

February 10, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of)	
)	
ENERGYSOLUTIONS)	Docket Nos. 110-05896 (import)
)	110-05897 (export)
(Radioactive Waste Import/Export)	
Licenses)	

**PETITIONERS’ REPLY TO ENERGYSOLUTIONS’ ANSWER TO
HEARING REQUEST AND PETITION TO INTERVENE**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 110.83(b), Petitioners Tennessee Environmental Council (TEC), Oak Ridge Environmental Peace Alliance (OREPA), and Citizens to End Nuclear Dumping in Tennessee (ENDIT), hereby reply to EnergySolutions’ Answer Opposing Various Tennessee Petitioners’ Request for Hearing (January 31, 2011) (“EnergySolutions’ Answer”). EnergySolutions opposes the Hearing Request and Petition to Intervene” filed by Petitioners on December 31, 2010 (“Hearing Request”), arguing that Petitioners lack standing or grounds to obtain a discretionary hearing. As discussed below, EnergySolutions' arguments are without merit.

II. DISCUSSION

**A. Petitioners Have Standing to Request a Hearing on EnergySolutions’
Import/Export License Application.**

EnergySolutions challenges Petitioners’ standing on several grounds, none of which has merit. First, EnergySolutions contests TEC’s and ENDIT’s standing to represent the interests of Ann Harris, who is a member of both organizations. According to EnergySolutions, only one organization may assert injury to Ann Harris’ interests as a

basis for representational standing. EnergySolutions' Answer at 12 (citing *Consumers Energy Co.* (Big Rock Point ISFSI), CLI-07-19, 65 NRC 423, 426 (2007)). *Consumers Energy* held that an individual petitioner (named McManemy) could not participate in a proceeding on his own behalf while simultaneously participating as a member of two petitioner organizations. The Commissioners of the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") found that "such multiple representation might lead to confusion as to which of the three Petitioners was speaking for Mr. McManemy; such confusion would be detrimental to the process of adjudication." *Id.* In support of its holding, the Commission cited *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 316 (1989), in which the Presiding Officer found that it would be "detrimental to the process to have a person appear in the proceeding individually and to be represented by an organization," and ordered that a person who sought to proceed with "both representations" should "inform the presiding officer of the reasons for the need to do so."

In both *Consumers Energy* and *Northern States Power*, the issue was not whether the petitioner organizations had representational standing based on injury to a shared member, but rather the confusion that would be caused if disparate voices advocated for the interests of a single individual. In this case, in contrast, such a potential for confusion does not exist because (a) TEC and ENDIT have jointly filed a single hearing request and (b) they are jointly represented by a single attorney. Because Ms. Harris' interests will be represented by a single voice rather than multiple voices, there would be no reason to restrict her participation as a member of both TEC and ENDIT. Indeed, it would be extremely unfair if the Commission could order that intervenors must consolidate their

interests and submit to representation by a lead intervenor (*see* 10 C.F.R. § 2.316) at the same time it could deny standing based on shared membership.¹

EnergySolutions also argues that OREPA has failed to demonstrate standing because the declaration of OREPA's Coordinator, Ralph M. Hutchison, does not state that he authorizes OREPA to represent his interests in this proceeding. EnergySolutions' Answer at 12. Mr. Hutchison submitted his declaration as a staff member of OREPA, not as a member. His declaration supports OREPA's standing by demonstrating an "institutional injury to the organization itself." *Duke Power Co.* (Amendment to Materials License SNM-1773), ALAB-528, 9 NRC 146, 151 (1979) (standing established where petition to intervene was "signed by a ranking official of the organization who himself had the requisite personal interest to support an intervention petition").

