# UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

# BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of:

WESTINGHOUSE ELECTRIC COMPANY LLC

Docket No. 70-036-MLA

(Hematite Decommissioning Project)

# APPLICANT'S ANSWER TO PETITION TO INTERVENE

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## I. <u>INTRODUCTION</u>

Pursuant to 10 C.F.R. § 2.309(h), Westinghouse Electric Company LLC ("WEC" or "Licensee"), the licensee/applicant in the above-captioned matter, hereby answers the "Petition for Leave to Intervene" ("Petition"), dated September 3, 2009, filed by Citizens for a Clean Idaho, Inc. ("CCI").<sup>1</sup>

On May 21, 2009, WEC requested an amendment to its license for the Hematite facility in Festus, Missouri, pursuant to 10 C.F.R. § 20.2002 ("WEC Request"). If granted, the amendment would authorize WEC to dispose of decommissioning waste from the Hematite site at US Ecology Idaho ("USEI"), a Resource Conservation and Recovery Act ("RCRA") Subtitle C facility. The application also supports WEC's request for an exemption from the byproduct material and special nuclear material licensing requirements in 10 C.F.R. §§ 30.3 and 70.3, respectively. The Nuclear Regulatory Commission ("NRC") accepted the application for

<sup>&</sup>lt;sup>1</sup> Although the request for a hearing is dated September 3, 2009, the petition was not served on Westinghouse until September 30, 2009. Accordingly, September 30, 2009 was used as the date of service for purposes of calculating the deadline for WEC's response to the hearing request. 10 C.F.R. § 2.309(h)(1).

docketing on June 19, 2009. The NRC published a notice and opportunity to request a hearing on the license amendment request in the *Federal Register* on July 6, 2009. *See* 74 Fed. Reg. 31994. The NRC Staff subsequently published a new notice in the *Federal Register* extending the deadline for requesting a hearing until October 5, 2009. *See* 74 Fed. Reg. 47287 (Sept. 15, 2009).

As discussed below, the Petitioner has not satisfied the Commission's requirements to intervene in this proceeding. CCI has not demonstrated standing and has also failed to proffer at least one admissible contention. Therefore, under 10 C.F.R. § 2.309, the Petition should be denied.

### II. FACTUAL BACKGROUND

#### A. <u>Hematite Facility and Waste Materials</u>

The Westinghouse Hematite site, located near Festus, Missouri, is a former nuclear fuel fabrication facility that is currently undergoing decommissioning. The Hematite site consists of approximately 228 acres, although operations at the site were confined to the "central tract" area that spans approximately 19 acres. *See* WEC Request, Attachment 4, at 9. Throughout its history, operations at the Hematite facility included the manufacturing of uranium metal and compounds from natural and enriched uranium for use as nuclear fuel. Specifically, operations included the manufacture of fuel pellets from uranium hexafluoride (UF<sub>6</sub>) gas of various <sup>235</sup>U enrichments. *Id.* These products were manufactured for use by the federal government and government contractors and by commercial and research reactors. In 2001, fuel manufacturing operations were terminated and the facility license was amended to reflect a decommissioning status.

Historic operations at the Hematite site resulted in the generation of a large volume of process wastes contaminated with uranium of varying enrichment. *Id.* Some of the

facility process wastes were consigned to unlined burial pits, which are now being exhumed. The primary waste types expected to be encountered during excavation of the pits are trash, empty bottles, floor tile, rags, drums, bottles, glass wool, lab glassware, acid insolubles, and filters. *Id.* at 10-11. Buried chemical wastes include hydrochloric acid, hydrofluoric acid, potassium hydroxide, trichloroethene, perchloroethylene, alcohols, oils, and waste water. Based on sample data and the original burial logs, the burial pits are believed to contain only small quantities of  $^{235}$ U (*i.e.*, less than 1 kg  $^{235}$ U per burial pit). *Id.* at 13.

The candidate waste to be disposed is approximately 22,809 m<sup>3</sup> of soil and debris with low concentrations of both special nuclear material and byproduct material contaminants. WEC Request at 2. Waste shipped from the Hematite site may include the following materials:

- 1. Exhumed burial waste from the Hematite burial pits and contaminated soils and backfill material associated with the Hematite burial pits and other remediation areas at the Hematite site; and
- 2. Solids recovered from the Water Treatment System (*i.e.*, used filter media, solids in the holding tanks, etc.).

WEC Request, Attachment 4, at 13.

Based on the anticipated volume of material to be shipped, the waste shipment would consist of approximately 400 covered gondola railcars, which would be sent to USEI's rail transfer facility where the waste would be transferred indoors from the railcars into covered trucks for transport to the disposal facility's permitted burial cell in approximately 1,200 truck loads. WEC Request at 5.

B. <u>U.S. Ecology Idaho Grand View Facility</u>

The USEI facility is a Subtitle C RCRA hazardous waste disposal facility permitted by the State of Idaho. It is located approximately 10.5 miles east of Grand View, Idaho, in the Owyhee Desert. Grand View has a population of 350. The nearest residence is 1 mile southwest of the site. The most important natural site features that limit the transport of radioactive material are the low precipitation rate (7.26 inches per year) and the long vertical distance to groundwater (203-ft thick unsaturated zone below the disposal zone). WEC Request at 4.

As is usual with a Subtitle C RCRA site, a number of engineered features are present to enhance confinement of contaminants over the long-term. These include an engineered cover, liners, and leachate monitoring systems. Operations at the site also include a number of systems that minimize the potential for exposure of workers to any waste handled by the facility. *See, e.g.*, "Safety Evaluation Report Related to a Request to Revise Authority to Dispose of Contaminated Demolition Debris [at USEI] Pursuant to 10 CFR 20.2002, Haddam Neck Plant," dated April 8, 2005, at 1 (ADAMS Accession No. ML0510100200) ("Haddam Neck SER"). These include a closed facility with filtered ventilation exhaust for transfer of incoming waste material from the shipping conveyance, mechanized equipment for disposition of waste material in the cell, and an application of an asphaltic spray at the end of each day's operations. *Id.* 

Disposal is regulated by the Idaho Department of Environmental Quality ("IDEQ") under regulatory authority provided by Idaho law and regulation. Radioactive material disposal limits, radiological performance assessment and source term reporting, environmental monitoring, limitations for potential exposure to radioactive material, and closure and postclosure requirements are implemented through the RCRA permit issued to USEI.<sup>2</sup> The State of

<sup>&</sup>lt;sup>2</sup> In accordance with IDAPA 58.01.05.008 (40 C.F.R. § 264.111), the USEI Closure/Post-Closure Plan provides for closure of the facility in a manner that minimizes the need for further maintenance while controlling, minimizing, or eliminating escape of hazardous waste constituents, leachate, or contaminated rainfall to groundwater, surface water, or the atmosphere. The closure/post-closure plan includes engineered caps for disposal cells

Idaho's radioactive materials regulations and USEI's radioactive materials Waste Acceptance Criteria ("WAC") have each been developed with extensive public involvement.

