

February 9, 2016

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of: )  
 )  
RARE ELEMENT RESOURCES, INC. ) Docket No. 40-38367  
 )  
(Bear Lodge Project) )

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APPLICANT'S RESPONSE TO PETITION TO  
INTERVENE FILED BY DEFENDERS OF THE BLACK HILLS

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h), Rare Element Resources, Inc. (“Rare Element”) files this response to the request for hearing/petition to intervene (“Petition” or “Pet.”) filed on January 15, 2016, by Defenders of the Black Hills (“Defenders”).<sup>1</sup> For the reasons discussed below, the hearing request should be denied. Defenders has not demonstrated standing and has not presented an admissible contention.

II. BACKGROUND

Rare Element is proposing to mine and recover rare earth elements (“REE”) in northeastern Wyoming. Because the rare earth minerals contain small concentrations of uranium and thorium, Rare Element will possess source material, as defined by NRC regulations, incidental to the recovery of REEs. Rare Element therefore is required to obtain a radioactive material license from the NRC. By letter dated May 4, 2015, Rare Element submitted an application to possess and use up to 10 curies of unsealed, non-volatile thorium hydroxide and to possess and use unlimited quantities of unsealed, non-volatile source material in any bound

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<sup>1</sup> Letter from Charmaine White Face, Coordinator, Defenders of the Black Hills, to Kenneth Kalman, NRC, dated January 15, 2016.

form.<sup>2</sup> The letter included a Master Application and an Environmental Report (“ER”).<sup>3</sup> Following an administrative review, the NRC found the application acceptable to begin a technical review. A notice of opportunity to request a hearing was published in the *Federal Register* with a deadline for filing petitions of January 16, 2015.<sup>4</sup> Defenders apparently filed a timely petition to intervene and request for hearing.

In a letter to the NRC Staff, dated January 21, 2016, Rare Element requested that the NRC temporarily suspend further review of the license application for the Bear Lodge Project, noting difficult capital markets, declining rare earth prices, and the high costs of licensing. Rare Element estimated a delay of approximately 12 months. The same day, counsel for Rare Element requested that the Commission likewise suspend the adjudicatory proceeding until such time as the licensing process is restarted. Counsel noted that continuing with the hearing process at this time would result in a costly and unnecessary use of the participants’ and the NRC’s resources. The Commission referred the hearing request to the Atomic Safety and Licensing Board on February 1, 2016. The Board has not yet addressed Rare Element’s request to suspend the adjudication.

A. Standing Requirements

Any person who seeks to intervene in a Commission proceeding must demonstrate that he or she has standing. The Commission has long applied judicial concepts of

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<sup>2</sup> The license application is available at <http://pbadupws.nrc.gov/docs/ML1513/ML15134A378.html> (ADAMS Accession No. ML15134A378).

<sup>3</sup> “License Application for Source Material Possession Submitted to the U.S. Nuclear Regulatory Commission” (ADAMS Accession No. ML15134A434); “Environmental Report” (ADAMS Accession No. ML15134A328).

<sup>4</sup> “Rare Element Resources, Inc.; Bear Lodge Project,” 80 Fed. Reg. 70846 (November 16, 2016).

standing to determine whether a party has a sufficient interest to intervene as a matter of right.<sup>5</sup> To establish standing, there must be an “injury-in-fact” that is either actual or threatened.<sup>6</sup> As a result, standing will be denied when the threat of injury is too speculative. The alleged “injury-in-fact” also must lie within the “zone of interests” protected by the Atomic Energy Act (“AEA”) or the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321, *et seq.*<sup>7</sup> A petitioner must also establish a causal nexus between the alleged injury and the challenged action.<sup>8</sup> A determination that the injury is fairly traceable to the challenged action depends, in part, on whether the chain of causation is “plausible.”<sup>9</sup>

In materials licensing cases, there is no automatic presumption of standing based on geographic proximity. Rather, “a presumption of standing based on geographical proximity may be applied . . . where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.”<sup>10</sup> Whether a proposed action carries with it an “obvious potential for offsite consequence,” and, if so, at what distance a petitioner can be presumed to be affected, must be determined “on a case-by-case

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<sup>5</sup> *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998).

