UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CLI-11-03

MEMORANDUM AND ORDER

I. INTRODUCTION

The Citizens' Advisory Panel of the Oak Ridge Reservation Local Oversight Committee (CAP)[1] and the Tennessee Environmental Council (TEC), Oak Ridge Environmental Peace Alliance (OREPA), and Citizens to End Nuclear Dumping in Tennessee (ENDIT)[2] have requested hearings and leave to intervene on import/export applications of EnergySolutions.[3]

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[1] LOC Inc. Oak Ridge Reservation Local Oversight Committee, Comments and Request for Hearing on EnergySolutions Import/Export License Application, Docket No. 11005896 (Dec. 14, 2010) (ADAMS Accession No. ML103610314) (CAP Petition).

[2] *Hearing Request and Petition to Intervene by Tennessee Environmental Council, Oak Ridge Environmental Peace Alliance, Citizens to End Nuclear Dumping in Tennessee* (Dec. 30, 2010) (ADAMS Accession No. ML103640463) (OREPA/TEC/ENDIT Petition). The OREPA/TEC/ENDIT Petition was unnumbered. For ease of reference, we numbered the petition consecutively, with the cover page as 1.

[3] *See* Request for a License To Import Radioactive Waste, 75 Fed. Reg. 74,107 (Nov. 30, 2010); Request for a License To Export Radioactive Waste, 75 Fed. Reg. 74,104 (Nov. 30, 2010) (application filed November 3, 2010). In response to several requests for additional time, the Secretary extended the deadline to file comments and/or request a hearing until January 18, 2011. *See* Order of the Secretary (Dec. 29, 2010) (unpublished) (ADAMS Accession No. ML103630731) (Order of the Secretary). No additional requests for hearing were received. Additional comments were received and reviewed. *See, e.g.*, Email Comments of Christopher Lish (Feb. 20, 2011) (ADAMS Accession No. ML110550132) (Lish Comment).
(continued. . .)

OREPA/TEC/ENDIT also requests a waiver of the categorical exclusion in 10 C.F.R. § 51.22(c)(15), applicable in this proceeding.[4] For the reasons discussed below, we deny both requests for hearing and request for waiver of 10 C.F.R. § 51.22(c)(15).

II. ENERGYSOLUTIONS' IMPORT AND EXPORT APPLICATIONS

On November 3, 2010, EnergySolutions filed a license application seeking authorization to import 1,000 tons of dry active low-level radioactive waste (LLRW) from Germany for processing at EnergySolutions' Bear Creek facility in Tennessee,[5] and for a companion license to export the resulting hearth ash, along with any non-incinerable and non-conforming waste, to Germany.[6] The imported materials would consist primarily of plastic, paper, wood, textiles, glass, and metal that have various levels of radioactive contamination.[7] According to the import application, the dry active material would undergo volume reduction through incineration at the Bear Creek facility.[8] The resulting hearth ash and any non-incinerable and non-conforming

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[4] OREPA/TEC/ENDIT Petition at 8.

[5] *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)). EnergySolutions purchased Duratek in 2006. *See* http://www.deseretnews.com/article/635182631/EnergySolutions-OKs-deal-to-buy-Duratek.html. The import/export applications reference Duratek, but for ease of reference, we will use EnergySolutions in this order, as Duratek is a subsidiary of EnergySolutions.

[6] Application for Specific License to Export Radioactive Material (to Germany), Lic. No. XW018 (Aug. 27, 2010) (ADAMS Accession No. ML103090595) (Export Application).

[7] EnergySolutions' Response to NRC Request for Additional Information [("RAI")] dated December 20, 2010, RAI # 2 Resp. (Jan. 19, 2011) (ADAMS Accession No. ML110210986) (Response to RAIs).

