

transportation, recycling, processing, and disposal of low-level radioactive waste (“LLRW”) and other nuclear material. There is a global marketplace for nuclear services, including waste processing services, and the viability of U.S. commercial disposal companies is significantly enhanced by participation in this global market. In addition, the LLRW to be imported under the above-captioned license application is nuclear medicine-related waste, collected by Eckert & Ziegler Nuclitec (“EZN”) from hospitals, research facilities, and other technical facilities in Germany.³ As explained in *EnergySolutions*’ Response to Petitioners’ Waiver Request, the effective management of such LLRW is important to global public health.⁴ In fact, the United States is among the largest consumers of certain key medical radioisotopes, but does not produce, process, or contribute to the disposal of waste associated with the production of such radioisotopes.⁵ Significant delay in the issuance of routine import and export licenses for medical-research waste could establish a climate of regulatory uncertainty that could ultimately restrict worldwide access to the benefits of developments in nuclear medicine and be detrimental to the viability of the commercial LLRW disposal industry in this country.

II. BACKGROUND

On November 3, 2010, the NRC received *EnergySolutions*’ application for a license to import up to 1,000 tons of LLRW into the United States from Germany under the provisions of 10 CFR Part 110.⁶ The LLRW is to be imported for the purpose of volume reduction through

³ See Letter from Philip Gianutsos, Duratek, to Scott Moore, NRC, “Combined Applications for the Export/Import of Radioactive Material” at 1 (Aug. 27, 2010) (import application cover letter), *available at* ADAMS Accession No. ML103090582 (appended to Application for Specific License to Import Radioactive Material (to Germany), Lic. No. IW029 (Aug. 27, 2010) (“Import Application”).

⁴ January 10, 2011 (“Waiver Response”).

⁵ See generally “The Supply of Medical Radioisotopes, Interim Report of the OECD/NEA High-level Group on Security of Supply of Medical Radioisotopes” (2010), *available at* <http://www.oecd-nea.org/med-radio/reports/HLG-MR-Interim-report.pdf> (accessed Jan. 31, 2011).

⁶ Request for a License To Import Radioactive Waste, 75 Fed. Reg. at 74,108.

incineration at the *EnergySolutions* Bear Creek Facility in Oak Ridge, Tennessee (the “Bear Creek Facility”). *EnergySolutions* also filed a companion application⁷ for a license to export up to 1,000 tons⁸ of LLRW from the United States to Germany. As explained in the Import and Export Applications, the hearth ash generated from the incinerated LLRW will be collected in appropriate packages and, along with any non-incinerable and non-conforming waste, will be exported back to Germany.

EnergySolutions applied for the import and export licenses to support a routine commercial transaction. The company provides LLRW services to the commercial nuclear sector and many other nuclear users, including hospitals, research facilities, the Tennessee Valley Authority, and the U.S. Departments of Energy and Defense. *EnergySolutions* is authorized to possess radioactive material in accordance with a Tennessee license held by its subsidiary, Duratek Services, Inc. (“Duratek”). The radionuclides in the LLRW will not exceed the possession limits in Duratek’s Tennessee licenses⁹ over the duration of the proposed import and export licenses. Thus, the German material proposed to be imported would be, from a public health and safety perspective, indistinguishable from the domestic and international LLRW that *EnergySolutions* routinely receives, processes, and disposes at its facilities.¹⁰ However, the German material will be processed in a dedicated campaign so that the hearth ash generated can be segregated from the hearth ash generated through processing of domestic material at the Bear

⁷ Application for Specific License to Export Radioactive Material (to Germany), Lic. No. XW018 (Aug. 27, 2010), available at ADAMS Accession No. ML103090595 (“Export Application”).

⁸ Because of the nature of incineration operations, *EnergySolutions* is not able to estimate the quantities, volume, and activities of the materials that will need to be exported. Because it will be a fraction of the imported amount, the material to export will not exceed 1,000 tons.

⁹ See Import Application at 7 (citing Tennessee licenses R-73008 and R-73016).

¹⁰ The NRC recognized this principle in its recent Part 110 rulemaking, in which the NRC eliminated some of the differences between the licensing requirements for export and import and the domestic licensing requirements for possession of LLRW. See Final Rule, Export and Import of Nuclear Equipment and Material; Updates and Clarifications, 75 Fed. Reg. 44,072, 44,073 (July 28, 2010) (“2010 Final Rule”).

Creek Facility.¹¹ This remaining hearth ash material from the dedicated campaign will be returned to Germany for disposal in Germany.

III. LEGAL STANDARDS

A. Standards for Hearings on Export and Import Licenses

1. Hearing Request or Intervention Petition.

To request a hearing in an import or export licensing proceeding under 10 CFR 110.82:

(b) Hearing requests and intervention petitions must:

- (1) State the name, address and telephone number of the requestor or petitioner;
- (2) Set forth the issues sought to be raised;
- (3) Explain why a hearing or an intervention would be in the public interest and how a hearing or intervention would assist the Commission in making the determinations required by § 110.45.
- (4) Specify, when a person asserts that his interest may be affected, both the facts pertaining to his interest and how it may be affected with particular reference to the factors in § 110.84.¹²

2. Commission Action on a Hearing Request or Intervention Petition.

Under “the Nuclear Non-Proliferation Act of 1978 (NNPA), Congress gave the Commission discretion to hold public hearings [on export and import license applications], or not, ‘as the Commission deems appropriate.’”¹³ 10 CFR 110.84 lists the factors that the Commission will consider in determining whether to grant a hearing request. For the instant petition, the relevant factors are:

(a) In an export licensing proceeding, or in an import licensing proceeding in which a hearing request or intervention petition does not assert or establish an interest which may be affected, the Commission will consider:

- (1) Whether a hearing would be in the public interest; and

¹¹ See EnergySolutions’ Response to NRC Request for Additional Information [(“RAI”)] dated December 20, 2010, RAI #5 Resp. (Jan. 19, 2011) (“Response to RAIs”).

¹² 10 CFR 110.82(b).

¹³ U.S. Dep’t of Energy (Plutonium Export License), CLI-04-17, 59 NRC 357, 366 (2004) (“Plutonium Export”).

- (2) Whether a hearing would assist the Commission in making the statutory determinations required by the Atomic Energy Act [“AEA”].
- (b) If a hearing request or intervention petition asserts an interest which may be affected, the Commission will consider:
- (1) The nature of the alleged interest;
 - (2) How that interest relates to issuance or denial; and
 - (3) The possible effect of any order on that interest, including whether the relief requested is within the Commission’s authority, and, if so, whether granting relief would redress the alleged injury.
-
- (d) Before granting or denying a hearing request or intervention petition, the Commission will review the Executive Branch’s views on the license application and may request further information from the petitioner, requester, the Commission staff, the Executive Branch or others.
-
- (g) After consideration of the factors covered by paragraphs (a) through (f), the Commission will issue a notice or order granting or denying a hearing request or intervention petition. Upon the affirmative vote of two Commissioners a hearing will be ordered. A notice granting a hearing will be published in the FEDERAL REGISTER and will specify whether the hearing will be oral or consist of written comments. A denial notice will set forth the reasons for denial.¹⁴

Under Section 110.84, the Commission has “traditionally applied the judicial concepts of standing to determine whether a potential intervenor has an ‘interest [that] may be affected’ within the meaning of section 189a of the AEA.”¹⁵ Section (B), below, explains in detail the judicial standing concepts as they apply to this proceeding under Section 110.84(b). Importantly, even if a petitioner shows standing, there is no statutory or regulatory requirement for the

¹⁴ 10 CFR 110.84.