<sup>6</sup> *Id.*, citing *Wilderness Soc’y v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987).

<sup>7</sup> *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 (1998).

<sup>8</sup> *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), LBP-98-27, 48 NRC 271, 276 (1998), *aff’d*, CLI-99-4, 49 NRC 185 (1999).

<sup>9</sup> *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75.

<sup>10</sup> *See Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995) (citing *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75 n.22).

basis, taking into account the nature of the proposed action and the significance of the radioactive source.”<sup>11</sup>

An organization may demonstrate standing by showing “either immediate or threatened injury to its organizational interests or to the interests of identified members.”<sup>12</sup> For an organization to assert “representational standing” on behalf of one or more of its members, the organization “[m]ust demonstrate how at least one member may be affected by the licensing action, must identify that member by name/address, and must show that the organization is authorized to request a hearing on that member’s behalf.”<sup>13</sup> Organizational standing requires a demonstration that the action at issue will cause an injury-in-fact to the organization’s interests that is within the zone of interests of the AEA or NEPA.<sup>14</sup> The injury-in-fact necessary to establish organizational standing must be more than “a mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem.”<sup>15</sup>

B. Admissibility of Contentions

To gain admission to a proceeding as a party, a petitioner must submit at least one contention that meets the requirements of 10 C.F.R. § 2.309(f)(1). An admissible contention must:

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<sup>11</sup> *Id.*; see also *Exelon Generation Co., LLC and PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580 (2005).

<sup>12</sup> *Georgia Tech*, CLI-95-12, 42 NRC at 115.

<sup>13</sup> *N. States Power Co.* (Monticello; Prairie Island, Units 1 & 2; Prairie Island ISFSI), CLI-00-14, 52 NRC 37, 47 (2000).

<sup>14</sup> *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

<sup>15</sup> *Id.* at 739.

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.

The contention rule is “strict by design.”<sup>16</sup> The Commission’s procedures do not allow “the filing of a vague, unparticularized contention,’ unsupported by affidavit, expert, or documentary support.”<sup>17</sup> Likewise, Commission practice does not “permit ‘notice pleading,’ with details to be filled in later.”<sup>18</sup> A contention must present a genuine dispute with the applicant on a material issue. Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue must be denied.<sup>19</sup> The

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<sup>16</sup> *Dominion Nuclear Conn., Inc.*, (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001),

<sup>17</sup> *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999), quoting *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant), CLI-98-25, 48 NRC 325, 349 (1998).

<sup>18</sup> *Id.*

<sup>19</sup> *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 24 (2007).

petitioner must present the factual information and expert opinions necessary to support its contention adequately.<sup>20</sup> Failure to do so requires that the contention be rejected.<sup>21</sup> Neither mere speculation nor bare assertions alleging that a matter should be considered will suffice to allow the admission of a proffered contention.<sup>22</sup>

### III. DISCUSSION

For the reasons set forth below, Defenders has not demonstrated standing or proffered an admissible contention.

#### A. Defenders Does Not Have Standing

A petitioner must demonstrate an injury that is “concrete and particularized,” not “conjectural” or “hypothetical.”<sup>23</sup> Conclusory allegations about potential harm from the facility in general are insufficient to establish standing. Judicial and Commission standing jurisprudence requires “realistic threat ... of direct injury.”<sup>24</sup> As a result, a standing inquiry includes a threshold, fact-based question as to whether the alleged injury is concrete and causation is plausible.

Here, Defenders wholly failed to address standing in its request for hearing. There is no declaration from a representative of the organization addressing the harm to

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<sup>20</sup> *Georgia Inst. of Tech.* (Georgia Tech Research Reactor), LBP-95-6, 41 NRC 281, 305 (1995).

<sup>21</sup> *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

<sup>22</sup> *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

<sup>23</sup> *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994).