[8] Import Application at 6. EnergySolutions proposes to process the material in a "dedicated campaign so that the hearth ash generated can be segregated from the hearth ash generated (continued. . .)

material would be sent to two facilities in Germany, via export license XW018.[9] EnergySolutions proposes to dispose of any residual radioactive material from processing the imported material, which is attributable to EnergySolutions under its Tennessee license, in accordance with applicable domestic license conditions and permits.[10]

The Department of State provided the Commission with Executive Branch views on the merits of EnergySolutions' applications on December 15, 2010.[11] The Executive Branch Views concluded that the proposed import and export application appeared consistent with the Joint Convention on the Safety of Spent Fuel Management and on Radioactive Waste Management guidelines. Further, the Executive Branch Views noted that the "German Government is prepared to issue the necessary import licenses for the return of the incineration residue to Germany by EnergySolutions."[12] On February 10, 2011, the State of Tennessee stated that it reviewed the applications and the authorizations granted by the Tennessee Radioactive Material Licenses issued to EnergySolutions and found no technical reason to prohibit the

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through processing of domestic material at the Bear Creek Facility." *See also* Response to RAIs, RAI # 5 Resp.

[9] Export Application.

[10] Import Application at 8. *See* Response to RAIs, RAI # 4 Resp. (defining "residual waste" under Tennessee law, which is compatible with Appendix G of 10 C.F.R. Part 20).

[11] Letter from Robin DeLaBarre, Office of Nuclear Energy, Safety & Security, Bureau of International Security & Nonproliferation, U.S. Department of State, to Ms. Janice E. Owens, Branch Chief, Export Controls and International Organizations, Office of International Programs, U.S. NRC (Dec. 15, 2010) (ADAMS Accession No. ML110030659) (Executive Branch Views). *See* 10 C.F.R. § 110.41(a)(8).

[12] Executive Branch Views.

processing of this described waste at the Bear Creek facility.[13] The Southeast Compact Commission for Low-Level Radioactive Waste Management had no comments with regard to the applications.[14]

III. PETITIONERS' REQUESTS FOR HEARING AND LEAVE TO INTERVENE

a. CAP

CAP filed a timely request for hearing on the import/export license application (1) to allow citizens of the area an opportunity to have their questions answered and raise any concerns in a public forum and (2) to argue that every country should have the capability of processing its own nuclear waste.[15] EnergySolutions filed a timely answer opposing CAP's Petition, arguing that the petition should be denied because (1) the Petition was not served on all parties, (2) CAP does not have standing, and (3) CAP does not show that a discretionary hearing would be in the public interest or assist the Commission in making its required determinations.[16]

b. OREPA/TEC/ENDIT

OREPA/TEC/ENDIT filed a timely petition for leave to intervene and a request for hearing on both applications, arguing that a hearing should be held to address several of its

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[13] Letter from Johnny C. Graves to Ms. Janice Owens, Application for NRC Import License IW029, (Feb. 10, 2011) (ADAMS Accession No. ML110450686) (Tennessee's Views). *See* 10 C.F.R. § 110.43(d).

[14] Email from Kathryn Haynes to Janice Owens, Jennifer Tobin, Johnny Graves, Debra Shults, Mike Mobley, NRC Import License Application IW029, (Feb. 15, 2011) (ADAMS Accession No. ML110460710) (Southeast Compact Commission's Views). *See* 10 C.F.R. § 110.43(d).

[15] CAP Petition. *See* 10 C.F.R. § 110.82. The petition did not provide information about the purpose of this group, but more information can be found at http://local-oversight.org/mission/.

[16] *EnergySolutions' Answer Opposing Oak Ridge Reservation Local Oversight Committee's Request for Hearing* (Jan. 26, 2011), at 2 (ADAMS Accession No. ML1102604411). *See* 10 C.F.R. § 110.83(a).

concerns, including (1) claimed deficiencies in EnergySolutions' applications and (2) public health, safety, security impacts related to these applications and whether the applications set precedent.[17] Petitioners also argue that the NRC should perform an environmental review of the import application. Petitioners therefore seek a waiver of 10 C.F.R. § 51.22(c)(15),[18] which provides a categorical exclusion from the National Environmental Policy Act (NEPA) requirement to prepare an environmental assessment or environmental impact statement for the issuance of import licenses involving LLRW.[19]