The USEI site is permitted to receive non-Atomic Energy Act material or exempted radioactive material that meets site permit requirements. The facility has accepted more than 2 million tons of low-activity radioactive material since 1998, including material from commercial decommissioning projects regulated by the NRC.<sup>3</sup> Most recently, Idaho adopted a rule to clarify that an authorized RCRA Subtitle C disposal facility may accept specifically exempted special nuclear material, such as the Hematite materials at issue in this proceeding.<sup>4</sup>

## C. <u>Proposed Disposal of Hematite Materials at U.S. Ecology Idaho</u>

The NRC regulates the uses of certain radioactive materials to ensure that public health and safety and the environment are protected. The NRC's regulation at 10 C.F.R. § 20.2001 identifies the mechanisms by which a licensee may lawfully dispose of its licensed radioactive waste. The regulation lists seven different disposal paths, including 10 C.F.R. § 20.2002, a provision for "alternative disposal" authorizations. Section 20.2002 is a general provision that allows for other disposal methods, different from those already defined in the regulations, provided that doses are maintained as low as reasonable achievable ("ALARA") and within the dose limits in Part 20. The provision is available for use by licensees for wastes that

<sup>4</sup> See IDAPA 58.01.10, "Rules Regulating the Disposal of Radioactive Materials Not Regulated Under the Atomic Energy Act of 1954, as Amended."

with long-term inspection, monitoring and maintenance supported by financial assurance mechanisms and IDEQ oversight.

<sup>&</sup>lt;sup>3</sup> See, e.g., Haddam Neck SER; "Review of the Letourneau Inc. Proposal To Transfer Unstabilized KO61 Waste To US Ecology of Idaho For Treatment And Disposal," dated March 22, 2007 (ADAMS Accession No. ML070530623); "Safety Evaluation Report Related to Amendment Request to Revise Authority to Dispose of Two M2A2 Bradley Fighting Vehicles Containing Depleted Uranium Material Pursuant to 10 CFR 20.2002," dated January 20, 2006 (ADAMS Accession No. ML060310257).

<sup>5</sup> 

typically are a small fraction of the Class A limits contained in Part 61, and for which the extensive controls in Part 61 are not needed to ensure protection of public health and safety and the environment. Although these materials could be disposed of in a licensed low-level radioactive waste facility (if a licensee chose to do so), disposal at another type of facility under 10 C.F.R. § 20.2002 may provide for more disposal options and lower disposal costs, while still providing for protection of public health and safety and the environment. In practice, 10 C.F.R. § 20.2002 has been frequently used to authorize disposal of radioactive waste in hazardous or solid waste landfills that are permitted under RCRA (*e.g.*, USEI's facility).<sup>5</sup>

For a 10 C.F.R. § 20.2002 request, the NRC requires a licensee to provide the following information:

- (a) A description of the waste containing licensed material to be disposed of, including the physical and chemical properties important to risk evaluation, and the proposed manner and conditions of waste disposal; and
- (b) An analysis and evaluation of pertinent information on the nature of the environment; and
- (c) The nature and location of other potentially affected licensed and unlicensed facilities; and
- (d) Analyses and procedures to ensure that doses are maintained ALARA and within the dose limits in this part.

The NRC reviews the information contained in a § 20.2002 request from a licensee to determine if the proposed disposal will be safe. For offsite disposals, standard practice is to assess three scenarios that may potentially expose people to radiation to evaluate exposure levels and potential long term impacts: a transportation worker (*e.g.*, truck driver), a worker at the disposal facility, and a hypothetical resident at the site. The NRC typically

<sup>&</sup>lt;sup>5</sup> *See supra*, note 3 (citing examples of prior NRC approvals of radioactive material disposal at USEI).

authorizes the request if the projected radiation dose is less than "a few millirem per year,"<sup>6</sup> and the basis for the authorization is documented in a Safety Evaluation Report ("SER") and Environmental Assessment ("EA"). *See* NUREG-1757, "Consolidated Decommissioning Guidance – Decommissioning Guidance for Materials Licensees, Final Report," Vol. 1, Rev. 2, at 15-30 (2006); SECY-07-0060, "Basis And Justification For Approval Process For 10 CFR 20.2002 Authorizations And Options For Change," at 2 (March 27, 2007). For offsite disposals, in conjunction with the 10 C.F.R. § 20.2002 authorization, the NRC may also grant exemptions from its licensing requirements under established regulations (*e.g.*, 10 C.F.R. §§ 30.11, 40.14, and 70.17).

WEC's application for alternate disposal under 10 C.F.R. § 20.2002 demonstrates that the dose to members of the public is within the "few millirem" exposure standards applicable to such requests. Using multiple conservative exposure scenarios, the dose equivalent was calculated for the Maximally Exposed Individual ("MEI") at the USEI site. WEC Request at 5 - 8. In all cases the MEI receives less than 1 mrem per year, which is less than the standard in NUREG-1757. *Id.* In addition, USEI's state permit requires that the operator demonstrate that no person will receive a dose exceeding 15 millirem for 1,000 years after closure of the facility. *Id.* at 9. Using the RESRAD code, the maximum dose predicted from the Hematite material is 0.92 millirem in year 246.9 (primarily from <sup>99</sup>Tc).<sup>7</sup> WEC Request at 9; *id.*,

<sup>&</sup>lt;sup>6</sup> The NRC selected this criterion because it is a fraction of the natural radiation dose, a fraction of the annual public dose limit, and an attainable objective.

<sup>&</sup>lt;sup>7</sup> The NRC has reviewed the Grand View facility RESRAD performance modeling output and related Safety Assessments prepared by USEI that calculate potential doses to members of the public and USEI workers submitted in support of other, unrelated alternative disposal authorizations and related exemptions. WEC Request at 3; *see also* Haddam Neck 20.2002 Request SER *et al, supra*, note 3. USEI's RESRAD model reflects use of site-specific parameters to replace certain default values, enhancing the model's utility. *Id*.

Attachment 3, at 14-15. This is the only post-closure dose of significance from all the radionuclides in the Hematite waste stream. This dose is well below a few millirem and much lower than the maximum dose authorized by USEI's permit.<sup>8</sup>

In light of these projected doses, which are within NRC and IDEQ limits, the section 20.2002 request and related exemptions should be granted.

