

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

Before Administrative Judges:

Paul S. Ryerson, Chairman
Dr. Michael F. Kennedy
Dr. Mark O. Barnett

In the Matter of
WESTINGHOUSE ELECTRIC CO., LLC
(Hematite Decommissioning Project License
Amendment Request)

Docket No. 70-36-MLA

ASLBP No. 10-894-01-MLA-BD01

December 3, 2009

MEMORANDUM AND ORDER
(Ruling on Request for Hearing)

Before the Board is a request for hearing filed by Citizens for a Clean Idaho, Inc. (CCI). CCI's hearing request concerns an application by Westinghouse Electric Co., LLC (Westinghouse) for a license amendment with regard to decommissioning activities at its Hematite facility, a former nuclear fuel fabrication facility in Festus, Missouri.¹

CCI has not demonstrated standing to participate as a party, and therefore the Board denies its request for hearing.

I. BACKGROUND

Westinghouse holds a Nuclear Regulatory Commission (NRC) license authorizing decommissioning activities at the Hematite facility.² On May 21, 2009, it sought an exemption under 10 C.F.R. § 20.2002 from the disposal site requirements of 10 C.F.R. §§ 30.3 and 70.3.

¹ Request for Alternate Disposal Approval and Exemptions for Specific Hematite Decommissioning Project Waste (License No. SNM-00033, Docket No. 070-00036) (ADAMS Accession No. ML091480071) (May 21, 2009) [hereinafter Westinghouse Application or Application].

² See 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).

The exemption would allow Westinghouse to dispose of low-activity radioactive waste from the Hematite facility at a site near Grand View, Idaho that is not licensed by the NRC. Specifically, the exemption would authorize Westinghouse to dispose of decommissioning waste from the Hematite facility – including special nuclear materials and byproduct material – at a U.S. Ecology Idaho, Inc. (USEI) facility. The USEI facility is an existing Resource Conservation and Recovery Act Subtitle C disposal facility that is regulated by the State of Idaho.³

According to the Application, the USEI waste facility has received over two million tons of low-activity radioactive material since 1998.⁴ Westinghouse proposes to send to the facility approximately 50,000 additional tons of such waste.⁵

The nearest residence to the USEI facility is one mile away.⁶ The nearest town is Grand View, Idaho (population 350), located 10.5 miles to the east.⁷ CCI's address in Chester, Idaho is approximately 300 miles away.⁸

The NRC accepted the Westinghouse Application for docketing on June 19, 2009, and published a hearing opportunity notice on July 6, 2009.⁹ CCI filed a timely petition requesting a hearing on the Application on September 30, 2009.¹⁰

CCI describes itself as a “grassroots, community advocacy, non-profit organization representing the interests of more than one thousand Idaho citizens.”¹¹ Although it does not

³ Westinghouse Application at 2-3.

⁴ Id. at 2.

⁵ Id. at 4.

⁶ Id.

⁷ Id.

⁸ According to MapQuest, Chester is 308 miles from Grand View, by automobile.
<http://www.mapquest.com/maps?1c=Chester&1s=ID&2c=Grand+View&2s=ID>

⁹ 74 Fed. Reg. at 31,994.

¹⁰ Official Request for Hearing (Sept. 3, 2009) [hereinafter CCI Request]. Although dated September 3, 2009, CCI did not submit the CCI Request until September 30, 2009. In response to CCI's seeking an extension, the Commission extended the deadline for requesting a hearing by thirty days. 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 (Sept. 15, 2009).

¹¹ CCI Request at 2.

identify any such citizens by name, CCI alleges that it represents “extensive Idaho property owners, Idaho business owners, Idaho agricultural operators, and environmental stewards of the irreplaceable lands of the State of Idaho.”¹² CCI contends that approval of the Westinghouse Application could “forever harm” the property, financial and other interests of such citizens, and that the combined value of such interests is “practically incalculable.”¹³ CCI proffers seven contentions addressing various groundwater concerns.¹⁴

This Board was established to preside over the proceeding on October 9, 2009.¹⁵ On October 26, 2009, Westinghouse and the NRC Staff filed timely answers opposing CCI’s request.¹⁶ Each asserts that CCI has failed to demonstrate standing¹⁷ or to proffer an admissible contention.¹⁸ CCI did not file a reply.¹⁹

II. ANALYSIS

Anyone who wishes to request a hearing concerning a proposed licensing action must (1) establish standing, and (2) proffer at least one admissible contention.²⁰

A. Standards Governing Standing to Be a Party

Pursuant to 10 C.F.R. § 2.309(d), a request for hearing must state: (1) the name, address, and telephone number of the requestor; (2) the nature of the requestor’s right under

¹² Id.

¹³ Id.

¹⁴ See id. at 2-12.