EnergySolutions filed a timely response to OREPA/TEC/ENDIT's waiver request, arguing that it should be denied because it does not show that special circumstances exist such that application of the rule would not serve the purposes for which it was adopted.[20] EnergySolutions also filed a timely answer, arguing that the hearing request should be denied because OREPA/TEC/ENDIT fail to (1) establish an interest that may be affected; and (2) show that a hearing would be in the public interest or that they can assist the Commission in making its required determinations.[21] OREPA/TEC/ENDIT filed a timely reply, arguing that

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[17] *See* 10 C.F.R. § 110.82. This is a summary of OREPA/TEC/ENDIT's concerns. *See* OREPA/TEC/ENDIT Petition at 5-9 for a detailed listing of all concerns. The petition did not provide information about the purpose of these groups, but more information can be found at http://www.tectn.org/about.php, http://getsustainablenow.org/orepa/, and http://www.change.org/citizens_to_end_nuclear_dumping_in_tn.

[18] OREPA/TEC/ENDIT Petition at 8.

[19] *Id*. at 8-9; Petitioners' Reply at 8-9. *See* 10 C.F.R. § 110.111.

[20] *EnergySolutions' Response to Petitioners' Waiver Request* (Jan. 10, 2011) (ADAMS Accession No. ML110100570), at 2. (EnergySolutions' Response to Waiver). *See* 10 C.F.R. § 110.111(d).

[21] *EnergySolutions' Answer Opposing Various Tennessee Petitioners' Request for Hearing* (Jan. 31, 2011) (ADAMS Accession No. ML1103108320), at 1 (EnergySolutions' Answer to OREPA/TEC/ENDIT). *See* 10 C.F.R. § 110.83(a).

OREPA/TEC/ENDIT (1) each have standing to request a hearing on EnergySolutions' import/export license application, (2) are entitled to a hearing on EnergySolutions' import license application, and (3) have satisfied the standard for a discretionary hearing.[22]

IV. WAIVER ANALYIS

a. Waiver Standard

Part 110 provides that "[a] participant may petition that a Commission rule or regulation be waived with respect to the license application under consideration."[23] To waive a Part 110 rule or regulation, the petitioner must show that "because of special circumstances concerning the subject of the hearing, application of a rule or regulation would not serve the purposes for which it was adopted."[24] OREPA/TEC/ENDIT seek a waiver of 10 C.F.R. § 51.22(c)(15),[25] which provides a categorical exclusion from the NEPA requirement to prepare an environmental assessment or environmental impact statement for the issuance of a LLRW import license.[26] Petitioners argue that the NRC should "address the environmental impacts of importing and incinerating German radioactive waste and the relative costs and benefits of the alternatives."[27]

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[22] *Petitioners' Reply to EnergySolutions' Answer to Hearing Request and Petition to Intervene* (Feb. 10, 2011) (ADAMS Accession No. ML1104107310), at 1-9 (Petitioners' Reply). *See* 10 C.F.R. § 110.83(b).

[23] 10 C.F.R. § 110.111(a).

[24] 10 C.F.R. § 110.111(b).

[25] OREPA/TEC/ENDIT Petition at 8.

[26] *See* Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, 49 Fed. Reg. 9,352, 9,379 (Mar. 12, 1984) (codifying Commission's reasoned determination that issuance of a license to import nuclear material, except for spent power reactor fuel, is an action that does not individually or cumulatively have a significant effect on the human environment).

[27] Petitioners' Reply at 8.

Petitioners claim that NEPA requires the NRC to "prepare and publish for comment a study of those impacts and the relative cost-effectiveness of alternatives to mitigate or avoid those impacts."[28]

b. No Special Circumstances

In arguing that special circumstances exist in this proceeding, Petitioners assert that "the issuance of an import license is the key federal action that will allow the incineration of foreign-made radioactive waste in a Tennessee incinerator."[29] However, the key action that will allow the incineration of this material is the domestic license authorizing such processing, not the NRC's grant of an import license.[30] This is true in any import licensing proceeding. Thus, this argument does not support a finding of special circumstances unique to this proceeding. Petitioners also argue that this application to import LLRW from Germany is "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."[31] However, Petitioners have not demonstrated how this import of LLRW is unusual or different

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[28] *Id*. *See also* OREPA/TEC/ENDIT Petition at 9 (asserting that the report should include an analysis of the claim that the import of foreign LLRW would be good for the U.S. economy).

