

October 26, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
WESTINGHOUSE ELECTRIC CO., LLC)	Docket No. 70-36-MLA
)	
(Hematite Decommissioning Project License Amendment Request))	ASLBP No. 10-894-01-MLA-BD01

NRC STAFF'S RESPONSE TO CITIZENS FOR A CLEAN IDAHO'S HEARING REQUEST

INTRODUCTION

The staff of the Nuclear Regulatory Commission (NRC or Commission) responds to the hearing request that Citizens for a Clean Idaho, Inc. (CCI) submitted on September 30, 2009. CCI requests a hearing with respect to Westinghouse Electric Company, LLC's application for a license amendment for its Hematite Decommissioning Project. The Atomic Safety and Licensing Board (Board) should deny CCI's hearing request because CCI fails to demonstrate it has standing to intervene in this proceeding. The Board should also deny CCI's hearing request because CCI has not submitted any contention that meets the NRC's standards for contention admissibility.

BACKGROUND

Westinghouse holds an NRC license authorizing decommissioning activities at its former fuel cycle facility in Festus, Missouri. By letter dated May 21, 2009, Westinghouse applied for a license amendment that would allow it to transfer decommissioning waste containing byproduct and special nuclear material from its Hematite facility to a U.S. Ecology Idaho, Inc. facility near Grand View, Idaho.¹ The U.S. Ecology facility is a Resource Conservation and Recovery Act

¹ Request for Alternate Disposal Approval and Exemptions for Specific Hematite Decommissioning

(RCRA)² Subtitle C disposal facility that is not licensed by the NRC. Westinghouse seeks a license amendment under 10 C.F.R. § 20.2002 granting it an exemption from the requirement that byproduct and special nuclear material be disposed of only at NRC-licensed facilities. 10 C.F.R. §§ 30.3, 70.3.

On June 19, 2009, the Staff notified Westinghouse that it had completed its acceptance review of Westinghouse's application and determined the application contained sufficient information for the Staff to begin its technical review.³ On July 6, 2009, the NRC placed notice in the *Federal Register* of Westinghouse's application and informed the public of the opportunity to request a hearing with respect to the application.⁴ The deadline for requesting a hearing was September 4, 2009.

On September 1, 2009, CCI sought a 45-day extension of time to submit a hearing request and asked that the Staff hold another public meeting to explain the proposed amendment.⁵ The Staff thereafter informed the Secretary of the Commission that it would be extending the deadline for requesting a hearing to October 5, 2009.⁶ By Order dated

Project Waste (May 21, 2009) (ADAMS Accession No. ML091480071).

² 42 U.S.C. § 6901 *et seq.*

³ Letter from J. Hayes, NRC, to E. Hackman, Director, Hematite Decommissioning Project, Westinghouse, Re: May 21, 2009 10 C.F.R. 20.2002 Request for Alternate Disposal for Byproduct and Special Nuclear Material from the Hematite Decommissioning Project (June 19, 2009) (ADAMS Accession No. ML091690253).

⁴ *Notice of License Amendment Request of Westinghouse Electric Company LLC for Hematite Decommissioning Project, Festus, MO, and Opportunity to Request a Hearing*, 74 Fed. Reg. 31,994 (July 6, 2009).

⁵ Letter from David H. Leroy, Counsel for CCI, to Secretary of Commission (September 1, 2009) (not found in ADAMS). On July 28, 2009, the Staff held a public meeting near the U.S. Ecology site, at which it explained Westinghouse's proposed amendment, answered questions from the public, and invited the public to offer comments concerning the proposal. Notice of Meeting on the Westinghouse Hematite Amendment Request Involving 20.2002 Authorization and Exemption to 10 CFR 30.3 and 10 CFR 70.3 (July 9, 2009) (ADAMS Accession No. ML091890888).

⁶ Letter from Michael J. Clark, OGC, to Anne Vietti-Cook (September 3, 2009) (ADAMS Accession No. ML092810220). The Staff extended the deadline from September 4, 2009 to October 5, 2009 in response to CCI's request for an extension of time.