### III. <u>REGULATORY BACKGROUND</u>

### A. <u>Standing Requirements</u>

Any person who requests a hearing or seeks to intervene in a Commission proceeding must demonstrate that he or she has standing. 10 C.F.R. § 2.309(a). The Commission's regulations in 10 C.F.R. § 2.309(d)(1) provide that a request for hearing or petition to intervene must state:

- (i) The name, address and telephone number of the petitioner;
- (ii) The nature of the requestor's/petitioner's right to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

The Commission has long applied contemporaneous judicial concepts of standing to determine whether a party has a sufficient interest to intervene as a matter of right. *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998). To establish standing, there must be an "injury-in-fact" that is "fairly traceable to the challenged

<sup>&</sup>lt;sup>8</sup> In addition, the total activity concentration (sum of all nuclides and progeny) for the Hematite materials is approximately 226 pCi/g or ~8% of USEI's 3,000 pCi/g total activity concentration limit.

action" and redressible in the proceeding. Sequoyah Fuels Corp. & Gen. Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72 (1994).

The "injury-in-fact" must be either actual or threatened. *Id., citing Wilderness Soc'y v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987). The injury must also be "concrete and particularized," not "conjectural" or "hypothetical." *Sequoyah Fuels*, CLI-94-12, 40 NRC at 72. As a result, standing will be denied when the threat of injury is too speculative. *Id*.

A petitioner must also establish a causal nexus between the alleged injury and the challenged action. *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), LBP-98-27, 48 NRC 271, 276 (1998), *aff'd*, CLI-99-4, 49 NRC 185 (1999). And, a petitioner must establish redressibility — that is, that the claimed actual or threatened injury could be cured by some action of the decisionmaker. *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 14 (2001).

An organization may establish standing to intervene through representational standing (based on the standing of its members) or organizational standing (showing that its own organizational interests could be adversely affected by the proceeding). Where an organization seeks to establish "representational standing," it must show that at least one of its members may be affected by the proceeding, it must identify that member by name and address, and it must show that the member "has authorized the organization to represent him or her and to request a hearing on his or her behalf." *See, e.g., Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409 (2007). Where an organization seeks to show organizational standing, the organization must meet the same requirements of injury, causation, and redressibility as an individual. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

### B. <u>Contention Admissibility Requirements</u>

In addition to establishing standing, petitioners must proffer at least one contention that meets the admissibility standards in 10 C.F.R. § 2.309(f)(1)(i)-(vi).<sup>9</sup> A proposed contention must contain:

- (i) A specific statement of the issue of law or fact raised;
- (ii) A brief explanation of the basis for the contention;
- (iii) A demonstration that the issue is within the scope of the proceeding;
- (iv) A demonstration that the issue is material to the findings that the NRC must make regarding the action which is the subject of the proceeding;
- (v) A concise statement of the alleged facts or expert opinions supporting the contention; and
- (vi) Sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.

The purpose of these six criteria is to "focus litigation on concrete issues and result in a clearer and more focused record for decision." "Changes to Adjudicatory Process; Final Rule," 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004). 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." 69 Fed. Reg. at 2202. As a result, the contention admissibility standard is "strict by design." *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001). Failure to comply with any one of the six admissibility criteria is grounds for rejecting a proposed contention. 69 Fed. Reg. at 2221.

<sup>&</sup>lt;sup>9</sup> The seventh contention admissibility requirement — 10 C.F.R. § 2.309(f)(1)(vii) — is only applicable in proceedings arising under 10 C.F.R. § 52.103(b), and therefore has no bearing on the admissibility of the Petitioners' contentions in this proceeding.

In support of a contention, a petitioner must provide "a specific statement of the issue of law or fact to be raised or controverted." 10 C.F.R. § 2.309(f)(1)(i). Namely, an "admissible contention must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]." *Millstone*, CLI-01-24, 54 NRC at 359-60. A petitioner must also provide "a brief explanation of the basis for the contention," including "sufficient foundation" to "warrant further exploration." *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-942, 32 NRC 395, 428 (1990) (citation omitted). As the Commission has observed, "[i]t is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions and demonstrate that a genuine dispute exists within the scope of this proceeding." *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-14, 48 NRC 39, 41 (1998).

A petitioner must demonstrate "that the issue raised in the contention is within the scope of the proceeding." 10 C.F.R. § 2.309(f)(1)(iii). A contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue. Contentions that advocate stricter requirements than agency rules impose are also outside the scope of the proceeding. *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 159, *aff'd*, CLI-01-17, 54 NRC 3 (2001).

A petitioner must also demonstrate "that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding." 10 C.F.R. § 2.309(f)(1)(iv). "The dispute at issue is 'material' if its resolution would 'make a difference in the outcome of the licensing proceeding." *Oconee*, CLI-99-11, 49 NRC at 333-34. In this regard, each contention must be one that, if proven, would entitle the petitioner to relief. *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2), CLI-02-26,

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56 NRC 358, 363 n.10 (2002). Additionally, contentions alleging an error or omission in an application must establish some significant link between the claimed deficiency and protection of the health and safety of the public or the environment. *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-04-15, 60 NRC 81, 89, *aff'd*, CLI-04-36, 60 NRC 631 (2004).

A petitioner bears the burden to present the factual information or expert opinions necessary to support its contention adequately, and failure to do so requires the Board to reject the contention. *See* 10 C.F.R. § 2.309(f)(1)(v). The petitioner must explain the significance of any factual information upon which it relies. *See Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 204-05 (2003). In addition, an expert opinion that merely states a conclusion (*e.g.*, the application is deficient, inadequate, or wrong) without providing *a reasoned basis or explanation* for why the application is inadequate cannot provide a basis for the contention. *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006).

With regard to the requirement that a petitioner provide sufficient information to show a genuine dispute with the applicant on a material issue of law or fact, the Commission has stated that the petitioner must "read the pertinent portions of the license application . . . [and] state the applicant's position and the petitioner's opposing view," and explain why it disagrees with the applicant. 54 Fed. Reg. at 33,170. A contention that does not directly controvert a position taken by the applicant in the application is subject to dismissal. *See Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

#### IV. DISCUSSION

#### A. <u>Petitioner Does Not Have Standing</u>

Here, CCI submits only limited, non-specific information in support of its standing — none of which is sufficient to meet the standards for standing reflected in

longstanding NRC precedent. As discussed further below, CCI has failed to provide information regarding any of its members that would satisfy the requirements for representational standing and has likewise failed to provide sufficient information to support standing for CCI as an organization. The need to affirmatively demonstrate standing is particularly important where, as here, CCI's offices in Chester, Idaho, are more than 275 miles away (by car) from USEI's site near Grand View, Idaho.