¹⁵ *Plutonium Export*, CLI-04-17, 59 NRC at 363.

Commission to hold a hearing. Instead, hearings are a matter of Commission discretion and are held only when they will assist the NRC in making its statutory determinations.¹⁶

3. Issuance or Denial of Licenses

For an export license the Commission will first solicit and receive the views of the Executive Branch. If it is the judgment of the Executive Branch that the proposed export will not be inimical to the common defense and security, then the Commission will make its own assessment under 10 CFR 110.42(d).¹⁷ The Commission will issue the export license if it finds that the “proposed export is not inimical to the common defense and security” and if the receiving country “finds that it has the administrative and technical capacity and regulatory structure to manage and dispose of the waste and consents to the receipt of the radioactive waste.”¹⁸ Under 10 CFR 110.45, the Commission will issue an import license if it finds that (1) the proposed import will not be inimical to the common defense and security; (2) it will not constitute an unreasonable risk to the public health and safety; (3) National Environmental Policy Act of 1969, as amended (“NEPA”) requirements are met; and (4) an appropriate facility has agreed to accept the waste for management and disposal.¹⁹

B. Standing

1. In General

As noted above, in evaluating whether a petitioner has an interest that might be affected under 10 CFR 110.84, the Commission has applied judicial concepts of standing.²⁰ In general, to demonstrate standing, a petitioner must show: (1) an actual or threatened, concrete and

¹⁶ *Id.* at 366-67 & n.14.

¹⁷ *See* 10 CFR 110.45(a).

¹⁸ 10 CFR 110.42(d). *See also* 10 CFR 110.45(a).

¹⁹ *See* 10 CFR 110.45(b). Notably, the proposed import here involves management of material at a U.S. facility, but ultimate disposal of the remaining hearth ash material at a German facility.

²⁰ *See Plutonium Export*, CLI-04-17, 59 NRC at 363.

particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision.²¹ These three criteria are commonly referred to as injury-in-fact, causation, and redressability, respectively.

First, a petitioner’s injury-in-fact showing “requires more than an injury to a cognizable interest. It requires that the party seeking [to participate] be himself among the injured.”²² The injury must be “concrete and particularized,” not “conjectural” or “hypothetical.”²³ Additionally, the alleged injury-in-fact must lie within “the zone of interests” protected by the statutes governing the proceeding.²⁴ Second, a petitioner must establish that the injuries alleged are fairly traceable to the proposed action—in this case, the issuance of the import and export licenses to EnergySolutions. Although a petitioner is not required to show that the injury flows directly from the challenged action, it must nonetheless show that the “chain of causation is plausible.”²⁵ Finally, each petitioner is required to show that “its actual or threatened injuries can be cured by some action of the tribunal.”²⁶ In other words, “it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision.”²⁷

2. No Proximity Presumption Applies

No proximity presumption applies to this proceeding. Under NRC case law, a petitioner may, in some instances, be presumed to have fulfilled the judicial standards for standing based

²¹ See *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). See also *Calvert Cliffs 3 Nuclear Project, LLC* (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, slip op. at 4 (Oct. 13, 2009).

²² *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

²³ *Sequoyah Fuels Corp.* (Gore, Okla. Site), CLI-94-12, 40 NRC 64, 72 (1994) (citations omitted).

²⁴ *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, N.M.), CLI-98-11, 48 NRC 1, 5 (1998), *aff’d sub nom. Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999).

²⁵ *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75.

²⁶ *Sequoyah Fuels Corp.* (Gore, Okla. Site Decommissioning), CLI-01-2, 53 NRC 9, 14 (2001).

²⁷ *Sequoyah Fuels*, CLI-94-12, 40 NRC at 76 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotations omitted)).

on his or her geographic proximity to a facility or source of radioactivity.²⁸ The Commission has held that working or living within a 50-mile radius of a nuclear power reactor is generally sufficient to invoke the proximity presumption in proceedings involving the issuance of a commercial reactor operating license.²⁹ In other proceedings, however, including export and import proceedings such as this one, the Commission has held there is no proximity presumption “[a]bsent situations involving such obvious potential for offsite consequences” as with the construction and operation of a reactor.³⁰ Instead, the Commission “determine[s] on a *case-by-case basis* whether the proximity presumption should apply, considering the ‘obvious potential for offsite [radiological] consequences,’ or lack thereof, from the application at issue, and specifically ‘taking into account the nature of the proposed action and the significance of the radioactive source.’”³¹

Furthermore, the smaller the risk of offsite consequences, the closer the petitioner must reside to be realistically threatened.³² For example, a Board held that a distance of 43 miles from a spent fuel pool facility, coupled with generalized claims of injury from radiation, was

²⁸ See *Calvert Cliffs*, CLI-09-20, slip op. at 4-5, 8 (recognizing proximity presumption in nuclear reactor proceedings).

²⁹ See *id.*

³⁰ *Plutonium Export*, CLI-04-17, 59 NRC at 364 (quoting *Fla. Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 & 2), CLI-89-21, 30 NRC 325, 329-30 (1989)).

³¹ *Consumers Energy Co.* (Big Rock Point Indep. Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007) (“*Big Rock Point ISFSI*”) (emphasis added) (quoting *Exelon Generating Co., LLC* (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-05-26, 62 NRC 577, 580-81 (2005)). See also *Ga. Inst. of Tech.* (Ga. Tech Research Reactor, Atlanta, Ga.), CLI-95-12, 42 NRC 111, 116-17 (1995) (case-by-case determination based on nature of the action and significance of the radioactive source); *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75 n.22 (determination of how proximate petitioner must live or have frequent contacts to a radioactive source depends on the danger posed by the source).