September 4, 2009, the Commission denied CCI's requests for an extension of time and another public meeting, at the same time noting that the Staff intended to issue a new *Federal Register* notice extending the deadline for requesting a hearing.⁷ On September 15, 2009, the Staff placed notice in the *Federal Register* extending the deadline for requesting a hearing to October 5, 2009.⁸ On September 30, 2009, CCI submitted its hearing request.

DISCUSSION

A hearing request must be denied unless the petitioner demonstrates it has standing to intervene in the proceeding and submits at least one admissible contention. 10 C.F.R. § 2.309(a). CCI addresses standing at page 2 of its hearing request,⁹ stating that it and the "many citizens" in Idaho it represents would be harmed by Westinghouse's requested license amendment. CCI also proposes seven contentions, all of which relate to the hydrology of the U.S. Ecology site. *Id.* at 2–13.

For reasons stated below, CCI has not shown it has standing to intervene in this proceeding. Moreover, even if CCI were found to have standing, it has not submitted any contention that meets the NRC's standards for contention admissibility.

⁷ Order (September 4, 2009) (unpublished) (ADAMS Accession No. ML092470503).

⁸ *Notice Extending the Deadline for Requesting a Hearing and Correcting Information Regarding the Procedure for Requesting a Hearing on a License Amendment Application Filed by Westinghouse Electric Company LLC for the Hematite Decommissioning Project, Festus, MO*, 74 Fed. Reg. 47,287 (September 15, 2009).

⁹ CCI's hearing request omits page numbers. An electronic version of the hearing request in PDF format may be viewed in the NRC's Agencywide Documents Access Management System (ADAMS) using the *Adobe Acrobat* program, which assigns a number to each page of the document (displayed in the status bar at the top of the page) (ADAMS Accession No. ML092730523). The Staff herein refers to CCI's hearing request by the page numbers reflected in ADAMS.

I. Standing

A. Legal Standards Governing Standing to Intervene

Under the NRC's Rules of Practice:

[a]ny person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing or petition for leave to intervene and a specification of the contentions which the person seeks to have litigated in the hearing.

10 C.F.R. § 2.309(a). NRC regulations further provide that the presiding officer "will grant the request [for a hearing] if it determines that the requestor has standing under the provisions of [10 C.F.R. § 2.309(d)] and has proposed at least one admissible contention that meets the requirements of [10 C.F.R. § 2.309(f)]." *Id.*

Under the general standing requirements in 10 C.F.R. § 2.309(d)(1), a request for hearing must state:

- (i) The name, address and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor's/petitioner's right under the [Atomic Energy Act (AEA) of 1954, 42 U.S.C. Sect. 2011 *et seq.*] 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.

"At the heart of the standing inquiry is whether the petitioner has 'alleged such a personal stake in the outcome of the controversy' as to demonstrate that a concrete adverseness exists which will sharpen the presentation of issues." *Sequoyah Fuels Corp. and Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994) (citing *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 72 (1978), and quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). In order to demonstrate the requisite "personal stake," the petitioner must:

- (1) allege an "injury in fact" that is

(2) “fairly traceable to the challenged action” and

(3) is “likely” to be “redressed by a favorable decision.”

Sequoyah Fuels, CLI-94-12, 40 NRC at 71–72 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)) (citations and internal quotation marks omitted).

When an organization requests a hearing, the organization may seek to establish standing either on its own behalf or on behalf of one or more of its members. *Entergy Nuclear Operations, Inc. and Entergy Nuclear Palisades, LLC* (Big Rock Point Plant), CLI-08-19, 68 NRC 251, 258–59, 266 (2008).

1. Organizational Standing

To establish organizational standing, the petitioner must show “immediate or threatened injury to its organizational interests.” *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995). The injury must be a “palpable injury” in fact to its organizational interests. *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528–30 (1991). In addition, the injury must be within the zone of interests protected under applicable law. *Id.* at 529; *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 271 (1998).