### 1. Petitioner Has Not Established Representational Standing

According to the petition, CCI represents "concerned Idaho citizens, extensive Idaho property owners, Idaho business owners, Idaho agricultural operators, and environmental stewards of the irreplaceable lands of the State of Idaho." Pet. at 2. The petition further states that "[t]he value of their combined property, financial, health, and other interests is practically incalculable." This vague and cursory statement cannot support standing.

First, the petition does not identify any individual member that would allegedly be harmed by disposal of Hematite waste at USEI. A petitioner making factual claims regarding the circumstances that establish standing should normally do so in affidavit form that is notarized or that includes a declaration that the statements are true and are made under penalty of perjury. *See Atlas Corp.* (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 427 n.4 (1997). Without any specific information regarding a petitioner's interests (*e.g.*, home address, distance from facility at issue, property and other interests), the Licensing Board has no basis for concluding that there would be any injury to the Petitioner (or its unspecified members) from the proposed disposal at USEI. Moreover, a party may not seek to represent the interests of others without their express authorization. *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2),

CLI-89-21, 30 NRC 325, 329-30 (1989). Thus, CCI cannot represent its members in this NRC proceeding without their specific authorization and supporting information.<sup>10</sup>

Second, the petition does not provide any specific information regarding the supposed injury to CCI's members. In addressing standing in a decommissioning proceeding, to establish "injury in fact" a petitioner must show how the alleged harmful radiological, environmental, or other legally cognizable effects arising from the approval at issue will cause injury to the petitioner or, in the case of an organization relying upon representational standing, the members it represents. *Babcock & Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 149, 153 (1992). Here, CCI states only that the approval "could forever harm the property, financial, and other interests of CCI and its member Idaho citizens." Pet. at 2. And, according to CCI, such approval would establish "a new high-level benchmark in both quantity and quality of waste eligible to receive exemptions from NRC guidelines on proper nuclear waste disposal, with such approval likely leading to a significant local and national increase in future exemption requests of this type." *Id.* Neither of these alleged harms is sufficiently concrete or particularized to support standing.

CCI provides no information to suggest that it or any of its members would be harmed by disposal of the Hematite decommissioning waste at USEI. There is no information regarding members' frequency of use of or contacts with the area near USEI's facility, or any details whatsoever on how specific members might be impacted by disposal of Hematite waste at

<sup>&</sup>lt;sup>10</sup> The need to provide authorizations from individual members is especially acute for CCI. CCI is a newly-formed organization and questions have been raised publicly regarding its support and membership. *See <u>http://www.idahostatesman.com/newsupdates/story/</u><u>878543.html</u> (last accessed October 19, 2009). NRC precedent is clear that entities with purely economic interests do not have standing because a bare economic injury is outside the zone of interests of the AEA. <i>See Quivira Mining Co.* (Ambrosia Lake Facility, Grants, NM), CLI-98-11, 48 NRC 1 (1998), *aff'd sub nom Envirocare, Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999).

USEI. By not providing any specific information regarding the extent of contacts with an area, a petitioner fails to carry his burden of establishing the requisite "injury in fact." *Atlas Corp.* (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 425-26 (1997). Similarly, there is no discussion of the financial or property interests that would allegedly be adversely impacted by disposal of Hematite waste at USEI. Other than a general opposition to disposal at USEI, the Petitioner has established no direct personal interest in disposal of the Hematite wastes at USEI.

Further, to support standing, an injury must be "concrete," not "conjectural" or "hypothetical." *Sequoyah Fuels*, CLI-94-12, 40 NRC at 72. The need to demonstrate an injury is particularly important in this case given that the application shows such low doses to workers and individuals at the site.<sup>11</sup> Under such circumstances, CCI must demonstrate that there is an "obvious potential for offsite consequences" from disposal of the Hematite materials at USEI. *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995). CCI has not asserted anywhere in its Petition that disposal of Hematite materials would lead to any <u>offsite</u> consequences. CCI's purported interest in limiting NRC grants of disposal exemptions in the future, which involves speculative, hypothetical requests, is also inadequate to support standing. Similarly, CCI cannot rely on a broad interest shared with many others, such as an interest in proper application of NRC regulations or even in environmental preservation generally.<sup>12</sup> *See International Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-02-3, 55 NRC 35, 39 (2002), *citing Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). General environmental and policy interests are insufficient to confer standing.

<sup>&</sup>lt;sup>11</sup> WEC's application concludes that the maximum dose predicted by the model is 0.92 mrem in year 246. WEC Request at 9.

<sup>&</sup>lt;sup>12</sup> Likewise, mere "concern" about the "risk" of accidental releases is insufficient injury for standing. *See, e.g., Metropolitan Edison*, 460 U.S. at 766 (holding that fear of an accident is not a cognizable injury under NEPA).

International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001).

Finally, there is no discussion about how disposal of Hematite wastes at USEI would <u>cause</u> any harm to the Petitioner's members. Conclusory allegations about potential radiological harm from the facility in general are insufficient to establish standing. *White Mesa*, CLI-01-21, 54 NRC at 251. A petitioner must establish a causal nexus between the alleged injury and the challenged action. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 122 (1992). Having failed to identify an injury-in-fact to a specific member, CCI obviously cannot establish any causal link between the disposal of Hematite wastes and that unidentified harm.

## 2. Petitioner Has Not Established Organizational Standing

In order to establish organizational standing, an organization must demonstrate a discrete institutional injury to the organization itself. *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001). Here, CCI provides little information regarding impacts to its interests as an organization and no information that satisfies the injury-in-fact or causation prong of the standing inquiry. There is no information regarding CCI's organizational interests relative to USEI's facility. And, CCI does not explain how it would be harmed as an organization from disposal of Hematite waste at USEI. The absence of a concrete interest in disposal of Hematite waste at USEI is particularly glaring in light of the fact that CCI's offices in Chester, Idaho are located more than 275 miles away (by car) from USEI's site near Grand View, Idaho. The geographically distant location and unspecified harms to the organization are simply inadequate to establish a concrete injury-in-fact.<sup>13</sup>

<sup>&</sup>lt;sup>13</sup> Having failed to establish any injury, CCI has of course also failed to demonstrate causation or redressibility.

At bottom, the cursory discussion of the interests of CCI and its unspecified members is wholly insufficient to establish the requisite injury-in-fact, causation, redressibility needed to support standing. The Petitioner has failed to provide information regarding any of its members that would satisfy the requirements for representational standing and has likewise failed to provide sufficient information to support standing for CCI as an organization. Thus, CCI does not have standing in this proceeding.

#### B. Petitioner Has Not Submitted One Admissible Contention

1. <u>Contention 1</u>: Contrary to the stated conclusion in the application, the applicant conclusively demonstrates that there is a direct hydrologic connection between Castle Creek and all the underlying aquifers at Site B, which is typically the opposite conclusion one hopes to arrive at with regard to hazardous waste storage sites.