³² See, e.g., *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 427-28, 432, *recons. denied*, LBP-02-25, 56 NRC 467, 474-76 (2002) (in a proceeding for a license to construct and operate an ISFSI at an operating reactor, granting standing to petitioners who lived within 17 miles of the facility, but denying standing to a petitioner who lived 20 miles from the facility); *Tenn. Valley Auth.* (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 25 (2002) (allowing for the proximity presumption to apply to an organization’s members who lived within 17 miles of the Sequoyah and Watts Bar reactors at which “TVA propose[d] to add tens of millions of curies of highly combustible radioactive hydrogen gas” to the reactors’ core inventory).

insufficient to establish standing in a spent fuel pool license amendment case.³³ In so ruling, the Board stated that “we note that we know of no scenario under which the radiation attributable to the fuel pool would affect a residence 43 miles distant from the fuel pool; and petitioner has not informed us of any such scenario.”³⁴

3. Standing of Organizations

An organization that wishes to intervene in a proceeding may do so either in its own right (by demonstrating injury to its organizational interests), or in a representative capacity (by demonstrating harm to the interests of its members).³⁵ To intervene in a proceeding in its own right, an organization must allege—just as an individual petitioner must—that it will suffer an immediate or threatened injury to its organizational interests that can be fairly traced to the proposed action and be redressed by a favorable decision.³⁶ General environmental or public policy interests are insufficient to confer organizational standing.³⁷

To invoke representational standing, an organization must: (1) show that at least one of its members has standing in his or her own right (*i.e.*, by demonstrating geographic proximity in cases where the presumption applies, or by demonstrating injury-in-fact within the zone of protected interests, causation, and redressability); (2) identify that member by name and address;

³³ *Bos. Edison Co.* (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98-99 (1985), *aff'd on other grounds*, ALAB-816, 22 NRC 461 (1985).

³⁴ *Id.* at 99.

³⁵ *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) (*citing Ga. Tech.*, CLI-95-12, 42 NRC at 115).

³⁶ *See Ga. Tech.*, CLI-95-12, 42 NRC at 115.

³⁷ *See Sierra Club*, 405 U.S. at 730 & 741 (holding that a “special interest in the conservation and the sound maintenance of the national parks, game refuges, and forests of the country” is insufficient to provide organizational standing to a petitioner).

and (3) show, “preferably by affidavit,” that the organization is authorized by that member to request a hearing on behalf of the member.³⁸

IV. ARGUMENT

The Hearing Request is deficient because: (A) Petitioners fail to establish an interest that may be affected; and (B) discretionary intervention would not assist the commission or be in the public interest.

A. Petitioners Fail to Establish An Interest That May Be Affected

The Petitioners fail to show how their interest may be affected, contrary to 10 CFR 110.82 and 110.84. To determine whether Petitioners’ interest may be affected; the Commission will rely on judicial concepts of standing. Because the Petitioners are “organizations,” Petitioners must either demonstrate that they have standing in their own right or that they have representational standing on behalf of their members. The Petitioners do not specify or explain whether they are claiming organizational or representational standing, but their Declarations of Standing suggest that they are claiming representational standing.³⁹ Ultimately, the Hearing Request fails to demonstrate either organizational or representational standing for any of the three petitioner organizations.

1. Petitioner Does Not Assert or Establish Organizational Standing

In order to establish organizational standing, Petitioners must demonstrate a “discrete institutional injury to itself, other than general environmental and policy interests.”⁴⁰ Petitioners

³⁸ *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 408-10 (2007). *See also N. States Power Co.* (Monticello Nuclear Generating Plant, Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Indep. Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 47 (2000); *GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000).

³⁹ *See generally* Declarations of Standing submitted by Ann P. Harris (Dec. 30, 2010) (“Harris Declarations”) and Ralph M. Hutchison (Dec. 28, 2010) (“Hutchison Declaration”). These declarations are attached to the Hearing Request.

⁴⁰ *Int’l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247 (2001).

do not articulate any specific organizational interests in support of their claim of standing, and instead rely solely on a theory of representational standing.⁴¹ Indeed, the Hearing Request does not assert a discrete institutional injury, as is required to establish organizational standing. The general assertion that the Oak Ridge Environmental Peace Alliance (“OREPA”) “has been a public voice representing the public health interests of the communities living downwind and downstream from operations at the Oak Ridge Nuclear Reservation”⁴² is the type of broad interest, shared with many others, that has been found insufficient to establish injury-in-fact and therefore organizational standing.⁴³

Absent any identified organizational interest beyond general concerns for the health and safety of the public, Petitioner organizations cannot demonstrate organizational standing.

2. Petitioner Fails to Establish Representational Standing

The Hearing Request asserts that “Petitioners have demonstrated their standing to request a hearing”⁴⁴ and points to declarations of standing provided by Ann P. Harris and Ralph Hutchison. As noted above, when an organization asserts a right to represent the interest of its members, the organization must show that the identified members would otherwise have standing to sue in their own right,⁴⁵ in this case by demonstrating injury-in-fact within the zone

⁴¹ See Hearing Request at 10. *See also* Harris Declarations, Hutchison Declaration. The Hearing Request does not provide page numbers. *EnergySolutions*’ citations are to the sequential pages in the Hearing Request, as filed and served.

⁴² Hutchison Declaration.

⁴³ *See Sierra Club*, 405 U.S. at 735, 741 (a general statement that an organization has a “special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country” is insufficient to provide organizational standing).

⁴⁴ Hearing Request at 10.

⁴⁵ *See, e.g., Palisades*, CLI-07-18, 65 NRC at 409.

of protected interests, causation, and redressability, not through the operation of any proximity presumption.⁴⁶

a. No Individual Has Clearly Authorized Any of the Petitioners to Seek a Hearing

The declarations submitted by Ann P. Harris appear to authorize the “Tennessee Environmental Council” (“TEC”) to represent her interests.⁴⁷ One of Ms. Harris’ declarations refers to “Citizens to End Nuclear Dumping in Tennessee,” (“CTENDIT”), and may have been intended to authorize CTENDIT to represent her. Ms. Harris, however, cannot simultaneously authorize multiple organizations to represent her interests in this proceeding.⁴⁸ This type of “multiple representation” might lead to confusion as to which of the Petitioners was speaking for Ms. Harris, and “such confusion would be detrimental to the process of adjudication.”⁴⁹ Thus, no individual has clearly authorized TEC or CTENDIT to seek a hearing on his or her behalf.

As for the third Petitioner, OREPA, the Declaration of Standing submitted by Ralph M. Hutchison does not authorize OREPA to represent *his* interests; instead it states the opposite: that OREPA has authorized him to represent *its* interests. As stated above, however, OREPA has not established organizational standing. Thus, no individual has clearly authorized OREPA to seek a hearing on his or her behalf.

In any case, even if we assume, *arguendo*, that OREPA and either TEC or CTENDIT are authorized to represent Mr. Hutchison and Ms. Harris, respectively, that authorization alone is

⁴⁶ See *Plutonium Export*, CLI-04-17, 59 NRC at 364-66.

⁴⁷ See Harris Declarations (“I have authorized TEC to represent my interests in this proceeding”).

⁴⁸ See *Big Rock Point ISFSI*, CLI-07-19, 65 NRC at 426 (“Mr. McManemy should not have requested to intervene in his own right and simultaneously authorized each of the two other Petitioners to represent his interests.”).