[29] OREPA/TEC/ENDIT Petition at 9. *See also* Petitioners' Reply at 9 (arguing that there is no other forum in which their concerns will be addressed).

[30] 10 C.F.R. § 110.50(a)(3). *See* Import Application; EnergySolutions' Answer to OREPA/TEC/ENDIT at 19. The incinerator is licensed by the Tennessee Department of Environment and Conservation, Division of Radiological Health, pursuant to an Agreement State license. Therefore, it seems that the State of Tennessee is better situated than the NRC to address any concerns related to the incineration.

[31] Petitioners' Reply at 8.

from any other import of LLRW.[32] Therefore, Petitioners have not demonstrated any special circumstances concerning this import application and their request for waiver is denied.[33]

V. THE PETITIONER'S STANDING

a. No Organization or Individual Has Standing to Intervene as a Matter of Right

Section 189a. of the Atomic Energy Act of 1954, as amended (AEA) "provides, among other things, that the Commission grant a hearing, as a matter of right, to any person 'whose interest may be affected by' a proceeding under the [AEA] for the granting of any license."[34] In assessing whether a petitioner has set forth a sufficient "interest" to qualify for a hearing as a matter of right in a licensing proceeding,[35] the Commission has long applied contemporaneous judicial concepts of standing.[36] Essential to establishing standing are findings of (1) injury, (2) causation, and (3) redressability.[37] In this case, Petitioners assert organizational standing, both

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[32] *See* EnergySolutions' Response to Waiver at 3 (noting that this LLRW is indistinguishable from other LLRW that EnergySolutions receives via import from other generators). *See also* EnergySolutions' Answer to OREPA/TEC/ENDIT at 23 n. 102.

[33] Petitioners also have not shown that there are "unresolved conflicts concerning alternative uses of available resources." 10 C.F.R. § 51.22(b).

[34] *Transnuclear, Inc.* (Export of 93.15% Enriched Uranium), CLI-94-1, 39 NRC 1, 3 (1994) (citing 42 U.S.C. § 2239a.(1)(A)).

[35] *See* 42 U.S.C. § 2239a.(1)(A); 10 C.F.R. § 110.84(b).

[36] *See, e.g.*, *Transnuclear, Inc.* (Export of Enriched Uranium), CLI-99-15, 49 NRC 366, 367 (1999); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

[37] *See Westinghouse Electric Corp.* (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 331-32 (1994) (noting that standing is not a mere legal technicality).

in their own capacity[38] and (in the case of TEC/ENDIT) in the capacity of representing their members.[39] However, Petitioners have not shown any injury-in-fact caused by the import or export license to either their organizations or any individual member. Thus, they are not entitled to a hearing as a matter of right.

First, CAP's generalized institutional interest in public forums and in preventing processing of foreign waste[40] is insufficient on its face to confer standing. Such claims are merely generalized grievances, not particular to CAP or its members, and thus not the kind of interest cognizable under traditional standing doctrine.[41]

Second, Petitioners' claimed interest in the public health, safety, and/or the environment[42] is insufficient to demonstrate standing because they have made no showing of a particularized injury caused by the import or export license. Although OREPA/TEC/ENDIT apparently have members living within 10-25 miles of the Bear Creek facility,[43] no "proximity presumption" applies in this case because Petitioners have not shown that the import or export

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[38] *See* Petitioners' Reply at 3 (OREPA). The CAP Petition does not indicate what type of standing it claims. *See Sierra Club v. Morton*, 405 U.S. 727 (1972); *Georgia Tech*, CLI-95-12, 42 NRC at 115 (outlining organizational standing requirements).

[39] *See* Harris Declaration at ¶ 5 (TEC); Corrected Harris Declaration at ¶ 3 and 4 (TEC/ENDIT). *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26 (1998) (outlining representational standing requirements).

[40] CAP Petition.

[41] *See Sierra Club,* 405 U.S. at 739 (noting that mere "interest" in a problem is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA); *See also Edlow International Co.* (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 572 (1976); *U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 363 (2004).