In addition, EnergySolutions claims that Petitioners fail to provide evidence that they will be injured by the incineration of radioactive waste in the Bear Creek incinerator, and therefore fail to meet the test established in the *Plutonium Export* case, CLI-04-17. In that case, however, the petitioners based their claim of standing to challenge a proposed plutonium export license on the potential that they would be injured in an explosion caused by a terrorist attack. 59 NRC at 365. The Commission found that the potential for an attack did not provide a legally sufficient basis for standing because there

¹ Ms. Harris submitted separate declarations authorizing TEC and ENDIT to represent her interests in this proceeding. EnergySolutions has pointed out a clerical error in one of the declarations, which is corrected in a new declaration that is attached to this Reply. *See* Corrected Declaration of Standing for Ann P. Harris (February 9, 2011).

was no causal relationship between the issuance of an export license and a terrorist attack.²

Here, in contrast, Petitioners are concerned about the potential adverse effects to their health of an activity that will directly result from the issuance of the requested import license: the intentional combustion of a large quantity of imported radioactive waste and resulting airborne release and transport of radionuclides. EnergySolutions does not deny that such emissions are possible. A “presumption of standing based on geographic proximity may be applied in cases involving nonpower reactors where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.” *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116 (1995) (citing *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75, n.22 (1994); *Armed Forces Radiobiology Institute* (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 153-54 (1982); *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 43 n.1, 45 (1990)). A licensing action that would enable the incineration of a large quantity of radioactive waste creates just such an “obvious potential for offsite effects.”

EnergySolutions claims that Petitioners have failed to provide “any evidence to suggest that they will be in danger of suffering any injury from the dose they might receive.” EnergySolutions’ Answer at 15. But the very lack of information in EnergySolutions’ license application about the nature and origin of the material to be

² Thus, contrary to EnergySolutions’ implication (*see* EnergySolutions’ Answer at 15), the distances claimed by petitioners in the *Plutonium Export* case were irrelevant to the issue of whether they had standing.

incinerated – which lack is described in Petitioners’ hearing request – shows that Petitioners have a strong basis for concern that their health and safety will not be adequately protected if the imported waste is incinerated. Petitioners concerns are buttressed by a Request for Additional Information (“RAI”) that the NRC Staff issued to EnergySolutions on December 20, 2010, which asked EnergySolutions to provide basic information about its license application, including the country of origin, information about the physical and chemical characteristics of the waste, information about the processes by which the waste was generated, a description of all types of residual waste that will result from incineration of the waste, and a description of how EnergySolutions’ “dedicated campaign” for radioactive waste incineration will work. Letter from Janice E. Owens, NRC, to Philip Gianutsos, EnergySolutions (December 20, 2010) (NRC ADAMS Accession No. ML103360164). While EnergySolutions provided some responsive information in a January 19, 2011, letter to the NRC Staff (NRC ADAMS Accession Nos. ML110190813 and ML110210986), Petitioners remain concerned that EnergySolutions has not provided adequate assurance about the origin and characteristics of the waste to be incinerated. *See* discussion below in Section C.

Finally, it is important to note that the type of government study that would allow Petitioners to fully evaluate the nature and geographical scope of the risks posed by the Bear Creek incinerator to their health has never been prepared. To Petitioners’ knowledge, no government-sponsored environmental analysis exists of the potential for accidental airborne radioactive releases from the Bear Creek incinerator or their zone of

impact. Thus, it is not possible for Petitioners to detail their potential injuries to the level that EnergySolutions demands.³

B. Petitioners Are Entitled to a Hearing on EnergySolutions' Import License Application.

EnergySolutions claims that even if Petitioners can show that they would be injured by the issuance of an import/export license to EnergySolutions, the Atomic Energy Act (“AEA”) gives them no right to a hearing. Citing *U.S. Department of Energy (Plutonium Export License)*, CLI-04-17, 59 NRC 357, 366 & n.14 (2004), EnergySolutions contends that the question of whether to grant Petitioners a hearing is entirely within the discretion of the NRC. EnergySolutions’ Answer at 5-6. The *Plutonium Export* case is relevant only to the export-related aspect of this proceeding, however. In that decision, the Commission applied 304(b) of the National Nuclear Non-Proliferation Act (“NNPA”), wherein Congress established that the NRC need grant a hearing on an export license application only “when the Commission finds that . . . participation [by members of the public in a hearing] will be in the public interest and

³ EnergySolutions compares this case to *Boston Edison Co.* (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97 (1985), where petitioners who lived 43 miles from the Pilgrim reactor were denied standing to challenge a proposed amendment to the operating conditions for the spent fuel pool that were relevant to prevention of a criticality accident. But that decision was specific to the circumstances of that case and did not reflect any generic determination regarding a maximum distance for establishing standing.