⁴⁹ *Id.*

not sufficient to establish standing because these individuals must establish standing in their own right. They have not.

b. Petitioners Cannot Rely on the Proximity Presumption

The Hearing Request fails to show representational standing because Petitioners' sole basis for asserting standing is a misplaced reliance on the proximity presumption. As explained above, in import or export licensing cases, this presumption can only be invoked with a showing of "an obvious potential for offsite consequences."⁵⁰ The distance at which the presumption applies "must be judged on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source."⁵¹

Petitioners here provide no information on the significance of the radioactive source or the area in which there might be an obvious potential for offsite consequences. Instead, Ms. Harris merely asserts that she lives "within 17 miles" of EnergySolutions' facilities,⁵² while Mr. Hutchison asserts he lives "due west of the incinerator," but does not reveal how far away he lives.⁵³ His address in Knoxville, Tennessee, however, would place him approximately 25 miles east of the Bear Creek Facility.

These distances are far greater than that claimed by most of the declarants who were denied standing in the *Plutonium Export* case.⁵⁴ In *Plutonium Export*, petitioners sought to demonstrate standing by showing their proximity to plutonium transport routes and shipment locations to be used under the proposed export license.⁵⁵ The petitioners submitted numerous

⁵⁰ *Plutonium Export*, CLI-04-17, 59 NRC at 365 (quoting *Ga. Tech*, CLI-95-12, 42 NRC at 116-17).

⁵¹ *Id.*

⁵² Harris Declarations.

⁵³ Hutchison Declaration.

⁵⁴ See CLI-04-17, 59 NRC at 364 n.11.

⁵⁵ See *id.* at 364.

supporting declarations from individuals who lived as close as one-eighth of a mile of the harbor to be used for the proposed shipments.⁵⁶ The petitioners also alleged that there was an obvious potential for offsite consequences because of the possibility of terrorist attacks on the plutonium shipments.⁵⁷ This was insufficient to demonstrate standing, however, because the petitioners failed to provide “evidence of a specific [and] credible” scenario that would lead to radiological releases.⁵⁸ Here, Petitioners similarly seek to rely on “generalized and hypothetical harm”⁵⁹ from “airborne radioactive emissions from the incineration of imported LLRW.”⁶⁰ They provide no evidence to show that there will be any releases beyond regulatory limits or that there is any danger of resulting harm to individuals located at the addresses listed in the Harris Declarations or the Hutchison Declaration.

The Commission’s decision in *Plutonium Export* thus forecloses any claim of standing based on proximity.⁶¹ Instead, Petitioners “must demonstrate a causal connection between the licensing action and the injury alleged.”⁶² Petitioners provide no evidence suggesting the possibility of excessive radiological releases during the transportation or processing of LLRW under the proposed licenses. In fact, the proposed shipments are no different from the numerous ongoing shipments that occur routinely involving domestic waste that is indistinguishable from the imported waste.⁶³

⁵⁶ *Id.* at 364 n.11.

⁵⁷ *Id.* at 365.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Harris Declarations. *See also* Hutchison Declaration.

⁶¹ *See* CLI-04-17, 59 NRC at 364 n.11.

⁶² *Id.* *See also* *Diablo Canyon*, LBP-02-23, 56 NRC at 433-34.

⁶³ *See, e.g.*, Sandia Nat’l Labs, How [safe] are radioactive material transportation packages?, http://www.sandia.gov/tp/SAFE_RAM/RECORD.HTM (“Radioactive material has been shipped in the U.S.

In sum, Petitioners cannot invoke the proximity presumption and must instead show standing under the judicial standing analysis.

c. Petitioners Fail the Judicial Standing Test

Under the traditional judicial standing test, Petitioners must show injury-in-fact within the zone of interest, causation, and redressability.⁶⁴ The Hearing Request claims that “those in the area, downwind, downstream” or along transport routes will “[c]ertainly” be affected,⁶⁵ but it fails to explain how the alleged “airborne emissions” will reach the locations of its members, much less reach them in sufficient concentrations to cause harm to any individual.⁶⁶

Although Ms. Harris claims that “airborne radioactive emissions from the incineration of imported LLRW” will adversely affect her health and the health of family members,⁶⁷ and Mr. Hutchison more vaguely claims that such emissions “will adversely affect the health of our communities,”⁶⁸ both fail to provide any evidence to suggest that they will be in danger of suffering any injury from the dose they might receive.⁶⁹ Thus, the Petition fails to show any injury-in-fact or any “causal connection between the licensing action and the injury alleged.”⁷⁰

for more than 50 years with no occurrences of death or serious injury from exposure of the contents of these shipments.”) (last visited Jan. 21, 2011).

⁶⁴ See, e.g., *Quivira Mining*, CLI-98-11, 48 NRC at 6; *Lujan v. Defenders of Wildlife*, 504 U.S. at 560-62.

⁶⁵ Hearing Request at 10.

⁶⁶ See *id.*; Harris Declarations; Hutchison Declaration.

⁶⁷ Harris Declarations.

⁶⁸ Hutchison Declaration.

⁶⁹ See *Pilgrim*, LBP-85-24, 22 NRC at 98-99 (denying standing to petitioner challenging a license amendment for spent fuel pool reracking because “we know of no scenario under which the radiation attributable to the fuel pool would affect a residence 43 miles distant from the fuel pool; and petitioner has not informed us of any such scenario”).

⁷⁰ *Plutonium Export*, 59 NRC at 364 n.11. For the same reasons, the Petition also fails to show both a substantially increased risk of harm to the Petitioner organizations or their members and a substantial probability of harm with that increase taken into account. See also *Pub. Citizen, Inc. v. Nat’l Highway Traffic Safety Admin.*, 513 F.3d 234, 237 (D.C. Cir. 2008).

As a result, Petitioners have failed to demonstrate standing. This failure cuts strongly against Petitioners in the Commission's consideration of the relevant factors in 10 CFR 110.84.

B. Discretionary Intervention Would Not Assist The Commission Or Be In The Public Interest

In an import or export licensing proceeding where the Petitioner fails to assert or establish an interest which may be affected, the Commission will consider whether a hearing would be in the public interest, and whether a hearing would assist the Commission.⁷¹ Petitioners also fail to show that a hearing on the issues they raise would be in the public interest or that they would assist the Commission in making its required findings, contrary to 10 CFR 110.82 and 110.84. Petitioners identify a series of "concerns" that they allege are not addressed in the Import and Export Applications.⁷² To the extent required under NRC regulations, all of the issues Petitioners raise are addressed in the Import and Export Applications. Petitioners' apparent desire for additional information, beyond that required for the Commission's determination under 10 CFR 110.45, is irrelevant. Indeed, as explained below, many of Petitioners' issues are vague, raise generic challenges to Commission rules, or are otherwise inappropriate topics for a hearing on these license applications.

Critically, the Hearing Request does not explain how the Petitioners will offer any specialized expertise relating to the EnergySolutions Bear Creek Facility⁷³ or additional information on any of the specific topics listed below. Instead, Petitioners' "issues" primarily consist of requests for information that either is already in the record or is not required by NRC's

⁷¹ See 10 CFR 110.84.