[42] *See* CAP Petition; OREPA/TEC/ENDIT Petition; Hutchison Declaration at ¶ 5; Harris Declaration at ¶ 4.

[43] *See* Hutchison Declaration at ¶ 2; Harris Declaration at ¶ 2.

"involves a significant source of radioactivity producing an obvious potential for offsite consequences."[44] Instead, Petitioners only speculate about an unexplained and undefined potential for radiological releases associated with the incineration of the LLRW.[45] They do not identify any specific risk or credible threat of any obvious offsite consequences.[46]

Similarly, Petitioners do not satisfy the traditional judicial standing test as they have not shown any injury-in-fact .[47] Specifically, OREPA/TEC/ENDIT have offered conclusory statements of harm, but no plausible explanation for why emissions from incinerating the imported LLRW would reach any of its members or prove harmful 10, 17, or 25 miles away from the site.[48] CAP only asserts that incineration releases a number of contaminants to the air, including tritium and mercury, that are difficult or impossible to capture in filters.[49] OREPA/TEC/ENDIT also have not shown that there will be any impact from the transport of the

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

[45] *See* OREPA/TEC/ENDIT Petition at 10; CAP Petition.

[46] For example, even if the import or export license authorized possession and/or use of the LLRW, the petition does not assert how this LLRW is a significant source of radioactivity or provide any scenario in which the import or export of the LLRW would result in an accident that could produce obvious offsite consequences. *See Babcock & Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 84 (1993); *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 25 (2002); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 2), LBP-92-28, 36 NRC 202, 213 (1992).

[47] *Plutonium Export License*, CLI-04-17, 59 NRC at 364-65 (noting that when no proximity presumption applies, petitioner must assert some specific "injury in fact" that will result from action taken). *See Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988) and *Bennett v. Spear*, 520 U.S. 154, 175 (1997) (outlining traditional judicial standing test).

[48] *See Nuclear Fuel Services, Inc.* (Erwin, Tennessee), LBP-04-5, 59 NRC 186, 195 (2004) (discussing petitioner's residence 20 miles from site), *aff'd, Nuclear Fuel Services, Inc.* (Erwin, Tennessee), CLI-04-13, 59 NRC 244 (2004).

[49] CAP Petition.

LLRW to be imported.[50] "Mere potential exposure to minute doses of radiation within regulatory limits does not constitute a 'distinct and palpable' injury on which standing can be founded."[51] Because OREPA/TEC/ENDIT and CAP have not established standing, no Petitioner is entitled to a hearing as a matter of right.

Even if Petitioners had established standing, we would still deny Petitioners' hearing requests. NRC hearings on import or export licenses under 10 C.F.R. § 110.82 presuppose that a petitioner has set forth material issues warranting a hearing and has explained why a hearing would assist the Commission in making the determinations required by § 110.45. As discussed in detail below, the concerns Petitioners raise here are not material to our findings on the import and export licenses. Moreover, Petitioners have not shown that they would assist us in making the requisite determinations on the import/export license.

Petitioners' written views are on the record. We therefore need not devote adjudicatory resources to providing an oral hearing on Petitioners' grievances when they have been unable to articulate material issues that require litigation at a hearing, or how Petitioners will contribute to their proper resolution. The Part 110 procedures afford Petitioners an opportunity to submit and challenge evidence as to any and all issues of material fact regarding these applications.[52]

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[50] OREPA/TEC/ENDIT Petition at 7, 10. *See Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001) (noting that speculation about accidents along feed material's transport routes does not establish standing under NRC case law).

[51] *Nuclear Fuel Services, Inc.* (Erwin, Tennessee), 59 NRC at 195. *See also Babcock & Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 87-88 (1993); *Public Citizen, Inc. v. National Highway Traffic Safety Administration*, 513 F.3d 234, 237 (D.C. Cir. 2008). It is also not clear whether denying this import/export application would avoid the harms that Petitioners assert for standing purposes. *See Westinghouse Electric Corp.* (Nuclear Fuel Export License for Czech Republic — Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 331 (1994). We need not decide the redressability issue because Petitioners have asserted neither sufficient injury-in-fact nor causation to support standing.