2. Representational Standing

An organization seeking to establish representational standing must show that at least one of its members may be affected by the proceeding. *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 408–09 (2007); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000). The organization must identify that member, and it must show that the member has authorized the organization to represent him or her and request a hearing on his or her behalf. *Palisades*, CLI-07-18, 65 NRC at 409; *Vermont Yankee*, CLI-00-20, 52 NRC at 163.

B. CCI Fails to Demonstrate It Has Standing to Intervene in this Proceeding

CCI's arguments regarding standing can be found on page 2 of its hearing request. CCI states that it is a "grassroots, community advocacy, non-profit organization representing the interests of more than one thousand Idaho citizens[.]" CCI further states that "CCI and the many citizens it represents are 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." According to CCI, "the value of their combined property, financial, health, and other interest is practically incalculable." CCI states that Westinghouse's proposed amendment, if granted, could (1) "forever harm the property, financial, and other interests of CCI and its member Idaho citizens," and (2) "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." This "benchmark," according to CCI, would likely lead to "a significant local and national increase in future exemption requests of this type" and may make U.S. Ecology's site "a top target for other waste producers seeking a much lower cost alternative to NRC licensed sites."

1. CCI Fails to Demonstrate Organizational Standing

CCI does not specify whether it is asserting standing based on its organizational status or as a representative for its members. To the extent CCI is asserting organizational standing, the Board must reject its claim. CCI fails to meet the requirement that it identify a discrete institutional injury it might suffer if the NRC grants the applicant's request. *Georgia Tech*, CLI-95-12, 42 NRC at 115; *Turkey Point*, ALAB-952, 33 NRC at 528-30. Moreover, CCI fails to provide sufficient information to even speculate as to what its injuries might be. CCI provides a mailing address in Chester, Idaho. Hearing Request at 1. Chester is in Fremont County, however, at the opposite end of the state from Owyhee County, where U.S. Ecology's site is

located.¹⁰ Although CCI states that granting Westinghouse's amendment request would "forever harm the property, financial, and other interests of CCI and its member Idaho citizens," CCI fails to identify any interest of its own that may be harmed. CCI does not state that it holds any land or other property in the vicinity of the U.S. Ecology site, nor does CCI identify any property it holds elsewhere that might be adversely affected by Westinghouse's proposal.

CCI also suggests it would be harmed because granting Westinghouse's amendment request could lead to an increase in exemption requests under 10 C.F.R. § 20.2002 and make the U.S. Ecology site "a top target for other waste producers seeking a much lower cost alternative to NRC licensed sites." Hearing Request at 2. This is a general policy concern that is insufficient to establish CCI's organizational standing. See *Big Rock Point*, CLI-08-19, 68 NRC 251, 269 ("Nor does [the petitioner's] status as an anti-nuclear advocate and a source of information for its community qualify it for organizational standing. Mere involvement in such issues is insufficient to merit intervenor status."); *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (holding that a petitioner cannot assert injury-in-fact to itself as an organization based upon nothing more than a broad interest—shared by many others—in the preservation of the environment).

In sum, CCI fails to identify any discrete injury to itself that may result if the NRC grants Westinghouse's license amendment request. CCI instead raises only "general environmental and policy interests of the sort [the Commission] repeatedly [has] found insufficient for organizational standing." *Big Rock Point*, CLI-08-19, 68 NRC at 270; *Turkey Point*, ALAB-952, 33 NRC at 528–30.

¹⁰ Chester is approximately 300 miles from Grand View, the town closest to U.S. Ecology's site. <http://www.mapquest.com/maps?1c=Chester&1s=id&2c=Grand+View&2s=id#>. Cf. *Big Rock Point*, CLI-08-19, 68 NRC at 270 (finding that there was not an obvious potential for offsite consequences sufficient to establish organizational standing in the context of a reactor license transfer proceeding, even though the organization's office was located *three miles* from the licensee's facility).