In Contention 1, CCI asserts that there is a direct hydrologic connection between

Castle Creek and the aquifers underlying Site B. Pet. at 3. CCI also argues that, under 10 C.F.R. § 20.2007, the NRC "must find applicant abides by all 'other applicable Federal, State, and local regulations governing any other toxic or hazardous properties of materials that may be disposed of under this subpart." Pet. at 3. The contention goes on to state that "[a] whole host of applicable Federal, State, and local regulations govern the interaction or potential interaction of hazardous wastes with groundwater" before contending that WEC has not adequately demonstrated its compliance with these applicable regulations. *Id.* As discussed below, this contention is inadmissible because it fails to establish a genuine dispute with the application on a material issue.

As an initial matter, the Petitioner miscomprehends the nature of 10 C.F.R. § 20.2007. That regulation does not require the NRC to find that a facility complies with all other Federal, State, and local regulations. Instead, section 20.2007 states only the noncontroversial proposition that compliance with NRC regulations does not relieve the licensee from compliance with other Federal, State, and local regulations. As discussed further below, this provision does not require the NRC to identify or determine compliance with such regulations. An "admissible contention must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]." *Millstone*, CLI-01-24, 54 NRC at 359-60. Contentions that advocate stricter requirements than agency rules impose are inadmissible as outside the scope of the proceeding, as are contentions that simply state the petitioner's views about what regulatory policy should be. *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 159, *aff'd*, CLI-01-17, 54 NRC 3 (2001). Nowhere else in the Petition does CCI point to any alleged failure to comply with the NRC's requirements. Thus, CCI has failed to provide an adequate legal basis for the contention.

Moreover, this proceeding is not an opportunity to challenge state laws and regulations, or to re-litigate the RCRA permit issued to USEI. USEI is regulated by IDEQ, and USEI's permit authorizes the disposal of certain types and concentrations of radioactive materials and imposes various requirements for engineered features, environmental monitoring, and facility closure. The NRC does not need to re-perform the reviews conducted by IDEQ or independently re-confirm the site's compliance with RCRA. The requirements of State law are for State bodies to determine, and are beyond the jurisdiction of NRC adjudicatory bodies.<sup>14</sup> *Northern States Power Company* (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 375 (1978), *citing Cleveland Electric Illuminating Co.* (Perry Nuclear Plant, Units 1 & 2), ALAB-

<sup>&</sup>lt;sup>14</sup> Absent some indication that it acted improperly, there is a presumption that IDEQ's decision-making process was adequate and that it fulfilled its statutory and regulatory duties. *See Akiak Native Cmty. v. United States Postal Serv.*, 213 F.3d 1140, 1146 (9th Cir. 2000) ("agency's decision-making process is accorded a presumption of regularity"); *see also, East 63rd Street Ass'n v. Coleman*, 414 F.Supp. 1318, 1328-1329 (S.D.N.Y. 1976) (noting the "still extant presumption of official regularity").

443, 6 NRC 741, 748 (1977). For the NRC's review, the relevant factor is the projected dose from disposal of the Hematite material. As discussed in greater detail below, CCI has not challenged any aspect of WEC's dose calculations. Thus, to the extent that CCI is challenging the adequacy of the RCRA permit, the proposed contention is outside the scope of this narrow proceeding, which is limited to an assessment of the potential dose consequences from disposal of Hematite materials under the terms of USEI's RCRA permit.

The contention also fails to demonstrate a dispute on a material issue. The petition appears to presume that disposal would be prohibited if there were any release to the environment. However, NRC regulations allow radioactive releases, within specified limits, to be discharged via various pathways, including groundwater. *See e.g.*, 10 C.F.R. §§ 20.2001 (release in effluents) and 20.2003 (release in sewer). The key is that the dose to members of the public be limited. WEC's application concludes that conservatively calculated doses to members of the public would be less than a few millirem per year and would also be much lower than the maximum dose authorized by USEI's permit. WEC Request at 9. The proposed contention does not take issue with that conclusion or otherwise challenge the basis for the dose modeling.<sup>15</sup> A contention alleging an error or omission in an application must establish some significant link between the claimed deficiency and protection of the health and safety of the public or the environment. *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-04-15, 60 NRC 81, 89, *aff'd*, CLI-04-36, 60 NRC 631 (2004). Having failed to contest the

<sup>&</sup>lt;sup>15</sup> As noted previously, the NRC has reviewed the Grand View facility RESRAD performance modeling output and related Safety Assessments prepared by USEI that calculate potential doses to members of the public and USEI workers submitted in support of other, unrelated exemption approvals. WEC Request at 3; *see also* Haddam Neck SER *et al*, *supra*, note 3. USEI's application of the RESRAD model reflects use of site-specific parameters to replace certain default values to enhance the model's utility. *Id*. None of this is challenged by CCI or its expert.

dose projections in the application, proposed Contention 1 fails to establish a genuine dispute on a material issue.

The proposed contention also fails to provide sufficient factual or expert support to establish a genuine dispute with the application. The Commission has stated that the petitioner must "read the pertinent portions of the license application . . . [and] state the applicant's position and the petitioner's opposing view," and explain why it disagrees with the applicant.<sup>16</sup> A contention that does not directly controvert a position taken by the applicant in the application is subject to dismissal. See Tex. Utils. Elec. Co. (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992). Here, the contention merely repeats information provided in the application. See Pet. at 4 (citing portions of the application that describe the alluvium and Castle Creek as "hydraulically connected" and the location of the Castle Creek relative to the site). CCI does not explain how or why it disagrees with the application. Parroting statements made in the application and asserting simply that the applicant must do "more" is insufficient to support an admissible contention. An expert opinion that merely states a conclusion (e.g., the application is deficient, inadequate, or wrong) without providing *a reasoned basis or explanation* for why the application is inadequate cannot provide a basis for the contention. USEC, CLI-06-10, 63 NRC at 472.

In addition, "[i]t is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions and demonstrate that a genuine dispute exists within the scope of this proceeding." *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-14, 48 NRC 39, 41 (1998). CCI mistakenly conflates the alluvium along Castle Creek with the "shallow aquifers" at the USEI

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<sup>54</sup> Fed. Reg. at 33,170; see also Millstone, CLI-01-24, 54 NRC at 358.

site (*i.e.*, the Lower Aquifer and the Upper Aquifer). *See* Pet. at 4, n. 3 (claiming a link "between Castle Creek and the shallow aquifers" based on a statement in the application that "[t]he alluvium and the creek are reported to be hydraulically connected."). The alluvium referenced in the application is more precisely a "local veneer of saturated alluvium" along Castle Creek and is primarily located upgradient from Site B. WEC Request, Attachment 1, at 7. A petitioner's imprecise reading of a document cannot be the basis for a litigable contention. *See Ga. Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300 (1995). Moreover, the site description attached to WEC's application indicates that the upper aquifer at the site is recharged by Castle Creek, not the converse (*i.e.*, Castle Creek is hydraulically upgradient). WEC Request, Attachment 1, at 18. CCI does not explain how, under these circumstances, the existence of a hydrologic connection would undermine the conclusion that the projected dose is within both NRC limits for section 20.2002 alternate disposal arrangements and USEI's permit limits.