[52] *See generally* Subpart G and Subpart H of Part 110.

Thus, any Section 189a. hearing rights to which Petitioners might be entitled (had they shown standing), have been satisfied.[53]

b. A Hearing or Intervention Would Not Assist The Commission in Making its Findings on the Application

We have also considered whether to order a discretionary hearing in this proceeding. Our regulations provide for a discretionary hearing in an export or import licensing proceeding if a hearing would be in the public interest and would assist the Commission in making the statutory determinations required by the AEA.[54]

OREPA/TEC/ENDIT claim that a discretionary hearing is warranted because EnergySolutions has not provided adequate information to support the issuance of this import/export license.[55] Petitioners also claim a hearing is warranted because the public should have the opportunity to discuss import/export issues in a public forum.[56] We consider the adequacy of information in the application as well as written comments from the public in making an import or export licensing decision.[57] However, EnergySolutions has provided the information required by our Part 110 regulations,[58] the public has had the opportunity to express

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[53] *See General Motors Corp. v. FERC*, 656 F.2d 791, 795 & n. 7 (D.C. Cir. 1981). *See also Braunkohle Transport, USA* (Import of South African Uranium Ore Concentrate), CLI-87-6, 25 NRC 891, 893-94 (1987) (noting that formal adjudicatory procedures are inappropriate in export or import licensing proceedings). *See generally Siegel v. AEC*, 400 F.2d 778, 785-86 (D.C. Cir. 1968); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 547 (1978); *City of West Chicago v. NRC*, 701 F.2d 632, 642 (7th Cir.1983).

[54] *See* 10 C.F.R. § 110.84(a).

[55] OREPA/TEC/ENDIT Petition at 9. *See id*. at 5-9 (outlining all the claimed deficiencies in EnergySolutions' applications).

[56] CAP Petition; OREPA/TEC/ENDIT Petition at 9 (noting that public needs clear explanation of NRC's import/export criteria).

[57] *See, e.g.*, 10 C.F.R. §§ 110.45 and 110.81.

its views on this import/export application,[59] and we have reviewed the public's and Petitioners' comments. Therefore, we have sufficient information to make the requisite determinations on the import and export license application.

Petitioners also raise several policy concerns related to allowing the import of foreign LLRW.[60] However, Part 110 allows for the import and export of such LLRW and provides the criteria for approving or denying these licenses.[61] Therefore, these claims amount to impermissible challenges to the Part 110 regulations and are not a valid basis for providing a discretionary hearing on a particular import/export license application.[62]

Finally, Petitioners raise issues related to impacts from transport or incineration of the LLRW to be imported.[63] As discussed, the grant of an import license only allows the materials

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[58] *See* Import and Export Application, Response to RAIs, 10 C.F.R. §§ 110.32, 110.42, 110.43.

[59] Both Petitions contained the organizations' comments offered pursuant to 10 C.F.R. § 110.81. *See* CAP Petition; OREPA/TEC/ENDIT Petition at 4. *See also* Order of the Secretary (extending opportunity to provide comments and/or request a hearing). Several members of the public also submitted comments pursuant to 10 C.F.R. § 110.81. *See, e.g.*, Lish Comment.

[60] *See* CAP Petition (noting that every country should have ability to process its own nuclear waste); OREPA/TEC/ENDIT Petition at 9-10 (noting that a hearing would address legal and policy issues raised by this proposal and would help identify where the larger decisions are made on how much waste overall could be imported to the U.S.).

[61] *See* Import and Export of Radioactive Waste, 60 Fed. Reg. 37,556, 37,557 (July 21, 1995) (rejecting comments requesting ban of import and export of radioactive waste). *See id*. at 37,556 (noting that after LLRW enters into the United States, domestic regulations of the NRC and Agreement States apply). *See also* 10 C.F.R. § 110.32 (outlining required information for specific license).

[62] In contrast, the Commission granted a discretionary hearing in *Advanced Nuclear Fuels Corp*. (Import of South African Enriched Uranium Hexafluoride), CLI-87-9, 26 NRC 109 (1987). In that case, the Commission was concerned with legal interpretations of the Anti-Apartheid Act, and the discretionary hearing involved written submissions on this issue.