2. CCI Fails to Demonstrate Representational Standing

To the extent CCI is asserting representational standing, it likewise fails to make the requisite showing. CCI states that it represents “the interests of more than one thousand Idaho citizens.” Hearing Request at 2. CCI does not identify *any* member of its organization, however, and for this reason alone fails to establish representational standing. *Palisades*, CLI-07-18, 65 NRC at 409; *Vermont Yankee*, CLI-00-20, 52 NRC at 163. Because CCI has not identified any member, it is necessarily unable to meet the additional requirement in Commission precedent that it show the member may be affected by Westinghouse’s proposed amendment. *Palisades*, CLI-07-18, 65 NRC at 409; *Vermont Yankee*, CLI-00-20, 52 NRC at 163. In other words, CCI fails to identify a property, financial, health or other interest of any member and explain how that interest would be harmed by the applicant’s proposed action. CCI therefore cannot allege an “injury in fact” to a member that is “fairly traceable to the challenged action” and “likely” to be “redressed by a favorable decision,” as CCI must do in order to establish representational standing. 10 C.F.R. § 2.309(d)(1)(iii); *Sequoyah Fuels*, CLI-94-12, 40 NRC at 71–72. Further, because CCI does not identify any member, it necessarily fails to meet the additional requirement that a petitioner show, through a declaration or other means, that the member has authorized the organization to represent him and request a hearing. *Palisades*, CLI-07-18, 65 NRC at 409; *Vermont Yankee*, CLI-00-20, 52 NRC at 163.

Nor can CCI establish representational standing based on its claim that granting Westinghouse’s amendment request may lead to “a significant local and national increase in future exemption requests of this type,” thereby making the Grand View site a “top target for other waste producers.” Hearing Request at 2. Such a claim is purely hypothetical and fails to demonstrate the “concrete adverseness” necessary for standing. *Sequoyah Fuels*, CLI-94-12, 40 NRC at 71.

Because CCI does not identify any member that may be affected by this proceeding, but raises only a general concern that granting Westinghouse’s amendment request might lead to

similar requests, CCI fails to establish representational standing. Because CCI has demonstrated neither organizational nor representational standing, its hearing request must be denied. 10 C.F.R. § 2.309(a).

II. CCI's Contentions Are Inadmissible

A. Legal Requirements for Contentions

The legal standards governing admissibility of contentions are set forth in the NRC's Rules of Practice at 10 C.F.R. Part 2. In order to be admissible, a 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) demonstrate 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 information sufficient to show that a genuine dispute with the applicant exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case of an application that is asserted to be deficient, the identification of such deficiencies and supporting reasons for this belief.

10 C.F.R. § 2.309(f)(1).

Sound legal and policy considerations underlie the Commission's contention pleading requirements. The purpose of the contention rule is to "focus litigation on concrete issues and result in a clearer and more focused record for decision." *Changes to Adjudicatory Process (Part II)*, 69 Fed. Reg. 2182, 2202 (January 14, 2004). The Commission "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." *Id.* The requirements for contention

admissibility are “strict by design.” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001). Failure to comply with any of the requirements in 10 C.F.R. § 2.309(f)(1) is grounds for dismissal of the contention. 69 Fed. Reg. at 2221; *Private Fuel Storage, L.L.C.*, CLI-99-10, 49 NRC 318, 325. “Mere ‘notice pleading’ does not suffice.” *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006) (internal citation omitted). A contention must be rejected where, rather than raising an issue that is concrete or litigable, it reflects nothing more than a generalization regarding the petitioner’s view of what the applicable policies ought to be. *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 129 (2004) (citing *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20–21 (1974)).

B. CCI Has Not Set Forth an Admissible Contention

CCI proposes seven contentions challenging Westinghouse’s evaluation of hydrology in the vicinity of the U.S. Ecology site and arguing that hydrological conditions could result in offsite radiological contamination. Hearing Request at 2–13. CCI bases its contentions on comments from Scott Gillilan, M.S., a hydrologist who reviewed Westinghouse’s application on CCI’s behalf, and whose comments are attached to CCI’s hearing request.

1. Deficiencies Common to All Contentions

Before addressing CCI’s contentions individually, the Staff calls the Board’s attention to certain deficiencies common to all seven contentions. The Board should reject CCI’s contentions because each contention suffers from several deficiencies that render them inadmissible under the NRC’s regulations.