Nor does the *Boston Edison* decision reflect current understanding of the risks posed by spent fuel pools. At that time, the Atomic Safety and Licensing Board was aware of “no scenario under which radiation attributable to the fuel pool would affect a residence 43 miles distant.” *Id.* at 99. Clearly, circumstances have changed such that the potential for wide-ranging adverse effects from a spent fuel pool fire are now recognized. *See Safety and Security of Commercial Spent Fuel Storage* at 54 (National Academy of Sciences: 2006) (concluding that exposure of fuel assemblies could result in ignition of fuel and cause “the release of a substantial fraction of the cesium inventory to the environment in the form of aerosols”).

will assist the Commission in making the statutory determinations required by this chapter.” 42 U.S.C. § 2155a.

Thus, in the NNPA, Congress specifically exempted export licensing proceedings from the requirements of Section 189a of the AEA, 42 U.S.C. 2239(a) to grant a hearing to any person who can show standing and who raises an admissible issue. Here, in contrast, Petitioners also seek a hearing on an *import* license application, for which the NNPA makes no provision that would exempt this proceeding from Section 189a. Moreover, as discussed below in Section C, Petitioners satisfy the standard for granting a discretionary hearing under 10 C.F.R. § 110.82(b)(3).

C. Petitioners Have Satisfied the Standard for a Discretionary Hearing.

EnergySolutions argues that Petitioners have failed to demonstrate that they meet the standard for obtaining a discretionary hearing because the information they demand is not required or has already been provided. But EnergySolutions has not submitted some of the most fundamental information about the characteristics of the imported waste, such as its radioactive content. Instead, it simply states that the radiological content of the waste will be within the parameters of the Bear Creek incinerator’s license. Import Application at 7. And EnergySolutions has not provided any information, even in its RAI response, regarding how it will confirm the origin and radiological content of the imported waste. Moreover, EnergySolutions makes inconsistent statements in its Answer that raise significant questions about the disposition of the radioactive waste it intends to import. At page 19, EnergySolutions states that “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.” *Id.* Yet, on the same page, EnergySolutions states

that a “small amount of residual materials” will be disposed of in the U.S. Entergy also states that some of the imported material “may be included in metal melt product that can be recycled within the nuclear industry.” Petitioners seek a hearing to question these contradictory claims.

EnergySolutions repeatedly states that the information it has provided is sufficient to satisfy the NRC’s Part 110 regulations for import and export licenses. In making this argument, EnergySolutions sidesteps the fact that many of Petitioners’ concerns arise under the National Environmental Policy Act (“NEPA”). As discussed in Petitioners’ waiver petition, they believe that before approving EnergySolutions’ license application, the NRC should address the environmental impacts of importing and incinerating German radioactive waste and the relative costs and benefits of alternatives. Petitioners do not believe the proposed import and incineration of 1,000 tons of radioactive waste from outside the U.S. is a “routine commercial transaction” (*see* EnergySolutions Answer at 3), but rather an unusual and precedent-setting action with potentially significant adverse impacts to the environment that may not be justifiable in light of the availability of other alternatives for disposing of the waste.⁴ Therefore, as required by NEPA, the NRC should prepare and publish for comment a study of those impacts and the relative cost-effectiveness of alternatives to mitigate or avoid those impacts. To hold a hearing on the environmental issues raised in Petitioners’ hearing request would satisfy the public’s interest in obtaining full consideration by the NRC of the environmental

⁴ Petitioners note that the U.S. House of Representatives clearly did not consider importing radioactive waste “routine” in 2009, when it passed H.R.515, the Radioactive Import Deterrence Act, which forbids import of foreign nuclear waste into the U.S.

implications of its import/export licensing decision, as provided by 10 C.F.R. § 110.84(a)(1). It will also assist the Commission in ensuring that the findings required by 10 C.F.R. § 110.45 include appropriate compliance with NEPA. As members of the public whose health and whose environment may be affected by the importation and incineration of a significant quantity of radioactive waste – both as approved in this application and as may become “routine” in other future applications by EnergySolutions – Petitioners have a strong interest in obtaining a complete environmental review of this import/export license application. Petitioners know of no other forum in which their concerns will be addressed.