⁷² See Hearing Request at 5-9.

⁷³ In his declaration, Mr. Hutchison recounts certain experiences with environmental matters but fails to explain how that experience is relevant to the issues Petitioners seek to raise in this proceeding.

governing regulations. Thus, if a hearing were to be held, it is unclear how any evidence presented by Petitioners would assist the Commission in making its required findings.⁷⁴

1. *WHAT THE WASTE IS: the amount, form, character, class and type of radioactivity and radioactive waste and material that would be imported and incinerated/processed in Tennessee. We want to know the volume, mass, curies (becquerels) of all radionuclides, chemical and physical form*

To the extent this information is required by regulation, it is available in the record. As required by 10 CFR 110.32(f)(1) and (5), the Import Application provides a description of the material. In particular, the LLRW proposed to be imported will consist of up to 1000 tons of incinerable dry (*i.e.*, solid) active material, will contain radionuclides that do not exceed the limits of Duratek's Tennessee licenses, and will be in a form suitable for transport in accordance with U.S. Department of Transportation regulations, as specified by the licenses.⁷⁵ EnergySolutions' Response to the NRC Staff's request for additional information ("RAI")⁷⁶ provides further details on the physical and chemical characteristics and volume of the LLRW.⁷⁷ The NRC's regulations in Part 110 recognize that, in some cases, there may be some degree of uncertainty regarding the final waste classification of imported LLRW.⁷⁸ To the extent Petitioners demand more specific or definitive information, it is not required under 10 CFR 110.32(f).

⁷⁴ Cf. *Plutonium Export*, 59 NRC at 368 ("Petitioners themselves acknowledge that they do not possess any specialized knowledge not already in the public record . . .") (citation omitted). See also *Transnuclear, Inc.* (Export of 93.3% Enriched Uranium), CLI-00-16, 52 NRC 68, 72 (2000) ("[T]here is nothing in [the] petition indicating that [petitioner] possesses special knowledge or that it will present significant information not already available to and considered by the Commission.").

⁷⁵ See Import Application, attach. 3, at 7.

⁷⁶ Letter from J. Owens, NRC, to P. Gianutsos, EnergySolutions, "Request for Additional Information (IW029)," available at ADAMS Accession No. ML103490685; *id.* encl., available at ADAMS Accession No. ML103490687.

⁷⁷ See Response to RAIs, RAI #2 Resp.

⁷⁸ See 2010 Final Rule, 75 Fed. Reg. at 44,079. See also *id.* ("The final rule does not require classification of waste being imported to a waste processor because such classification would have no safety relevance at the time. The licensed waste processor, after processing the waste, must classify the waste . . .").

2. *WHERE THE WASTE IS COMING FROM (countries and industries): the need for specific information on the sources and origins of the radioactive wastes. Since the German company, EZN, is in the business of collecting radioactive waste from all over the world, EnergySolutions should specifically identify the sources, industries, geographical origins and characterization of all wastes*

To the extent this information is required by regulation, it is available in the record. As required by 10 CFR 110.32(c), the Import Application explains that the country of origin is Germany.⁷⁹ All waste to be transferred to the U.S. for processing under the import license will have been generated in Germany.⁸⁰ In accordance with 110.32(f)(6), the Import Application states that the LLRW proposed to be imported is waste generated from research and related medical activities, from hospitals, research facilities, and other technical facilities.⁸¹ In short, the Import Application and supplemental information submitted in connection with NRC's review process provides ample explanation as to the precise origin and characteristics of the waste.

3. *HOW LONG WILL THE RADIOACTIVE WASTE MATERIALS BE IN THE UNITED STATES: what are the time limits for domestic transit to and from Oak Ridge, storage both prior to and after incineration, and total duration of the waste material in any form being in the U.S. In no case should the radioactive waste material in any form be in the U.S. for longer than 90 days.*

Petitioners identify no regulation requiring EnergySolutions to commit to specified time limits for the retention of waste, much less commit to the 90-day limit that Petitioners demand. There is no such specified time limit. The Export and Import Applications provide that the radionuclides in EnergySolutions' possession at any given time will not exceed the limits in Duratek's Tennessee licenses.⁸²

4. *HOW MUCH RADIOACTIVITY WILL STAY HERE (in our air, water, soil, landfills, etc): the amount of radioactivity that will remain in the state/country as solid waste going to solid waste landfills or to restricted or unrestricted "recycling" or to cement kilns. This*

⁷⁹ See Import Application, attach. 3, at 6.

⁸⁰ See Response to RAIs, RAI #1 Resp.

⁸¹ See Import Application Cover Letter at 1; Response to RAIs, RAI #3 Resp.

⁸² See Import Application, attach. 3, at 7; Export Application, attach. 2, at 4.

is of concern because the Tennessee Department of Environment and Conservation license for EnergySolutions allows some radioactive waste/material to be released for unrestricted reuse or disposal-that is, to go to unregulated destinations including commercial and municipal landfills in the state. Additionally, what is the disposal path of the incinerators' radioactive air filters which must be removed after becoming clogged?

In accordance with 10 CFR 110.32(f)(5) & (6), the Import Application provides information on the disposition of the LLRW, and further information is provided in the Response to RAIs. Briefly, the imported material will be possessed and incinerated in accordance with Duratek's Tennessee licenses. The imported waste will be processed in a dedicated campaign, and the hearth ash and any material that is not processed will be returned to EZN under the proposed export license.⁸³ A small amount of residual material, such as floor sweepings, booties, and slag will be disposed of in accordance with Duratek's procedures and applicable license conditions and permits.⁸⁴ No material imported under the license will be released by EnergySolutions into the general commercial recycling stream of commerce.⁸⁵

In this issue, Petitioners also appear to challenge the adequacy of Tennessee's regulatory program. Contrary to Petitioners' assumption, there will also be no "release[] for unrestricted reuse or disposal"⁸⁶ of the material imported under this license.⁸⁷ None of the waste will be disposed of in Tennessee because the wastes imported from Germany will not be processed via Duratek's volumetric assay program, which otherwise would allow certain qualified waste

⁸³ See Import Application, attach. 3, at 8; Response to RAIs, RAI #5 Resp.

⁸⁴ See Import Application, attach. 3, at 8; Response to RAIs, RAI #4 Resp. This residual material includes "radioactive air filters."

⁸⁵ As noted in the Response to RAIs, however, a portion of the LLRW will be shipped in steel drums, some of which may be reused in EnergySolutions' facilities or processed into shielding blocks for the domestic and international nuclear industry. See Response to RAIs, RAI #2 Resp.

⁸⁶ Hearing Request at 6.

