although the Board has used a proximity presumption when resolving issues of standing for cases involving reactor licensing,³³³ in a case such as this one involving an enforcement order, a petitioner’s standing is based on the Confirmatory Order itself, and the petitioner must show that he or she will be adversely affected by the Confirmatory Order.³³⁴ Therefore, something more than distance from the facility is necessary to establish standing, that is, a link between the Confirmatory Order and the alleged harm to the individual.³³⁵ As described above, Ms. Kelley has not made the appropriate connection between the Confirmatory Order and any alleged harm she will suffer.

Finally, even assuming Ms. Kelley were able to demonstrate standing, her Request for Hearing must fail because she has not raised an admissible contention. Under 10 C.F.R. § 2.309(f)(1), all six factors for contention admissibility must be met for the Board to admit a

³³² Alaska Dep’t of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 406.

³³³ Sequoyah Fuels Corp. & General Atomics, CLI-94-12, 40 NRC at 75 n.22.

³³⁴ Alaska Dep’t of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 406.

³³⁵ Id. (determining that the injury must be “attributable to the Confirmatory Order” to establish standing) (emphasis in original)).

contention.³³⁶ The matter of the scope of this proceeding, just as it is intertwined with the standing issue, is also intertwined with the issue of contention admissibility.³³⁷ Title 10 of the Code of Federal Regulations, Section 2.309(f)(1)(iii) requires the petitioner to “[d]emonstrate that the issue raised in the contention is within the scope of the proceeding.”³³⁸ Ms. Kelley did not meet this third contention admissibility factor because her claims, as discussed above, are outside the scope of this proceeding. And because Ms. Kelley did not meet the required showing under the third contention admissibility factor, she cannot meet all six contention admissibility requirements so as to have her contentions admitted.

Ms. Kelley has not demonstrated that she has standing or raised an admissible contention as is required for a hearing under 10 C.F.R. § 2.309(a). As such, Ms. Kelley’s Request for Hearing is denied.

IV. Conclusion

Because each of the six Petitioners’ hearing requests suffer from the same deficiencies in that each Petitioner (1) lacks standing and (2) has failed to provide an admissible contention given that the issues they each seek to raise are outside the scope of this enforcement proceeding, the Board must deny their hearing requests and terminate this proceeding.

For the foregoing reasons it is this 13th day of December 2007, ORDERED that:

³³⁶ 10 C.F.R. § 2.309(a), (f)(1).

³³⁷ See 10 C.F.R. § 2.309(f)(1)(iii).

³³⁸ Id.

1. The hearing requests of Ken Silver, the Sierra Club/We the People, Inc., R. Feher, A. Christine Tipton, Barbara A. O'Neal, and Wanda Sue Kelley regarding the February 21, 2007 Confirmatory Order issued by the NRC Staff to NFS are denied.³³⁹

2. In accordance with the provisions of 10 C.F.R. § 2.311, as it rules upon intervention petitions, any appeal to the Commission from this Memorandum and Order must be taken within ten (10) days after it is served.

³³⁹ As fully explained above, because it involved a Confirmatory Enforcement Order, under existing Commission precedent the potential scope of this proceeding, and thus the scope of any challenge to the Order, is very limited. See Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 405; Maine Yankee Atomic Power Co., CLI-04-5, 59 NRC at 57 n.16 (2004) (citing Sequoyah Fuels Corp. & General Atomics, CLI-94-12, 40 NRC at 71-72). Given the Commission's previously expressed concern about misunderstandings regarding the scope of challenges to enforcement orders such as this one, see Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 404, perhaps serious consideration should be given to revising the language of hearing notices in these cases to go beyond the somewhat euphemistic reference to the scope of the proceeding as being "whether this Confirmatory Order should be sustained." 72 Fed. Reg. at 41,531. Additional wording could be added to the notice to advise putative intervenors about the very limited opportunity for obtaining a hearing regarding such orders, as clearly articulated by the Commission in proceedings such as the Alaska Department of Transportation case. See Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC at 404 (petitioners cannot "challenge NRC Staff enforcement orders as too weak or otherwise insufficient."). This additional explanation might well result in (1) submitted petitions that are more directly focused on the applicable standard; or (2) a fully informed decision not to expend the energy in preparing and submitting a petition that almost inescapably faces dismissal. Certainly putting petitioners (particularly pro se petitioners such as are involved here) more clearly on notice about the fate that awaits petitions raising matters that are beyond the scope of what the Commission repeatedly has found to be litigable in challenging enforcement orders, while perhaps not alleviating their frustration about not being able to adjudicate the issues, nonetheless would avoid any bad feelings associated with unknowingly expending time on an effort that has no reasonable chance of success before the agency.

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THE ATOMIC SAFETY
AND LICENSING BOARD³⁴⁰

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

/RA/

Richard F. Cole
ADMINISTRATIVE JUDGE

/RA/

G. Paul Bollwerk
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 13, 2007

³⁴⁰ Copies of this Order were sent this date by Internet electronic mail transmission to: (1) counsel for NFS and (2) counsel for the NRC Staff. Copies of this Order were also sent via Federal Express, Overnight Delivery to: (1) Barbara A. O'Neal, (2) Dr. Ken Silver, (3) A. Christine Tipton, (4) R. Feher, (5) Wanda Sue Kelley, and (6) the Sierra Club.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING REQUESTS FOR HEARING) (LBP-07-16) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 70-143-CO
LB MEMORANDUM AND ORDER (DENYING REQUESTS
FOR HEARING) (LBP-07-16)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 14th day of December 2007