III. CONCLUSION

For the foregoing reasons, the Commission should grant Petitioners’ hearing request.

Respectfully submitted,

Electronically signed by
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February 10, 2011

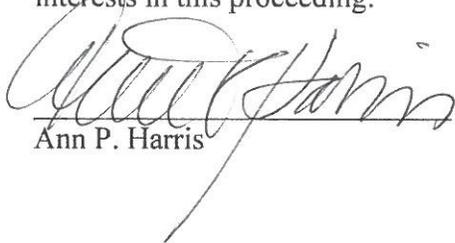
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE SECRETARY

_____)
In the Matter of)
ENERGYSOLUTIONS) Docket Nos. 110-05896 (import)
(Radioactive Waste Import/Export) 110-05897 (export)
Licenses)
_____)

**CORRECTED DECLARATION OF STANDING
FOR ANN P. HARRIS**

Under penalty of perjury, Ann P. Harris declares as follows:

1. My name is Ann P. Harris. I am a member of the Citizens to End Nuclear Dumping in Tennessee (ENDIT). I am also a member of Tennessee Environmental Council (TEC).
2. On December 30, 2010, I signed two declarations of standing that were submitted in this proceeding on December 31, 2010. One of the declarations stated in par. 1 that I am a member of ENDIT. In par. 5, that same declaration stated that I authorize TEC to represent my interests in this proceeding.
3. I hereby correct par. 5 of that declaration to conform to my intention, which was to state that I authorize ENDIT to represent my interests in this proceeding.
4. My other declaration, which authorizes TEC to represent me in this proceeding, remains unchanged. Therefore I have authorized both ENDIT and TEC to represent my interests in this proceeding.



Ann P. Harris



Date

CERTIFICATE OF SERVICE

I certify that on February 10, 2011, I served the foregoing PETITIONERS' REPLY TO ENERGYSOLUTIONS' ANSWER TO HEARING REQUEST AND PETITION TO INTERVENE on the following persons by posting on the NRC's Electronic Information Exchange:

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_____)	

NOTICE OF APPEARANCE FOR DIANE CURRAN

Pursuant to 10 C.F.R. § 110.108, I, Diane Curran, hereby enter an appearance as duly authorized counsel for Tennessee Environmental Council, Oak Ridge Environmental Peace Alliance, and Citizens to End Nuclear Dumping in Tennessee. I am a member in good standing of the bars of the District of Columbia; the State of Maryland; the U.S. District Court for the District of Columbia; the U.S. Supreme Court; and the U.S. Courts of Appeals for the D.C., First, Third, Ninth, and Tenth Circuits.

Respectfully submitted,

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Licenses)	
_____)	

NOTICE OF APPEARANCE FOR BRIAN PADDOCK

Pursuant to 10 C.F.R. § 110.108, I, Brian Paddock hereby enter an appearance as duly authorized counsel for Tennessee Environmental Council, Oak Ridge Environmental Peace Alliance, and Citizens to End Nuclear Dumping in Tennessee. I am a member of the bars of the State of Tennessee, the Eastern and Middle Districts of Tennessee, and the U.S. Supreme Court.

Respectfully submitted,
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Licenses)	
_____)	

NOTICE OF WITHDRAWAL OF APPEARANCE BY RALPH HUTCHISON

Pursuant to 10 C.F.R. § 110.108, Ralph Hutchison hereby withdraws his appearance from this proceeding.

Electronically signed by
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February 10, 2011

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Licenses)	
_____)	

NOTICE OF WITHDRAWAL OF APPEARANCE BY DONALD SAFER

Pursuant to 10 C.F.R. § 110.108, Donald Safer hereby withdraws his appearance from this proceeding.

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February 10, 2011

CERTIFICATE OF SERVICE

I certify that on February 10, 2011, I served the foregoing Notices of Appearance for Diane Curran and Brian Paddock and Notices of Withdrawal of Appearance for Donald Safer and Ralph Hutchison on the following persons by posting on the NRC's Electronic Information Exchange:

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