⁸⁷ See Import Application, attach. 3 at 8 ("Residual radioactive material . . . will be disposed of in accordance with Duratek's procedures and applicable license conditions and permits.").

material to be disposed of in Tennessee industrial landfills.⁸⁸ Moreover, under the agreement states program, the Commission found Tennessee's radioactive materials regulation program to be "compatible with the Commission's program . . . and . . . adequate to protect the public health and safety."⁸⁹ The NRC also periodically reviews the Tennessee regulatory program.⁹⁰ The Commission should not entertain a challenge to these generic issues in the context of this import and export licensing proceeding.

5. *WHETHER ANY RADIOACTIVITY GETS INTO RECYCLING: the amount of radioactive or slightly radioactive material, if any, that could enter into commercial or restricted recycling through the EnergySolutions state license*

This information is available in the Import Application, the Response to RAIs, and in the state licenses and applicable regulations.⁹¹ As noted above, no material imported under the license will be released by EnergySolutions into general commercial recycling. Some material, however, may be included in metal melt product that can be recycled within the nuclear industry and used for purposes approved and controlled by the recipients' licenses.⁹² To the extent that this issue expresses Petitioners' desire for more specific information, Petitioners fail to explain why such additional information is required for the Commission to make its determinations under 10 CFR 110.45.

⁸⁸ *See id.*

⁸⁹ Agreement Between Atomic Energy Commission and State of Tennessee; Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State, 30 Fed. Reg. 10,918, 10,919 (Aug. 21, 1965).

⁹⁰ *See* Letter from D. Janda, NRC, to D. Shults, Tenn. Division of Radiological Health, Dept. of the Env't & Conservation (Oct. 26, 2010) *available at* ADAMS Accession No. ML103000173.

⁹¹ *See* Import Application at 8; Response to RAIs, RAI #4 Resp.

⁹² *See* Response to RAIs, Response to RAI #2.

6. *WHERE THE RADIATION WILL GO: a determination of the final destinations of the radioactive waste at various levels resulting from various kinds of processing of the imported waste*

As explained in response to item 4, above, and item 8, below, this information is clearly available in the Import Application and the Response to RAIs.⁹³ As already noted, the hearth ash and associated material will be segregated in a dedicated campaign and returned to Germany.⁹⁴ As noted above, some other material may be included in metal melt product that can be recycled within the nuclear industry, and residual waste will be dispositioned in accordance with applicable license requirements.⁹⁵ To the extent that Petitioners desire further specific information, they fail to explain why such additional information is required for the Commission to make its determinations under 10 CFR 110.45.

7. *COMPLIANCE WITH LICENSES AND HOW MUCH RADIOACTIVITY WILL GET OUT: the need for additional technical information on how the waste will meet acceptance criteria at US EnergySolutions facilities and technical information on the routine and accidental air and water radioactive emissions from those facilities*

As explained in the Import Application, all activities at EnergySolutions' Tennessee facilities will be conducted under applicable regulations and licenses.⁹⁶ Petitioners identify no regulatory requirement for EnergySolutions to provide additional information to the NRC on Duratek's compliance with those licenses. Indeed, it is a settled principle in NRC proceedings that the Commission will not litigate issues based on the assumption that a licensee will violate regulatory requirements,⁹⁷ and EnergySolutions' compliance with other licenses is outside the

⁹³ See Import Application, attach. 3, at 8-9; Response to RAIs RAIs #2, #4, #5 Resps.

⁹⁴ See Response to RAIs, RAI #5 Resp.

⁹⁵ See Response to RAIs, RAI #4 Resp.

⁹⁶ See Import Application, attach. 3, at 8.

⁹⁷ See *Curators of the Univ. of Mo.*, CLI-95-8, 41 NRC 386, 400 (1995) (rejecting intervenor's request "to base our findings on the assumption that the University will violate an explicit and unambiguous condition of the license").

scope of this proceeding.⁹⁸ Petitioners also provide no information to suggest that surrounding populations are negatively impacted by operations conducted at the Tennessee facilities; nor is EnergySolutions aware of such evidence.

8. *HOW MUCH RADIOACTIVITY WILL GO BACK TO EUROPE AND HOW: the need for more specific determination of the amount and levels of radioactivity of material and waste that could be returned to Germany, since the radioactivity will be concentrated and the transport distance will be doubled, just for the sake of burning it in the US*

To the extent this information is required by regulation and available at this time, it is available in the Export Application, which explains:

At this time it is not possible to estimate the quantities, volume, and activities of the materials that will need to be exported. It will be a fraction of the imported amount. Consequently, the material to be exported will not exceed 1000 tons (900 tonnes). The radionuclides in the waste to be exported over the duration of the proposed license will not exceed the following limits which are consistent with the possession limits of Duratek's Tennessee licenses (R73008 and R-73016)⁹⁹

To the extent Petitioners' desire a more "specific determination," they do not explain what regulation requires such specificity or why it is necessary for the Commission to make its required findings on the Export Application under 10 CFR 110.42(d).

9. *ULTIMATE DESTINATION IN GERMANY FOR RADIOACTIVE ASH AND OTHER RETURNS: is there a possibility the radioactive materials will be orphaned in the U.S. because of Germany's unwillingness to take it back, what are the specific disposal plans and guarantees?*

Here, Petitioners appear to speculate about the possibility that either the German government will interfere in this transaction or that EZN will refuse to accept return of the waste. This speculation, however, is contrary to the terms of Duratek's Tennessee licenses, which require all contracts with international customers to specify that Duratek retains the right to

⁹⁸ *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 & 2), CLI-07-25, 66 NRC 101, 105 (2007) ("The NRC's adjudicatory process [is] not the proper forum for investigating alleged violations that are primarily the responsibility of other Federal, state, or local agencies.").

⁹⁹ Export Application, attach. 2, at 4.

return radioactive waste to the generator, and for the international customers to warrant that they have the legal right and ability to accept the return of the waste.¹⁰⁰ In addition, the Import Application contains the commitment that EnergySolutions will not import any material under the proposed U.S. import license until its international counterpart has obtained all necessary permits for export from *and import* to Germany.¹⁰¹ Petitioners also ignore the fact that the cross-border shipment of LLRW for processing, followed by return of the waste to the country of origin, is common practice in the commercial nuclear industry.¹⁰²

10. TRANSPORT INFORMATION AND RISKS: specific information on the transport routes to, from, and through Tennessee and Virginia including documentation of transport insurance liability for the wastes and materials, and specific information on transport containers and protocols

In accordance with 10 CFR 110.32(f)(5), the Import Application provides information on the expected route of transit of shipment:

[T]he expected route of imports is by ocean vessel from Germany to the port at Portsmouth and/or Norfolk, Virginia. Transportation will continue via truck from the port of entry at Portsmouth primarily by interstate highway to TN route 95 or 58 to Bear Creek Road.”¹⁰³

The safety of materials during transportation is regulated by the U.S. Department of Transportation, not the NRC. Petitioners do not explain what regulations require

¹⁰⁰ See Import Application, attach. 3, at 8-9.

¹⁰¹ See *id.* at 7.