<sup>24</sup> *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 254 (2001).

organizational interests nor is there any declaration from an individual member articulating actual or threatened harm to his or her personal interests. There is no discussion of any visits to the area potentially impacted by the proposed activity by Defenders' members. Nor does the hearing request specify what Rare Element activities allegedly would harm Defenders' interests or identify any particular resource that would be impacted. There is no information to suggest a link between a member's interests and Rare Element's proposed operations. Because Defenders did not claim any actual or threatened cognizable injury to it or its members attributable to Rare Element's operations, Defenders fails to establish an injury in fact traceable to the proposed project. Because Defenders lacks standing, the hearing request should be denied.

B. The Proposed Contention Is Not Admissible

The hearing request includes a single contention alleging that Defenders' "right to religious freedom will be denied with the approval of [Rare Element's] Bear Lodge Project as the project will destroy a sacred mountain (hill) in the process of mining." For the reasons discussed below, the proposed contention is inadmissible.

First, the contention on its face fails to address the contention pleading criteria set forth in 10 C.F.R. § 2.309(f)(1). These criteria are mandatory and must be scrupulously followed. As the Commission has stated with respect to these regulatory provisions, "[i]f any one of these requirements is not met, a contention must be rejected."<sup>25</sup> In particular, Defenders provided no "concise statement of the alleged facts or expert opinions" in support of their position, nor did they include any references to sources or documents on which Defenders intends to rely to support its position. Defenders also failed to present information to show that a genuine dispute exists on a material issue of law or fact. Defenders does not even cite to Rare

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<sup>25</sup> *Palo Verde*, CLI-91-12, 34 NRC at 155.

Element's license application. Any contention that fails directly to controvert the application must be denied.<sup>26</sup> Ultimately, it is the responsibility of Defenders, not the Licensing Board, to provide the necessary information to satisfy the requirements for the admission of their contentions, including an explanation of the bases for those contentions.<sup>27</sup> Defenders has wholly failed in this regard.

Second, to the extent that Defenders has offered a contention, it failed to raise an issue within the scope of the proceeding. The principal components of the Bear Lodge Project are:

- An open-pit mine operation at the Bull Hill Mine Site and associated support facilities;
- A Physical Upgrade ("PUG") Plant for mineral pre-concentration, located adjacent to the Bull Hill Mine Site; and
- A Hydrometallurgical ("Hydromet") Plant for further concentration and recovery of the REE into a rare earth carbonate concentrate product and Tailings Storage Facility ("TSF") at the Upton Plant Site, located approximately 40 miles south of the Bull Hill Mine Site.

The NRC simply does not regulate conventional mining of source material.<sup>28</sup> The Atomic Energy Act requires an NRC license to transfer or receive in interstate commerce any source

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<sup>26</sup> *Susquehanna*, LBP-07-10, 66 NRC at 24.

<sup>27</sup> *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 416-417 (1990).

<sup>28</sup> *Hydro Res., Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-14, 63 NRC 510, 512 (2006); see also *Rochester Gas and Electric Corp.* (Sterling Power Project Nuclear Unit No. 1), ALAB-507, 8 NRC 551, 554 n.7 (1978) ("[T]he Commission's authority over uranium ore and other 'source material' attaches only 'after removal from its place of deposit in nature,' and not when the ore is mined.").

material (such as uranium ore) only “after removal from its place of deposit in nature.”<sup>29</sup> Under 10 C.F.R. § 40.13(b), a license is not required to receive, possess, use, or transfer unrefined and unprocessed ore containing source material. The NRC begins its oversight with the *processing* of ore containing source material, and, even then, a license is only necessary when the source material concentration exceeds 0.05% by weight.<sup>30</sup> Mining activities at the Bull Hill Mine Site therefore are beyond the scope of the NRC’s jurisdiction and do not require an NRC source material license. The request for hearing, however, fails to recognize the limited scope of the NRC’s jurisdiction, referring only to “Bull Hill, the land area to be mined,” which Defenders describes as a “sacred mountain (hill)” that will be impacted “in the process of mining.” The request for hearing does not mention or describe any impact associated with the PUG Plant or the Hydromet Plant at the Upton site — the only NRC-licensed activities. Because operations at the Bull Hill Mine are outside the NRC’s jurisdiction and are not part of the proposed NRC action,<sup>31</sup> Defenders’ concerns regarding mining-related impacts at the Bull Hill Mine are beyond the scope of the NRC proceeding.