[63] OREPA/TEC/ENDIT Petition at 10 (asserting that many individuals, residents, organizations, and the public at large will be impacted by the transport and incineration of the imported LLRW); (continued. . .)

to be brought into the United States.[64] Petitioners' questions or challenges to the domestic licenses that authorize possession, use, transport, and incineration of the waste are outside the scope of the proceeding.[65]

Notably, Petitioners do not claim to have special knowledge on any of the issues raised by this import/export application, nor have they presented any significant information not already available to and considered by us in assessing the applications. Thus, a discretionary hearing would impose unnecessary burdens on the participants without assisting us in making the requisite findings.[66]

For all of the foregoing reasons, we deny both requests for a discretionary hearing in this proceeding.

VI. THE STATUTORY DETERMINATIONS

a. Import

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CAP Petition (noting that incineration releases a number of contaminants, including tritium and mercury, to the air).

[64] Export and Import of Nuclear Equipment and Material; Updates and Clarifications, 75 Fed. Reg. 44,072, 44,075 (July 28, 2010). *See also* Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, 49 Fed. Reg. 9,352, 9,369 (Mar. 12, 1984) (discussing how transportation of material is not authorized by an import license and that in any event, the NRC has determined that the environmental impact of the transportation of imported LLRW from the time of its arrival in the United States until it reaches its ultimate destination is negligible).

[65] 75 Fed. Reg. 44,072, 44,075 (noting that an import license is not a mechanism to alter the established domestic authorization process, including Agreement State regulations). *See, e.g.,* Import Application at 8 (noting that imported LLRW will be possessed and incinerated in the U.S. in accordance with EnergySolutions' Tennessee Agreement State License No. R-73016).

[66] *Transnuclear, Inc.* (Export of 93.3% Enriched Uranium), CLI-00-16, 52 NRC 68, 72 (2000). *See also Transnuclear,* CLI-99-15, 49 NRC at 368.

Under the AEA, the NRC is responsible for authorizing the import of byproduct, source, and special nuclear material.[67] Under the NRC's regulations governing imports of nuclear materials, we will issue a LLRW import license if we find that: (1) the proposed import will not be inimical to the common defense and security; (2) the proposed import will not constitute an unreasonable risk to the public health and safety;[68] (3) the environmental requirements of Part 51 have been satisfied (to the extent applicable); and (4) an appropriate facility has agreed to accept the waste for management or disposal.[69]

As discussed above, the Executive Branch concluded that the import application appeared consistent with the Joint Convention on the Safety of Spent Fuel Management and on Radioactive Waste Management guidelines.[70] Further, the Executive Branch noted that the "German Government is prepared to issue the necessary import licenses for the return of the incineration residue to Germany by EnergySolutions."[71] Tennessee stated that it reviewed the applications and the authorizations granted by the Tennessee Radioactive Material Licenses issued to EnergySolutions and found no technical reason to prohibit the processing of this described waste at the Bear Creek facility.[72]

After reviewing the Executive Branch Views, Tennessee's Views, the Southeast Compact Commission's Views, the applications, and the responses to the request for additional

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[67] 42 U.S.C. § 2021(c)(2).

[68] *See* 42 U.S.C. § 2111(a).

[69] 10 C.F.R. § 110.45(b)(1)-(4). 10 C.F.R. § 110.45(b)(5), which pertains to Part 110 Appendix P radioactive material, does not apply in this proceeding.

[70] Executive Branch Views.

[71] *Id*.