¹⁵ Establishment of Atomic Safety and Licensing Board, 74 Fed. Reg. 53,522 (Oct. 19, 2009).

¹⁶ Applicant’s Answer to Petition to Intervene (Oct. 26, 2009) [hereinafter Westinghouse Answer]; NRC Staff’s Response to Citizens for a Clean Idaho’s Hearing Request (Oct. 26, 2009) [hereinafter NRC Staff Answer].

¹⁷ Westinghouse Answer at 12-17; NRC Staff Answer at 6-9.

¹⁸ Westinghouse Answer at 17-32; NRC Staff Answer at 10-20.

¹⁹ We do not speculate on why CCI failed to reply. See Letter from David A. Repka, Counsel for Westinghouse, to the Licensing Board (Nov. 10, 2009) (transmitting newspaper article implying that CCI may have ceased its activities). Because CCI’s request for hearing plainly must be denied on the basis of its own filing of record, we assume the organization’s continuing interest in this proceeding and have not asked CCI’s counsel to clarify its status. We note, however, that ethics rules in most jurisdictions require, and the Board expects, that counsel will promptly correct statements of material fact that are no longer true. See MODEL RULES OF PROF’L CONDUCT R. 3.3 (2009).

²⁰ 10 C.F.R. § 2.309(a).

the governing statutes to be made a party to the proceeding; (3) the nature and extent of the requestor's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order that may be issued in the proceeding on the requestor's interest.²¹

The Commission applies judicial concepts of standing,²² requiring a requestor to show that (1) it has suffered or will suffer "a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statute[s];" (2) the injury is fairly traceable to the challenged action; and (3) "the injury is likely to be redressed by a favorable decision."²³

The requisite injury may be "either actual or threatened,"²⁴ but must nonetheless be "concrete and particularized," not "conjectural, or hypothetical."²⁵ Although the Commission recognizes a fifty-mile proximity presumption to establish standing in proceedings concerning nuclear power reactor construction and operating licenses,²⁶ in other cases, Licensing Boards must address standing "on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source."²⁷

Organizations such as CCI may demonstrate standing in either an organizational or representational capacity.²⁸ For organizational standing, the organization must, in its own right, satisfy the same requirements of injury, causation, and redressability as an individual.²⁹

²¹ Id. § 2.309(d)(1).

²² See U.S. Dep't of Energy (Plutonium Export License), CLI-04-17, 59 NRC 357, 363 (2004); see also Shaw Areva MOX Services (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 182 (2007).

²³ Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

²⁴ Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) (citing Wilderness Soc'y v. Griles, 824 F.2d 4, 11 (D.C. Cir. 1987)).

²⁵ Sequoyah Fuels Corp. & Gen. Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994) (internal citation omitted) (internal quotation marks omitted).

²⁶ See Calvert Cliffs 3 Nuclear Project, LLC (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, 70 NRC __, __ (slip op. at 4-5) (Oct. 13, 2009).

²⁷ Georgia Inst. of Tech. (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116-17 (1995).

²⁸ See Consumers Energy Co. (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409, 411 (2007).

²⁹ See id. at 411.

Alternatively, for representational standing, the organization must (1) demonstrate that the licensing action will affect at least one of its members; (2) identify that member by name and address; (3) show that it is authorized by that member to request a hearing on his or her behalf; (4) demonstrate that the member would qualify for standing in his or her own right; (5) show that the interests the organization seeks to protect are germane to its own purpose; and (6) show that neither the proffered contentions nor the requested relief would require an individual member to participate in the proceeding.³⁰

B. Ruling on Standing

CCI has failed to demonstrate either organizational or representational standing.

First, CCI fails to show how the challenged action might cause injury to CCI's organizational interests.³¹ CCI simply identifies itself as a "concerned Idaho citizen."³² It claims that approval of the Westinghouse Application "could forever harm the property, financial, and other interests of CCI."³³ CCI also contends that approval might lead to "a significant . . . increase in future exemption requests of this type."³⁴

Such claims do not state a sufficiently concrete and particularized injury-in-fact to establish standing. CCI's expressed concern that the requested exemption could "forever harm [CCI's] property, financial, and other interests" merely repeats the language of 10 C.F.R. § 2.309(d) and fails to explain, much less demonstrate, how approval of the Westinghouse Application would adversely affect CCI's interests. CCI's lack of specificity is especially troubling in light of the fact that its stated address is over 300 miles from the USEI site.³⁵ CCI

³⁰ Id. at 409.

³¹ See Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972) (injury-in-fact requires more than a general interest in preserving of the environment).

³² See CCI Request at 2.

³³ Id.

³⁴ Id.