At bottom, the arguments CCI raises about groundwater do not take into account, or fail to assess properly, the information in the application. CCI has therefore failed to establish a genuine dispute with the application on a material issue. Accordingly, proposed Contention 1 is inadmissible.

2. <u>Contention 2</u>: The applicant's study indicates that the local hydraulic head associated with the underlying artesian aquifer is significant and geologically impressive while simultaneously documenting through site well data that the area groundwater table is rising. In ideal storage siting, the applicant typically wants to demonstrate a very deep below ground, static and or receding groundwater table. The applicant has documented the opposite condition.

In Contention 2, CCI again focuses on the hydrologic setting of USEI's Grand View site without actually disputing the dose assessment or related conclusions in WEC's application and without making any reference to regulatory requirements. CCI simply proffers the unsupported view that an "applicant typically wants to demonstrate a very deep below ground, static and or receding groundwater table." Pet. At 4. CCI also repeats its incorrect assertions that 10 C.F.R. § 20.2007 requires the NRC to confirm compliance with all Federal, State, and local regulations. As discussed below, proposed Contention 2 is inadmissible.

An "admissible contention must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]." *Millstone*, CLI-01-24, 54 NRC at 359-60. As noted above, CCI's legal basis for the contention is flawed. Section 20.2007 does not require the NRC to find that a facility complies with all other Federal, State, and local regulations. The requirements of State law are for State bodies to determine, and are beyond the jurisdiction of NRC adjudicatory bodies. *Northern States Power*, ALAB-464, 7 NRC at 375. Instead, section 20.2007 states only that compliance with NRC regulations does not relieve the licensee from compliance with other Federal, State, and local regulations. CCI has not alleged any other failures to comply with the NRC's requirements. Thus, CCI has not articulated a legal basis for the contention.

In addition, contentions alleging an error in an application must establish some significant link between the claimed deficiency and protection of the health and safety of the public or the environment. *Millstone*, LBP-04-15, 60 NRC at 89. In proposed Contention 2, CCI again fails to demonstrate that its concerns about the site hydrology would lead to doses higher than those described in the application. CCI mischaracterizes the application by stating, without qualification, that USEI projects that water levels will reach the silos within a certain time period. Pet. at 5. In fact, the application itself indicates that, for many wells, the hydrographs show an initial steeper trend followed by a distinct flattening trend beginning in about 1993. WEC Request, Attachment 1, at 18. Regardless, CCI seems to implicitly suggest,

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without support, an unabated water level rise. But, CCI does not otherwise explain how the changing water levels would adversely impact the performance of USEI's lined disposal cells or lead to doses in excess of those projected in WEC's application.<sup>17</sup> With respect to factual information or expert opinion proffered in support of a contention, "the Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention." *Private Fuel Storage*, LBP-98-7, 47 NRC at 181. Proposed Contention 2 lacks adequate support to establish a genuine dispute.

Nor does CCI acknowledge that USEI's RCRA permit requires the changes in groundwater to be periodically re-evaluated. *Id.* The IDEQ is aware of the issue but has found no reason to believe that changing groundwater levels will undermine the performance of the disposal cell at USEI.<sup>18</sup> To meet the admissibility requirements CCI must do more than simply point to comments or questions it has based on its review of the application. As with Contention 1, CCI merely repeats statements in the application and asserts, without reference to regulatory requirements, that these circumstances are not "ideal."<sup>19</sup> A contention that does not directly controvert a position taken by the applicant in the application is subject to dismissal. *See Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992). Having failed to challenge the key conclusions in the application (*i.e.*, a projected)

<sup>&</sup>lt;sup>17</sup> The missile silos extend much deeper below the ground surface than does the excavation for the disposal cells. Thus, even if water levels were to reach the bottom of the silos, the water level would not necessarily reach the bottom of the disposal cells.

<sup>&</sup>lt;sup>18</sup> The facility's combined state and federal RCRA Part B Operating Permit (IDD073114654) was renewed for a 10-year period on November 12, 2004 by the State of Idaho.

<sup>&</sup>lt;sup>19</sup> There is no support offered by CCI for the implicit proposition in the contention that the standard the NRC should employ is one of whether the application is "ideal."

dose less than a few millirem per year), CCI has failed to establish a genuine dispute on a material issue.

Finally, to the extent the CCI is challenging the adequacy of the RCRA permit, the proposed contention is outside the scope of this narrow proceeding. It is not the NRC's responsibility to re-evaluate the adequacy of USEI's permit. Instead, the NRC's role is to assess the potential dose from disposal of Hematite materials under the terms of USEI's RCRA permit as it exists.

For these reasons, proposed Contention 2 is inadmissible.

3. <u>Contention 3</u>: The applicant's analysis largely considers the risk of downward contaminant leakage to the underlying Upper and Lower Aquifers which are connected to Castle Creek. However, given the documented groundwater rise, the more likely pathway for contaminants leaving the site is through dispersal in a saturated near-surface water table which also includes and permits significant lateral contaminant movement.

Proposed Contention 3 adds little to what is offered in proposed Contentions 1

and 2, and suffers from the same deficiencies as those contentions discussed above. The contention simply repeats statements in the application regarding the site hydrology without identifying a legal/regulatory basis for the contention or establishing a dispute with the application on a material issue.

As noted previously, the NRC's evaluation of WEC's application focuses on the projected dose from disposal of Hematite materials at USEI's site *as currently permitted by IDEQ*. The NRC is not responsible for ensuring compliance with all other Federal, State, or local laws (*e.g.*, RCRA). The decision to issue a permit to USEI in the first instance (and the appropriate conditions for that permit) lies with IDEQ. The specific hydrologic mechanisms mentioned in the petition are taken from the application and are known to IDEQ. USEI and IDEQ are actively monitoring and responding to site conditions (*e.g.*, bi-annual evaluations).

WEC Request, Attachment 1, at 18. To the extent that CCI is challenging the adequacy of USEI's RCRA permit and IDEQ's performance of its regulatory duties, the proposed contention is outside the scope of this proceeding.