¹⁰² *E.g.*, Import License No. IW018 (Dec. 14, 2007), available at ADAMS Accession No. ML080080262 (authorizing importation of LLRW from France for treatment and disposal; the waste resulted from the decontamination of reactor coolant pump internals previously exported to France from a U.S. power station); Import License No. IW017 (Oct. 10, 2006), available at ADAMS Accession No. ML062860179 (authorizing importation of Class A LLRW from Canada for recycling and/or disposal and specifying that nonconforming material will be returned to Canada under an appropriate export license); Import License No. IW022 (Sept. 25, 2007), available at ADAMS Accession No. ML072750271 (authorizing importation of Class A LLRW from Canada for recycling and specifying that nonconforming material will be returned to Canada under an appropriate export license); Import License No. IW009 (Oct. 16, 2003), available at ADAMS Accession No. ML032960176 (authorizing importation of Class A LLRW from Germany for recycling and/or disposal, and specifying that certain byproducts will be returned to Germany under an appropriate export license).

¹⁰³ Import Application, attach. 3, at 8.

EnergySolutions to provide the NRC with information on “transport insurance liability” or “transport containers and protocols” in order to obtain an import or export license. EnergySolutions currently makes routine shipments within the United States on a regular basis that meet all applicable regulatory requirements, including transportation permitting and insurance requirements. Moreover, EnergySolutions has an excellent safety record making such shipments, including over 60,000 shipments without an incident.¹⁰⁴ The shipments made in connection with the proposed import are no different and present no unique issues warranting further consideration.

11. CLARIFICATION AND CLEAR IDENTIFICATION OF THE PORTS through which the radioactive waste and material would be shipped and routes to, from and through TN and the US; identification of state regulations that apply to offloading, handling and temporary storage in any port facility as well as clarification as to whether the port authorities have the ability to off-load and handle nuclear waste and respond in case of emergency

As with the previous issue, the Import Application provides the information required by NRC regulation to obtain an NRC import license. To the extent that Petitioners desire “clarification” of this information, they fail to explain why such additional information is required for the NRC to make its determinations under 10 CFR 110.45. Under Part 110, EnergySolutions is not required to provide further information to the NRC on the state or other regulations that apply to the transport of radioactive waste.

¹⁰⁴ See EnergySolutions, Safety – Employees, Public and Environment, <http://www.energysolutions.com/our-company/safety> (last accessed Jan. 14, 2011) (“Through EnergySolutions’ transportation division, Hittman Transport Services (Hittman), safety is of utmost importance. With more than 60,000 shipments without a hazardous materials incident and an excellent safety rating in the nuclear transportation business, EnergySolutions is proud of Hittman’s outstanding safety record.”).

12. PUBLIC HEALTH, SAFETY, AND SECURITY: impacts on the public health and safety and common defense and security of the states and our nation, specifically with regard to the radioactive materials in this application but also with regard to setting a precedent for additional large imports for processing and transport in, through and out of the US

Petitioners' vague allegation of "impacts on the public health and safety and common defense and security" fails to raise an issue suitable for hearing. To the extent Petitioners speculate about the effect of precedent on future shipments, their allegations are also irrelevant. Future shipments would be governed by future licenses. Furthermore, there would be no such precedent established because such imports already routinely occur.¹⁰⁵ Thus, issuance of the requested license will not set any new "precedent." To the contrary, all potential future imports will be subject to NRC licensing requirements and will be subject to public comment and potential hearings.

13. WORKPLACE RELATED RISKS AND EXPOSURE: what level of exposure will workers incur? How many employees will receive the maximum allowable dose per year, and over what period of time? Who will be responsible for the healthcare costs of those who become ill?

This issue challenges the safety of operations at EnergySolutions Tennessee facilities, thereby raising issues outside the scope of this proceeding. All activities at the Tennessee facilities will be conducted under applicable Tennessee regulations and licenses. Petitioners provide no evidence to suggest that workers at EnergySolutions' Tennessee facilities will receive exposures above regulatory limits. EnergySolutions is not aware of any such evidence.

14. CUMULATIVE EFFECTS: what will be the cumulative emissions and potential health effects of the incineration of this additional foreign waste (and potentially much more of it) combined with the existing radioactive emissions in the Oak Ridge area? Presently people in Oak Ridge are exposed to routine and accidental releases from the Oak Ridge-DOE TSCA incinerator for DOE mixed radioactive and hazardous wastes across the weapons complex, the Kingston DSSI boiler for mixed radioactive and hazardous wastes, the two EnergySolutions incinerators on Bear Creek Road, the new impact

¹⁰⁵ *Supra* note 102.

pyroprocessor near Oak Ridge; Oak Ridge DOE site operations, as well as other industrial emissions

As with the previous issue, this issue challenges the safety of operations at EnergySolutions' Tennessee facilities, thereby raising issues outside the scope of this proceeding.¹⁰⁶ All activities at the Tennessee facilities will be conducted under applicable Tennessee regulations and licenses, and the effects of such activities on the environment are within the jurisdiction of the state regulatory program.¹⁰⁷ As noted in Section 4, above, the NRC periodically reviews the Tennessee regulatory program and has found it to be compatible with the Commission's program and adequate to protect the public health and safety. Petitioners provide no evidence to suggest that the surrounding populations are negatively impacted by operations at EnergySolutions' Tennessee facilities, or that members of the public receive exposures above regulatory limits. EnergySolutions is not aware of any such evidence.

15. EXAMINATION OF THE PREMISE that the Business of World-Wide Radioactive Waste Management is Good for the People of the USA.

This issue is addressed in EnergySolutions' Waiver Response. In short, no new public policy examination is appropriate or warranted. This proceeding is not an appropriate forum for the policy debate Petitioners seek. This routine proposed import and export of nuclear medicine related waste raises no unique policy issues. On the contrary, the Commission's current regulations reflect this nation's compelling policy and legal interests in the safe disposal of radioactive waste that is generated throughout the world. As noted above, the LLRW proposed

¹⁰⁶ Petitioners also appear to raise issues related to the operation of other facilities such as the Department of Energy's ("DOE") TSCA Incinerator, which was not operated by EnergySolutions and has been permanently shut down. See DOE Presentation, "2010 Congressional Nuclear Cleanup Caucus" (Feb. 25, 2010), available at <http://www.orau.gov/DDSC/projects/DOE/congressional-caucus-briefings/2010-ORO-Cleanup.pdf> (accessed Jan. 31, 2010).

¹⁰⁷ See Final Rule, Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, 49 Fed. Reg. 9352, 9366-67 (Mar. 12, 1984) (explaining that licensing actions taken by agreement states are not federal actions for the purposes of NEPA, and relevant state licensing actions are "unlikely to have significant environmental effect").

to be imported is primarily nuclear medicine-related waste, from hospitals, research facilities, and other technical facilities. By facilitating the responsible management of waste, the United States is able to help support the use of nuclear medicine for the benefit of populations in other countries. Significantly, U.S. citizens also benefit from the global marketplace, because the United States imports radio-pharmaceutical products that are produced by other countries. These other countries manage and dispose the spent nuclear fuel and other radiological hazards associated with the reactor operations necessary to produce such radio-pharmaceuticals, even though the benefits of the production flow to U.S. citizens.