³⁵ See, e.g., Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 269-70 (2008) (no obvious potential for offsite consequences sufficient to establish organizational standing even though the organization's office was a mere three miles from the facility).

makes no showing, for example, that its own property or staff could be threatened by the proposed storage of low-activity material at the USEI site. Indeed, CCI tells us nothing at all about its “property, financial, and other interests.” Likewise, CCI’s claim that approval of the Westinghouse request would likely lead to “a significant . . . increase in future exemption requests of this type” is far too speculative to demonstrate standing.³⁶

Second, CCI has failed to demonstrate representational standing. CCI states that it “represent[s] the interests of more than one thousand Idaho citizens,”³⁷ but tells us nothing about them or how they will be injured if the requested exemption were granted. For example, CCI fails to identify by name and address a single member of its organization. Nor does CCI verify that any member has authorized CCI to request a hearing on that member’s behalf.³⁸

Thus, CCI has failed, by affidavit or otherwise, to set forth sufficient facts to demonstrate either organizational or representational standing. Absent an “‘obvious’ potential for harm, it is a petitioner’s burden to show how harm will or may occur.”³⁹ CCI alleges injury to its own “property, financial, and other interests,” as well as to those of its members, but it tells us nothing about its interests or those of its members, or how the interests of either might be injured if the NRC grants the exemption in issue.

C. Contentions

As noted, CCI proffers seven contentions, all of which address how soil and groundwater conditions at the USEI site would interact with the introduction of additional waste materials from

³⁶ See, e.g., Int’l Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001) (standing cannot be based on unfounded conjecture).

³⁷ CCI Request at 2.

³⁸ See, e.g., Palisades, CLI-07-18, 65 NRC at 409-10 (no representational standing where petitioner provided no supporting affidavits or other evidence that any member had authorized it to represent their interests in the proceeding).

³⁹ Palisades, CLI-08-19, 68 NRC at 260 (quoting Exelon Generation Co., LLC (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580-83 (2005)).

the Hematite facility.⁴⁰ Both Westinghouse and NRC Staff oppose the admissibility of these contentions, arguing that none satisfies the requirements of 10 C.F.R. § 2.309(f).

Because CCI has failed to demonstrate standing to be a party, the Board need not reach the issue of whether CCI's seven proffered contentions satisfy the requirements of 10 C.F.R. § 2.309(f)(1).

III. CONCLUSION

CCI has not demonstrated standing to participate as a party in this proceeding. Therefore, CCI's request for hearing is denied.

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

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

/RA/ E. R. Hawkens for

Dr. Mark O. Barnett
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 3, 2009

⁴⁰ See CCI Request at 2-12.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
WESTINGHOUSE ELECTRIC COMPANY, LLC) Docket No. 70-36-MLA
)
(Hematite Decommissioning Project,)
Materials License Amendment))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Ruling on Request for Hearing) (LBP-09-28)**, dated December 3, 2009, have been served upon the following persons by either Electronic Information Exchange.

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15 D21
Washington, DC 20555-0001

Paul S. Ryerson, Chair
Administrative Judge
E-mail: psr1@nrc.gov

Michael Clark, Esq.
E-mail: mjc1@nrc.gov
Mauri Lemoncelli, Esq.
E-mail: mauri.lemoncelli@nrc.gov
Catherine Scott, Esq.
E-mail: catherine.marco@nrc.gov

Michael F. Kennedy
Administrative Judge
E-mail: mfk2@nrc.gov

OGC Mail Center: OGCMailCenter@nrc.gov

Mark O. Barnett
Administrative Judge
E-mail: mob1@nrc.gov or
mark.barnett@nrc.gov

Anthony C. Eitrem, Esq., Chief Counsel
E-mail: ace1@nrc.gov
Ann Hove, Law Clerk
E-mail: ann.hove@nrc.gov
Zachary Kahn, Law Clerk
E-Mail: zxk1@nrc.gov

WESTINGHOUSE ELECTRIC COMPANY, LLC , Docket No. 70-36-MLA
MEMORANDUM AND ORDER (Ruling on Request for Hearing) (LBP-09-28)

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop O-7H4M
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Rulemakings & Adjudications Staff
Mail Stop O-16C1
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

Winston and Strawn, LLP
Counsel for the Applicant
1700 K Street, N.W.
Washington, DC 20006

Winston and Strawn, LLP
Counsel for the Applicant
101 California Street
San Francisco, CA 94111

David A. Repka, Esq.
E-Mail: drepka@winston.com
Mark J. Wetterhahn, Esq.
E-mail: mwetterh@winston.com

Tyson R. Smith, Esq.
E-mail: trsmith@winston.com

Citizens for a Clean Idaho, Inc.
P.O. Box 202
Chester, ID 83421

Citizens for a Clean Idaho, Inc.
P.O. Box 193
Boise, ID 83701

Stephen Loosli, Director
E-mail: stephen@cleanidaho.org

David H. Leroy, Esq.
E-mail: dave@dleroy.com

 [Original signed by Linda D. Lewis]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 3rd day of December 2009.