First, contrary to 10 C.F.R. § 2.309(f)(1)(iv), CCI fails to explain how the issues it raises are material to any finding the NRC must make in reviewing Westinghouse’s license amendment request. The findings the NRC must make in order to grant a license amendment permitting alternate disposal of byproduct or special nuclear material are set forth in 10 C.F.R.

Part 20. To grant such an amendment, the Staff must find under 10 C.F.R. § 20.2002 that the applicant's analyses and procedures ensure that doses are as low as reasonably achievable (ALARA) and are within the limits in 10 C.F.R. Part 20. 10 C.F.R. § 20.2002(d).¹¹ As discussed more fully below, despite CCI's claims that the hydrology in the vicinity of the U.S. Ecology site could result in offsite radiological contamination, CCI fails to demonstrate—or even allege—that any resulting doses would not be ALARA or would exceed Part 20 limits.

Rather than addressing the criteria in 10 C.F.R. § 20.2002, CCI focuses on § 20.2007, which states that “[n]othing in this subpart relieves the license from complying with other applicable Federal, State, and local regulations governing any other toxic or hazardous properties of materials that may be disposed of under this subpart.” CCI misquotes § 20.2007, however, asserting that under this regulation the Staff must find that the “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.’” Hearing Request at 3–4, 6–8, 10–11. CCI then makes the claim, which it repeats verbatim in each contention, that Westinghouse “has not adequately demonstrated its compliance” with a “whole host of applicable Federal, State, and local regulations [that] govern the interaction or potential interaction of hazardous wastes with groundwater.” *Id.* CCI never identifies the regulations to which it is referring, however, or explains why the unspecified regulations are ones with which Westinghouse must comply in order for the Staff to approve its requested license amendment. Accordingly, CCI fails to satisfy 10 C.F.R. § 2.309(f)(1)(iv), which requires that a petitioner “demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding.” Further, even if the regulations to which CCI refers

¹¹ In order to make these determinations, standard Staff practice is to assess three scenarios that potentially expose individuals to radiation. The Staff considers potential exposures by (1) a transportation worker (e.g., a truck driver), (2) a worker at the disposal facility, and (3) a resident at the site, with respect to whom the Staff examines long term impacts. Division of Waste Management and Environmental Protection, Operating Procedures EPPAD 3.5, Review, Approval, and Documentation of Low-Activity Waste Disposals in Accordance with 10 CFR 20.2002 and 10 CFR 40.13(a), Rev. 0 (August 2009).

would be material to the Staff's licensing decision, CCI fails to provide any support for its claim that Westinghouse has not adequately demonstrated its compliance with those regulations. CCI therefore fails to satisfy § 2.309(f)(1)(v), which requires that the petitioner state the alleged facts upon which it intends to rely in support of its position.

In addition, CCI fails to meet 10 C.F.R. § 2.309(f)(1)(vi) because it does not identify any dispute with Westinghouse on a material issue of law or fact. CCI does not specifically dispute Westinghouse's conclusion that the maximum dose attributable to the waste it proposes to ship to the U.S. Ecology site will be "well below a few millirem," with a maximum dose of "0.92 millirem in year 246.9."¹² Further, although CCI claims that this waste might cause offsite contamination, the scenarios that CCI suggests might lead to such contamination appear to rest on the assumption that material at the U.S. Ecology site will be placed in an open pit and will be readily infiltrated by groundwater or rainwater.¹³ CCI fails to address portions of Westinghouse's application explaining that the U.S. Ecology facility is subject to both RCRA and Idaho State environmental regulations, and that the material Westinghouse ships to the site will be placed in a RCRA Subtitle C liner.¹⁴ Because CCI does not address portions of Westinghouse's application that are relevant to assessing whether the contamination scenarios it alleges are at all plausible, CCI fails to identify a dispute with Westinghouse on any material issue. CCI's contentions are therefore inadmissible. 10 C.F.R. § 2.309(f)(1)(vi).

The Staff will next address specific deficiencies in CCI's contentions and explain why the Board should reject each contention.

¹² Request for Alternate Disposal at 9.