Petitioners contend that EnergySolutions has “provided virtually no information to assure the affected public that the waste to be shipped will conform to the specifications of the incinerator.”¹⁰⁸ However, this allegation is without foundation. Rather, the Import Application makes clear that the import and related activities will be in full compliance with the applicable incinerator license.¹⁰⁹

16. Additional Policy-Related Issues

In the final two pages of their Hearing Request, Petitioners purport to show why a hearing is in the public interest and would assist the Commission in making its regulatory determinations.¹¹⁰ This section of the Hearing Request raises a variety of vague and generic issues. In asking for a “clear explanation of the limited criteria that NRC considers in determining whether or not to approve” import and export license applications, Petitioners appear to question the structure of NRC’s regulations in Part 110—or at the least, appear to be

¹⁰⁸ Hearing Request at 9.

¹⁰⁹ See Import Application, attach. 3, at 8 (explaining that “[t]he imported material will be possessed and incinerated in the United States in accordance with Duratek’s Tennessee Agreement State License Number R-73016”).

¹¹⁰ See Hearing Request at 9-10.

asking for the Commission to hold an adjudicatory hearing so the regulations can be explained to them.¹¹¹ Similarly, by asserting that hearings would “identify where the larger decisions are made” and “go a long way to facilitating better understanding,” Petitioners appear to view adjudicatory hearings as either a forum for engaging in a policy debate or an educational experience for them.¹¹²

Neither view is appropriate. In general, the Commission will hold hearings in Part 110 proceedings when a hearing would be in the public interest *and* “would assist the Commission in making” *its* required determinations under the AEA,¹¹³ not when a hearing would assist petitioners in challenging NRC regulations or help them gain a “better understanding” of the regulatory process.¹¹⁴

In the 1995 Final Rule promulgating the current basic regulations on import and export of radioactive waste, however, the Commission rejected comments that “urged the NRC to ban all imports and exports of radioactive waste” or to limit such movements to “extraordinary circumstances.”¹¹⁵ This was because “[i]nternational commerce in radioactive waste . . . into and out of the United States, may be desirable from a policy perspective.”¹¹⁶ The Commission continued by citing certain “example[s]” of instances where “commerce involving radioactive waste may further important policy goals of the international community,” including “waste

¹¹¹ *Id.* at 9.

¹¹² *Id.* at 10.

¹¹³ 10 CFR 110.84(a).

¹¹⁴ *See also Plutonium Export*, CLI-04-17, 59 NRC 366 (“[I]n the Nuclear Non-Proliferation Act of 1978 (NNPA), Congress gave the Commission discretion to hold public hearings [on export and import license applications], or not, ‘as the Commission deems appropriate.’”).

¹¹⁵ Final Rule, Import and Export of Radioactive Waste, 60 Fed. Reg. 37,556, 37,557 (July 21, 1995).

¹¹⁶ *Id.*

shipments for international research.”¹¹⁷ The Commission’s regulations, moreover, do not restrict all imports to such examples, nor do they require imports or exports to fulfill “important policy goals.”¹¹⁸ As noted above, the Commission also has a long history of permitting the importation of LLRW for commercial purposes. Indeed, the NRC recently completed an extensive rulemaking to update, clarify, and correct many aspects of its import and export regulations in 10 CFR Part 110.¹¹⁹ The Commission could have adopted more stringent controls on the import and export of LLRW—as Petitioners apparently desire—but chose not to. Instead, the Commission “simplif[ed] the regulatory framework”¹²⁰ and “align[ed]” its “export and import regulations with its domestic regulations”¹²¹ Ultimately, Petitioners seek to challenge and revise this policy, apparently hoping that the Commission will adopt a new policy prohibiting—or strictly limiting—commercial importation of LLRW, including waste generated through research activities, such as the waste proposed to be imported here.

In sum, the policy debate Petitioners desire would not be in the public interest or assist the Commission in making its required determinations under 10 CFR 110.45.

* * *

Thus, contrary to 10 CFR 110.84(a), the issues Petitioners raise do not, individually or collectively, show that a hearing would be in the public interest or would assist the Commission in making the required statutory determinations on the license applications.

¹¹⁷ *Id.*

¹¹⁸ *See* 10 CFR 110.45.

¹¹⁹ *See* 2010 Final Rule, 75 Fed. Reg. at 44,072.

¹²⁰ *Id.* at 44,073.

¹²¹ *Id.* at 44,074.

V. CONCLUSION

For the foregoing reasons, the Commission should deny the Hearing Request in its entirety.

Respectfully submitted,

Signed (electronically) by Raphael P. Kuyler

John E. Matthews

Raphael P. Kuyler

Morgan, Lewis & Bockius LLP

1111 Pennsylvania Avenue, N.W.

Washington, DC 20004

Phone: 202-739-5524

Email: jmatthews@morganlewis.com

Brett Hickman

EnergySolutions, Inc.

423 West 300 South

Suite 200

Salt Lake City, UT 84101

Phone: 801-244-8438

Email: bahickman@energysolutions.com

Counsel for EnergySolutions

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of)	Docket Nos. 110-05896 (Import)
)	110-05897 (Export)
ENERGYSOLUTIONS)	
)	
(Radioactive Waste Import/Export Licenses))	January 31, 2011
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *ENERGYSOLUTIONS*' ANSWER OPPOSING VARIOUS TENNESSEE PETITIONERS' REQUEST FOR HEARING has been served upon the following persons on January 31, 2011 through the Electronic Information Exchange. Participants who are not registered with EIE were served via e-mail and U.S. Mail in accordance with 10 CFR 110.89(c)(3) and are indicated with an asterisk.

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001

OCAAMAIL
E-mail: OCAAMAIL@nrc.gov

Hearing Docket
E-mail: hearingdocket@nrc.gov
Evangeline S. Ngbea
E-mail: evangeline.ngbea@nrc.gov

OGCMailCenter
Kristy Remsburg
E-mail: ogcmailcenter@nrc.gov

Diane D'Arrigo
E-mail: dianed@nirs.org

Kathleen Ferris, Co-Founder
Citizens to End Nuclear Dumping in
Tennessee
E-mail: k.r.ferris@comcast.net

Franz Raetzer
E-mail: fraetzer@icx.net

Donald Safer
Tennessee Environmental Council
E-mail: dsafer@comast.net

James B. Steinberg*
Deputy Secretary of State
2201 C Street NW
Washington DC 20520
E-mail: updegrovel@state.gov

Norman A. Mulvenon*
Chair, LOC Citizens' Advisory Panel
102 Robertsville Rd., Suite B
Oak Ridge, TN 37830
E-mail: loc@icx.net

Respectfully submitted,

Signed (electronically) by Raphael P. Kuyler

Raphael P. Kuyler