[72] Tennessee's Views.

information, we have determined that the import will not be inimical to the common defense and security[73]and will not constitute an unreasonable risk to the public health and safety. No environmental review is required for this import application, as 10 C.F.R. § 51.22(c)(15) specifically exempts the import application from an environmental review. The Bear Creek facility is an appropriate facility to manage the imported LLRW and has agreed to accept the waste for management. Moreover, the two German facilities identified in the applications are appropriate facilities to receive and dispose of the hearth ash generated from the incinerated imported LLRW, along with any non-incinerable and non-conforming waste, and have agreed to accept this waste for disposal.[74] Thus, the record reflects no "orphaned" foreign waste.[75]

b. Export

Under the AEA, the NRC is responsible for authorizing the export of byproduct, source, and special nuclear material.[76] Under our regulations governing exports of nuclear materials, we will issue a LLRW export license if: (1) we have been notified by the State Department that it is the judgment of the Executive Branch that the proposed export will not be inimical to the common defense and security,[77] (2) we have made an independent judgment that the export will

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[73] 10 C.F.R. § 110.42(d)(1).

[74] *See* Executive Branch Views.

[75] *See* OREPA/TEC/ENDIT Petition at 7 (noting concern that radioactive materials will be orphaned in U.S.). Any residual waste attributable to EnergySolutions under its Tennessee license will be disposed of in accordance with domestic license conditions and permits. *See* Import Application at 8; Response to RAIs, RAI # 4 Resp.

[76] 42 U.S.C. § 2021(c)(2). This import/export involves waste that was contaminated with byproduct, so 42 U.S.C. §§ 2155, 2156, and 2157 do not apply.

[77] *See* 10 C.F.R. § 110.41(a)(8) and 10 C.F.R. § 110.41(b)(1).

not be inimical to the common defense and security,[78] (3) the receiving country has received a description of the equipment or material including the volume, physical and chemical characteristics, route of transit of shipment, and ultimate disposition (including forms of management or treatment) of the waste,[79] and (4) the receiving country has found 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.[80]

As discussed above, the Executive Branch concluded that the export application appeared consistent with the Joint Convention on the Safety of Spent Fuel Management and on Radioactive Waste Management guidelines.[81] Further, the Executive Branch noted that the "German Government is prepared to issue the necessary import licenses for the return of the incineration residue to Germany by EnergySolutions."[82]

After reviewing the Executive Branch Views, Tennessee's Views, the Southeast Compact Commission's Views, the applications, and the responses to the request for additional information, we have made an independent judgment that the export will not be inimical to the common defense and security.[83] Germany has been advised of the applicable information regarding the export application and has found that it has "the administrative and technical

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[78] 10 C.F.R. § 110.42(d)(1).

[79] *See* 10 C.F.R. §§ 110.42(d)(2) and 110.32(f)(5). Classification of the waste to be imported or exported is not required because it is not being imported or exported for direct disposal at a part 61 or equivalent Agreement State licensed facility.

[80] 10 C.F.R. § 110.42(d)(2).

[81] Executive Branch Views.

[82] *Id*.

[83] 10 C.F.R. § 110.42(d)(1).

capacity and regulatory structure to manage and dispose of the waste and consents to the receipt of the radioactive waste."[84]

VII. CONCLUSION AND ISSUANCE OF LICENSES

For the reasons stated above, we find that (1) OREPA/TEC/ENDIT have not met the standard to waive 10 C.F.R. § 51.22(c)(15), (2) no petitioner has demonstrated standing, and (3) a discretionary hearing in this matter would not assist us in making the requisite determinations on the import and export licenses. Accordingly, we deny Petitioners' requests for hearing, intervention, and waiver of 10 C.F.R. § 51.22(c)(15). We have determined that the statutory and regulatory import and export licensing criteria set forth in Part 110 have been met. Therefore, we direct the Office of International Programs to issue license IW029 to EnergySolutions for the import of up to 1,000 tons of dry active material from Germany and to issue license XW018 to EnergySolutions for the export of up to 1,000 tons of hearth ash and any non-incinerable and non-conforming materials to Germany.

IT IS SO ORDERED.

For the Commission

[NRC SEAL]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 6th day of June 2011.

[84] 10 C.F.R. § 110.42(d). *See* Executive Branch Views.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-11-03) have been served upon the following persons by the Electronic Information Exchange (EIE) or by electronic mail as indicated by an asterisk*.

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Docket No. 110-05896 (Import)
110-05897 (Export)

COMMISSION MEMORANDUM AND ORDER (11-03)

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[Original signed by Evangeline S. Ngbea]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 6th day of June 2011