¹³ *E.g.*, Hearing Request at 6 (arguing that contaminants might leave the U.S. Ecology site "through dispersal in a saturated near-surface water table which also includes and permits significant lateral contaminant movement.").

¹⁴ Request for Alternate Disposal at 2-4. See *also* 40 C.F.R. Part 264 (RCRA regulations establishing "Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities").

Proposed Contention 1

Contrary to the stated conclusion in the application, the applicant conclusively demonstrates that there is a direct hydrologic connection between the Castle Creek and all the underlying aquifers at Site B,^[15] which is typically the opposite conclusion one hopes to arrive at with regards to hazardous waste storage sites.

Hearing Request at 3.

CCI argues that Westinghouse has underestimated the amount of communication between the aquifers underlying U.S. Ecology's site. CCI suggests this is significant because of the possibility artesian water will become contaminated with radioactive material, enter Castle Creek, and thereby enter the Snake River. Hearing Request at 3-4. CCI also argues that whereas in "an ideal waste storage facility, the applicant is required to demonstrate no connectivity to local surface water . . . [t]he opposite is presented in [Westinghouse's] application." Hearing Request at 4.

The Board need not resolve whether CCI's factual assertions are correct. Regardless of the accuracy of its statements, CCI has not demonstrated that the degree of communication between the aquifers and surface water in the vicinity of the U.S. Ecology site is an issue material to the findings the NRC must make in reviewing Westinghouse's amendment request. Communication between the aquifers is material only to the extent water might become contaminated with or remove radioactive material from the site, and CCI provides no explanation of how this might occur. In fact, in this contention CCI does not even allege that contamination might occur. CCI therefore fails to satisfy 10 C.F.R. § 2.309(f)(1)(iv), and its contention must be rejected.

CCI's claim that hydrologic conditions at "an ideal waste storage facility" would differ from those at the U.S. Ecology site is likewise insufficient to support admitting its contention.

¹⁵ "Site B" refers to the U.S. Ecology site. Request for Alternate Disposal at 11.

CCI does not explain how ideal conditions are relevant to any finding the NRC must make in its review of Westinghouse's amendment request. CCI therefore fails to satisfy 10 C.F.R. § 2.309(f)(1)(iv). Further, CCI does not cite any specific sources or documents in support of its claim that ideal conditions for a disposal site require that there be no hydrologic connection between aquifers and local surface water. This renders the contention inadmissible under 10 C.F.R. § 2.309(f)(1)(v). CCI's reference to hydrologic conditions at "an ideal waste storage facility" appears to be nothing more than a generalization regarding CCI's view of what applicable policies ought to be—a generalization that cannot support admitting CCI's contention. *Private Fuel Storage*, CLI-04-22, 60 NRC at 129.

Proposed Contention 2

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.

Hearing Request at 4.

CCI further states that the groundwater table underlying U.S. Ecology's site has risen in recent years. Hearing Request at 5. CCI claims that Westinghouse offers no explanation of the reason for the rise. CCI concludes, "One can plausibly ask the question as to whether the groundwater will eventually reach the land surface." *Id.*

As with Contention 1, the Board need not resolve the specific factual issues CCI raises. Although CCI states that one might plausibly ask whether groundwater will eventually reach the land surface, it does not explain how that circumstance would be material to any finding the NRC must make in reviewing Westinghouse's amendment request. CCI appears to be suggesting that groundwater might become contaminated through contact with Hematite waste at the U.S. Ecology site, or possibly remove material from the disposal cell. CCI fails to address the characteristics of the disposal cell, however, which will be constructed in accordance with

the requirements of RCRA. Nor does CCI explain why other requirements applying to U.S. Ecology's site will be inadequate to protect against any hazards from rising groundwater.¹⁶ Because CCI does not explain why a rising groundwater table is material to any finding the NRC must make in reviewing Westinghouse's application, and because it does not identify any dispute with Westinghouse regarding a material issue, its contention is inadmissible under 10 C.F.R. § 2.309(f)(1)(iv) and (vi).

Proposed Contention 3

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.

Hearing Request at 5–6.