Third, to the extent that the proposed contention can be read as a challenge to the adequacy of the discussion of cultural resources at the Upton Site,<sup>32</sup> the Defenders have failed to

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<sup>29</sup> Atomic Energy Act of 1954, as amended, (“AEA”) § 62, 42 U.S.C. § 2092.

<sup>30</sup> 10 C.F.R. § 40.4.

<sup>31</sup> Mining activities at the Bull Hill Mine Site would be regulated by the State of Wyoming, which has responsibility for mining within the state, or by the U.S. Forest Service, who is preparing an environmental impact statement for the Bull Hill Mine Site. ER at 5.

<sup>32</sup> While the mention of “sacred places” could be a reference to cultural resources, the specific legal basis for the Defenders’ proposed contention is not clear given their additional references to “religious freedom.” For example, under the Religious Freedom Restoration Act, the federal government may not “substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.” 42 U.S.C. § 2000(b)b-1(a). But Defenders has not explained how the Religious Freedom

raise a genuine dispute with the application on a material issue. A Class III cultural resource inventory was conducted in the spring of 2012 and fall of 2013. Results of the inventory are reported in *A Class III Cultural Resource Inventory of the Bear Lodge Project, Upton Plant Site for Rare Element Resources on the Western Edge of the Black Hills, Weston County, Wyoming*, which was provided as Stand Alone Report 10 with Rare Element's NRC application.<sup>33</sup> Defenders has not identified any cultural resources that were alleged to have been overlooked. Nor has Defenders challenged the adequacy of the cultural resources investigation or the conclusions in the report. There is simply no basis for a dispute with the application. As a result, Defenders has failed to raise a genuine dispute with the discussion of cultural resources in Rare Element's application.

#### IV. CONCLUSION

For all of the above reasons, Defenders lacks standing and has not submitted an admissible contention. Accordingly the petition to intervene and request for hearing should be denied.

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Restoration Act is relevant to this proceeding or its claims. Nor has Defenders articulated a claim under the First Amendment to the U.S. Constitution or the American Indian Religious Freedom Act. Given the absence of a clearly articulated legal basis, the proposed contention should be denied regardless of Defenders' intent.

<sup>33</sup> As the NRC noted in the November 16, 2015 *Federal Register* notice, the Class III inventory contains Sensitive Unclassified Non-Safeguard Information ("SUNSI") and has been withheld from public disclosure pursuant to Section 304 of the National Historic Preservation Act of 1966. The *Federal Register* notice establishes a process for potential parties to request access to documents containing SUNSI. However, Defenders did not seek to access the Class III Cultural Resources Inventory in accordance with the notice.

Respectfully submitted,

/s/ signed electronically by \_\_\_\_\_

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RESOURCES, INC.

Dated at San Francisco, California  
this 9th day of February 2016

February 9, 2016

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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NOTICE OF APPEARANCE

Notice is hereby given that the following attorney enters an appearance in the captioned matter on behalf of the applicant, Rare Element Resources, Inc. The attorney is duly authorized, has been admitted to practice in the jurisdiction noted, and is in good standing. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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COUNSEL FOR RARE ELEMENT  
RESOURCES, INC.

Dated at San Francisco, California  
this 9th day of February 2016

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CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S RESPONSE TO PETITION TO INTERVENE FILED BY DEFENDERS OF THE BLACK HILLS” and “NOTICE OF APPEARANCE” in the captioned proceeding have been served via the Electronic Information Exchange this 9th day of February 2016. In addition, copies have been served on Charmaine White Face by email at [bhdefenders@msn.com](mailto:bhdefenders@msn.com).

/s/ signed electronically by \_\_\_\_\_

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