Proposed Contention 3 also fails to challenge the conclusions in the application. CCI does not dispute WEC's conclusion that the projected dose would be less than a few millirem per year. CCI also does not provide any information to indicate that the water level will continue to rise, impact the lined disposal cell that will contain the Hematite waste, or otherwise adversely impact cell performance.<sup>20</sup> Nor is there any reason to conclude that the water table, even in the hypothetical event it did continue to rise and reach the disposal cell, would be able to penetrate the cell boundary comprised of compacted clays, a dual synthetic liner system, and other required design features of the disposal cell. Instead, CCI states simply that "the principal hydrologic concern with the site is that it could convert to a saturated shallow groundwater area or even surface water discharging area supported by significant upward movement of water under pressure." Pet. at 6. CCI's "concern" that the near surface could become saturated is insufficient to establish a genuine dispute.<sup>21</sup> CCI has provided no basis for such an assertion, nor has CCI demonstrated that such circumstances are physically possible given the site topography, hydrology, or geology. It is well settled that "neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention." System Energy Resources, Inc. (Early Site Permit for

As noted above, for many wells, the hydrographs show an initial steeper trend followed by a distinct flattening trend beginning in about 1993. WEC Request at 18.

<sup>&</sup>lt;sup>21</sup> CCI is arguing that WEC must have a definitive explanation for every facet of the groundwater system. However, the NRC need not have complete information on all issues raised before proceeding. *See*, *e.g.*, *Pub. Serv. Co. of Oklahoma* (Black Fox Station, Units 1 and 2), LBP-78-26, 8 NRC 102, 141 (1978).

Grand Gulf ESP Site), LBP-04-19,60 NRC 277, 289 (2004). CCI has therefore failed to establish a genuine dispute with the application on a material issue.

Similarly, to the extent that the contention is based on a concern regarding future seismic activity at the site (Pet. at 7), CCI has failed to provide any expert or factual support to show that seismic activity is likely to occur in the region, that it could cause release of the buried Hematite material from the lined disposal unit, or that it could lead to increases in calculated dose consequences that would be material to the NRC's licensing decision. As explained in the application, the USEI site is located within seismic zone 2 and therefore does not require a seismic standard demonstration under EPA regulations (40 C.F.R. Part 264 Appendix IV). *See* WEC Request, Attachment 4, at 21.<sup>22</sup> CCI does not engage this statement at all. Absent any expert or factual support to explain why seismic issues should be considered in greater detail, the Petition fails to demonstrate a genuine dispute on a material issue.

For these reasons, proposed Contention 3 fails to satisfy the Commission's strict admissibility standards.

4. <u>Contention 4</u>: The applicant's data and analysis suggests a highly unusual and dynamic relationship between surface ground pressure at Site B and the underlying aquifers such that simple excavation of trenches and stockpiling overburden on the site dramatically and rapidly alters the elevation of the underlying groundwater.

In proposed Contention 4, CCI again focuses on hydrogeologic issues without specifying a dispute with the application or demonstrating that its concerns are material to the

<sup>&</sup>lt;sup>22</sup> Attachment 4 is NSA-TR-09-14, "Nuclear Criticality Safety Assessment of the US Ecology Idaho (USEI) Site for the Land Fill Disposal of Decommissioning Waste from the Hematite Site," Revision 0 (May 2009). US Geological Survey seismic activity mapping information confirms that the USEI site is located within an area of low seismic activity. *See* <u>http://earthquake.usgs.gov/</u>.

NRC's decision on the application. As discussed below, this proposed contention is inadmissible.

As an initial matter, nowhere does the contention point to a single instance where WEC has failed to comply with the NRC's requirements. This alone is sufficient basis to reject Contention 4. Equally important is CCI's continuing failure to address the conclusions in WEC's application. This contention again merely repeats statements in the application without explaining how or why it disagrees with the conclusions therein. Regurgitating the application and asserting that the applicant must do "more" is insufficient to support an admissible contention.

As with other proposed contentions, proposed Contention 4 does not explain how the response of the site to excavation/stockpiling would undermine the conclusion that the projected dose is less than a few millirem and within USEI's permit limits. Indeed, the application states, in discussing the excavation/stockpiling of material, that "[w]ater level changes in the Lower Aquifer have not significantly affected the groundwater flow paths." WEC Request, Attachment 1, at 19. A petitioner must do more than argue that site conditions are "complicated" or dynamic (Pet. at 8) — to be admissible, a contention must directly controvert the application. Neither CCI nor its expert has provided any information that would undermine the conclusions in the application regarding site hydrology or the dose projections. The contention therefore lacks adequate expert support to establish a genuine dispute on a material issue.

Having failed to satisfy the Commission's strict admissibility standards, proposed Contention 4 is inadmissible. 5. <u>Contention 5</u>: The applicant clearly states that well log data analysis from UP-28 and U-29 indicate anomalies in expected potentiometric surfaces based on other well data onsite, and that these anomalies can be explained by upward leakage from the Lower Aquifer to the Upper Aquifer.

As with proposed Contentions 1-4, proposed Contention 5 focuses on the hydrogeologic setting at USEI. While Contention 5 accurately cites facts identified in the application concerning hydrologic conditions at the site, the Petitioner again fails to contest the conclusions therein. CCI also fails to provide a legal basis for the contention or allege a non-compliance with NRC requirements. The petition therefore fails to establish — through expert or factual support — a genuine, material dispute with WEC's conclusions in the application.

The Petition correctly cites statements in the application regarding the existence of artesian pressure in the Lower Aquifer and certain well data. Pet. at 9. However, CCI does not identify any dispute with the status of the characterization of the hydrogeologic conditions at the site. The Petition does not explain in what way WEC failed to evaluate site hydrogeologic conditions. Nor does the CCI explain why these matters must be included in the application, which is focused on the projected dose from disposal of Hematite materials, not USEI's compliance with RCRA. In short, nothing in the petition alleges that the performance of the disposal cell is inadequate with respect to the Hematite materials. Thus, CCI has failed to establish a genuine dispute with WEC's application.

In particular, this proposed contention again does not explain how the Petitioner's concerns are material to the dose calculation. WEC's application is based on the conclusion that the dose is limited to less than a few millirem per year. CCI does not explain how its postulated leakage between the aquifers would undermine WEC's dose calculations. Pet. at 9. As noted earlier, vague and conclusory assertions are insufficient to provide the facts or expert opinions required under the Commission's rules. *USEC*, CLI-06-10, 63 NRC at 472. A statement "that

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simply alleges that some matter ought to be considered" does not provide a sufficient basis for an admissible contention. *Rancho Seco*, LBP-93-23, 38 NRC at 246. Moreover, the fact that the information is included in the application confirms that the matter has not been ignored, and it is therefore the petitioner's obligation to provide some basis on which to conclude that the application is inadequate.