CCI further states that "if water under pressure accesses the high porosity Bruneau gravels, its subsurface flow paths would likely radiate out horizontally through 360 degrees of the compass along any number of fine sand, silt, thin clay seams." Hearing Request at 6–7. CCI adds that, given hydrologic conditions at the site, "it cannot be discounted that geologic forces such as an earthquake could take place [and cause] a resultant discharge at the site. . . ." Hearing Request at 7.

CCI fails to explain how these statements, even if true, are relevant to any finding the NRC must make in reviewing Westinghouse's application. Thus, CCI's contention fails to satisfy 10 C.F.R. § 2.309(f)(1)(iv). Although CCI asserts that there is a more likely pathway through which contaminants could leave the U.S. Ecology site than the downward leakage scenario discussed in Westinghouse's application, this is not enough. CCI makes no attempt to explain *how* contaminants would escape the disposal cell and leave the site. CCI also does not

¹⁶ As CCI acknowledges, Idaho Department of Environmental Quality regulations also apply to the U.S. Ecology site. Hearing Request at 5 n.11 (citing Request for Alternate Disposal at 30).

address the amount of contamination that it alleges is susceptible to leakage. Moreover, CCI omits any discussion of whether and how this contamination would reach potentially exposed persons. Because CCI does not even allege that such contaminants would exceed Part 20 limits or be other than ALARA, resolution of CCI's claims would have no bearing on the outcome of this proceeding. CCI therefore has not demonstrated that its claims are material, and its contention must be rejected. 10 C.F.R. §§ 2.309(f)(1)(iv), 2.309(f)(1)(vi).

Proposed Contention 4

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.

Hearing Request at 7.

According to CCI, Westinghouse's application "suggests the underlying aquifer dynamics are exceptionally complicated and far from stable or static under the applicant's normal site operating plans, much less in situ." Hearing Request at 8. CCI states that information regarding groundwater rise and connectivity "has to be reconciled with contaminant dispersal models and fate and transport studies that are assuming far less unique hydrogeologic conditions." *Id.*

Here again, CCI has not established a link between the issues it raises and any finding the NRC must make in its review of Westinghouse's application. CCI fails to explain why a "highly unusual and dynamic relationship between surface ground pressure at Site B and the underlying aquifers" would in some way increase contamination or affect the exposure pathway. CCI simply asserts that "this information has to be reconciled with contaminant dispersal models and fate and transport studies." *Id.* A "bald assertion that a matter ought to be considered or

that a factual dispute exists,” however, is not a sufficient basis to admit a contention.¹⁷ Rather, “a petitioner must provide documents or other factual information or expert opinion that sets forth the necessary technical analysis to show why the proffered bases support its contention.”¹⁸ Because CCI has not cited any applicable law that would require Westinghouse to further analyze the relationship between surface ground pressure and the underlying aquifers, and because CCI does not even allege that the conditions it describes might result in doses that exceed Part 20 limits or are other than ALARA, its contention must be rejected. 10 C.F.R. § 2.309(f)(1)(iv).

Proposed Contention 5

The applicant clearly states that well log data analysis from UP-28 and U[P]-29¹⁹ 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.

Hearing request at 8.

CCI asserts that the “underlying geohydrology” at the U.S. Ecology site “is not well understood and the applicants are collecting some data that is not consistent regarding important aquifer conditions.” Hearing Request at 8. According to CCI, this data “points to a strong likelihood that the Upper and Lower Aquifers are hydrologically communicating to a greater extent than is documented.” *Id.*

As stated above, CCI has not shown that the degree of communication between the lower and upper aquifers underlying the U.S. Ecology site is an issue material to the findings the NRC must make in reviewing Westinghouse’s application. Even assuming CCI’s statements

¹⁷ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 180 (1998), *reconsideration granted on other grounds*, LBP-98-10, 47 NRC 288, *aff’d* CLI-98-13, 48 NRC 26.

¹⁸ *Id.*

¹⁹ “UP-28” and “UP-29” refer to piezometers at which surveys have been conducted. Request for Alternate Disposal at 29.

are correct, communication between the aquifers is material only to the extent water might become contaminated with radioactive material, and CCI provides no explanation of how such contamination might occur. In fact, in this contention CCI does not even allege that contamination might occur at a significant level. Accordingly, CCI fails to satisfy 10 C.F.R. § 2.309(f)(1)(iv) and (vi), and Board must reject its contention.

Proposed Contention 6

Based on the applicant's acknowledgement 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.

Hearing Request at 10.

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 are not scientifically plausible." *Id.* CCI also claims that Westinghouse's data contains "significant uncertainty that has to be attached to outputs from groundwater flux and velocity modeling exercises." Hearing Request at 10. CCI cites as an example Westinghouse's discussion of "vertical flux and leakage calculations between the Upper and Lower Aquifer utilizing the principle of Darcy's Law." *Id.* According to CCI, there is an "equally plausible conclusion" to the conclusion drawn by Westinghouse, one which "result[s] in anomalous water chemistry conditions." *Id.*

As discussed above, CCI misconstrues the findings that the NRC must make in order to grant a license amendment under 10 C.F.R. § 20.2002. Contrary to CCI's assertion, an applicant need not demonstrate, and the Staff need not find, that "future escape of contaminants from the storage site to surrounding groundwater tables and transport *are not scientifically plausible.*" Hearing Request at 10 (emphasis added). Rather, the Staff must determine that the

applicant's analyses and procedures ensure that doses are ALARA and within the dose limits in Part 20. 10 C.F.R. § 20.2002(d).

Further, regardless of the merits of its claim regarding hydrologic anomalies, CCI does not explain how those anomalies would lead to contamination at a level such that it would be material to findings the Staff must make in reviewing Westinghouse's application. Contention 6 is therefore inadmissible because, contrary to 10 C.F.R. § 2.309(f)(1)(iv), CCI does not raise an issue material to any finding the Staff must make in reviewing Westinghouse's application. CCI's contention likewise fails to meet § 2.309(f)(1)(vi) because CCI does not identify any dispute with Westinghouse regarding a material issue.

Proposed Contention 7

The applicant clearly states a significant trend in groundwater rise beneath the site that is not related to any measureable change in the contributing area's 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.

Hearing Request at 11.

CCI further states that this allegedly "significant trend in groundwater rise" might be related to seismic activity in the area and that Westinghouse has failed to sufficiently consider this possibility. Hearing Request at 12. According to CCI, Westinghouse should have assessed risks at the U.S. Ecology site based on the assumption that there is a local earthquake epicenter. *Id.*

This contention rests on speculation that the U.S. Ecology site may be susceptible to seismic events and that such events might result in an offsite release of radioactive material. CCI fails to provide any support for either claim, and it does not point to any affirmative evidence of the seismic activity it describes. Instead, CCI merely notes that Westinghouse has not definitively established the absence of such activity. This is insufficient to show a genuine

dispute on a material issue, and for that reason CCI's contention fails to satisfy 10 C.F.R. § 2.309(f)(1)(vi).

Even assuming CCI is correct that seismic activity might account for some of the groundwater rise in the vicinity of the U.S. Ecology site, CCI fails to explain how this might lead to radiological impacts. Contention 7, in other words, suffers from the same deficiencies as CCI's other contentions in that CCI does not draw a connection between the risk it alleges and any finding the NRC must make in its review of Westinghouse's application. The contention thus fails to satisfy 2.309(f)(1)(iv). In addition, CCI does not address specific features of the U.S. Ecology site and explain why those features would not be sufficient to mitigate or eliminate any consequences linked to seismic activity and an associated groundwater rise. CCI therefore fails to meet 2.309(f)(1)(vi) because it has not identified a genuine dispute with Westinghouse on a material issue.

CONCLUSION

CCI fails to demonstrate it has standing to intervene in this proceeding. CCI also has not submitted any contention that meets the NRC's standards for contention admissibility. Accordingly, CCI's hearing request must be denied

Respectfully submitted,

/Signed (electronically) by/
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Dated at Rockville, Maryland
this 26th day of October, 2009