Additionally, the adequacy of USEI's RCRA permit is not the subject of this proceeding. It is not the NRC's role to evaluate or independently review USEI's compliance with Idaho or EPA regulations on hazardous waste disposal. Instead, the NRC evaluates the projected dose from the USEI site as it is currently permitted and regulated by IDEQ. Accordingly, to the extent that CCI is challenging the adequacy of the RCRA permit, the proposed contention is outside the scope of the proceeding.

For these reasons, Contention 5 is inadmissible.

6. <u>Contention 6</u>: Based on the applicant's acknowledgment of complex site stratigraphy, communication between the Upper, Lower, Artesian, and Castle Creek shallow alluvial aquifer, and that time trends on this data show rapidly changing conditions, discussions concerning groundwater flux and velocity can be considered no more than speculative exercises.

Like the prior proposed contentions, proposed Contention 6 revolves around the hydrogeologic conditions at USEI's Grand View site, but never challenges the specific conclusions in WEC's application. And, once again, CCI does not dispute the accuracy of the dose modeling contained in the section 20.2002 request or provide a regulatory basis for the proposed contention. Instead, CCI raises issues that are outside the scope of this proceeding and fails to establish a genuine dispute on a material issue.

First, CCI attempts to challenge the basis for the issuance of the RCRA permit to USEI in the first instance. Without citing any requirement, CCI asserts that "an appropriately sited hazardous waste disposal facility must demonstrate that future escape of contaminants from

the storage site to surrounding groundwater tables and transport off site are not scientifically plausible."<sup>23</sup> Pet. at 10. However, the NRC's role is not to second-guess IDEQ or USEI's compliance with Idaho or EPA regulations governing RCRA permits. As noted above, compliance with State law is a matter for State bodies, not the NRC. *Northern States*, ALAB-464, 7 NRC at 375. Any challenge to the adequacy of IDEQ's review or issuance of USEI's RCRA permit is outside the scope of this proceeding.

Moreover, the contention fails to demonstrate a dispute on a material issue. The petition presumes that disposal would be prohibited if there were any release to the environment. *See* Pet. at 10. However, NRC regulations allow radioactive releases, within specified limits, to be discharged via various pathways, including groundwater. *See e.g.*, 10 C.F.R. §§ 20.2001 (release in effluents) and 20.2003 (release in sewer). The key is that the dose to members of the public be limited. WEC's application concludes that the conservatively calculated dose to members of the public is less than a few millirem per year. *See* WEC Request at 9 (maximum dose predicted by the model is well below a few millirem and much lower than the maximum dose authorized by USEI's permit). The proposed contention does not take issue with that conclusion or otherwise challenge the basis for the site-specific modeling that was used to project doses.

For these reasons, the proposed Contention 6 fails to establish a genuine dispute on a material issue.

<sup>&</sup>lt;sup>23</sup> CCI does not cite any authority — NRC, EPA, or Idaho — for its statement that a hazardous waste disposal facility must be sited to ensure that offsite releases are "not scientifically plausible." Pet. at 10.

7. <u>Contention 7</u>: The applicant clearly states a significant trend in groundwater rise beneath the site that is not related to any measurable change in the contributing areas precipitation or surface distribution of water related to agriculture or water storage facilities. Therefore, the observed rise in water table has to be related to a change in conditions in the overall hydrogeographic watershed.

In proposed Contention 7, CCI again takes issue with the discussion of site hydrogeologic conditions. CCI states that WEC "has failed to consider the possibility of local effects induced by an earthquake or other geologic events within the greater Snake River Plain artesian aquifer." Pet. at 12. CCI also asserts that WEC "does not consider the risks to the storage site or assumed hydrogeologic conditions based on an analysis of the geologic likelihood of the existence of a local earthquake epicenter or the possible subsequent ramifications for the stored hazardous waste." As discussed below, proposed Contention 7 fails to provide adequate support to demonstrate a genuine dispute on a material issue.

First, proposed Contention 7 raises an issue that is outside the scope of the proceeding. The permit issued to USEI is not subject to challenge in this proceeding. USEI has a valid permit for the Grand View facility and it is not the NRC's role to re-litigate the issuance of the permit or test USEI's permit against other State and Federal statutes or regulations. *See Akiak Native Cmty.*, 213 F.3d at 1146 (finding a presumption of regularity in an agency's discharge of its regulatory and statutory obligations). Thus, to the extent that the Petition challenges USEI's RCRA permit, the proposed contention is outside the scope of the proceeding.

Second, as with the other contentions, proposed Contention 7 does not support a genuine dispute on a material issue. WEC concludes that the potential dose from disposal of Hematite material is only a few millirem per year. CCI does not provide any information that would undermine or contradict WEC's dose projections. And, CCI does not provide any other legal basis for the proposed contention. *See Turkey Point*, LBP-01-6, 53 NRC at 159 (holding that contentions that simply state the petitioner's views on regulatory policy are inadmissible).

Accordingly, the contention fails to directly controvert the material conclusions in WEC's application.

To the extent that the proposed contention is based on a concern regarding seismic activity at the site (Pet. at 12), CCI also fails to provide adequate expert or factual support for the contention. The USEI site is located within seismic zone 2 (an area of low seismic activity) and therefore does not require a seismic standard demonstration under EPA regulations (40 C.F.R. Part 264 Appendix IV). WEC Request, Attachment 4, at 21; *see also id.* at 11 ("No indications of faulting (such as displacement, associated fracturing, or alteration) have been witnessed throughout the entire geologic section investigated."). The Petition provides no basis for requiring additional analysis of seismic issues other than CCI's own view that such an analysis "appears appropriate." Pet. at 12. A valid contention is not raised by an intervenor merely asserting some activity "ought" to be considered. *Rancho Seco*, LBP-93-23, 3 8 NRC at 246.

For these reasons, proposed Contention 7 is inadmissible.

# V. <u>CONCLUSION</u>

For all of the above reasons, the Petitioner lacks standing and has not submitted an admissible contention. Accordingly the petition to intervene and request for hearing should be denied.

Respectfully submitted,

Washington, DC 20006

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COUNSEL FOR WESTINGHOUSE ELECTRIC COMPANY LLC

Dated at Washington, District of Columbia this 26th day of October 2009

# UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

# BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of:

WESTINGHOUSE ELECTRIC COMPANY LLC

Docket No. 70-036-MLA

(Hematite Decommissioning Project)

## CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT'S ANSWER TO PETITION TO INTERVENE" in the captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 26th day of October 2009, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

Respectfully submitted,

/s/ signed electronically by

David A. Repka Winston & Strawn LLP 1700 K Street, NW Washington, DC 20006

COUNSEL FOR WESTINGHOUSE ELECTRIC COMPANY LLC