

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD PANEL ⁹⁹ MAY 13 P2:59

Before Administrative Judges: OFFICE OF THE SECRETARY
RULING

Charles Bechhoefer, Presiding Officer
Frederick J. Shon, Special Assistant

In the matter of:

ATLAS CORPORATION
Moab, Utah facility

(Amendment of License
Condition (LC) 55 B.(2),
Source Material License
SUA-917)

Docket No. 40-3453-MLA-4

ASLBP No. 99-763-05-MLA

May 14, 1999

SERVED MAY 13 1999

MEMORANDUM AND ORDER
(Granting Request for Hearing and Posing Questions re:
Suspension of Proceeding)

This proceeding involves a proposed amendment of a source-material license to revise a site-reclamation milestone currently specified in the license, in effect to extend for more than seven years the completion date for ground-water corrective actions, from December 31, 1998 to a projected July 31, 2006. In response to a Notice of Opportunity for Hearing on this amendment, published in the Federal Register at 64 Fed. Reg. 2919 (January 19, 1999), the NRC received one request for a hearing and petition for leave to intervene, from Ms. Sarah M. Fields, of Moab, Utah. Ms. Fields opposes the proposed amendment.

As provided in the Federal Register notice, this proceeding is an informal proceeding subject to the hearing procedures set forth in 10 C.F.R. Part 2, Subpart L (§§

20373

2.1201-2.1263). The undersigned has been designated Presiding Officer (64 Fed. Reg. 12383, March 12, 1999) and, pursuant to the provisions of 10 C.F.R. §§ 2.722 and 2.1209, I have appointed, after consultation with the Acting Chief Administrative Judge, Administrative Judge Frederick J. Shon to serve as my Special Assistant to assist me in taking evidence and in preparing a suitable record for review.

No timely response to Ms. Fields' petition--indeed, no response at all--has been filed by the Licensee. The NRC Staff (Staff) has elected, in accordance with 10 C.F.R. § 2.1213, not to participate in the proceeding. (However, for reasons set forth below, I am directing the NRC Staff to participate and answer certain questions concerning the future course of this proceeding.)

Motivated by the lack of any response from the Licensee, I independently ascertained that the Licensee is bankrupt and that, in accordance with the dictates of a bankruptcy court, it does not want to spend funds litigating this matter but rather wishes to preserve such funds as it has for site remediation. The Licensee has confirmed this position by a motion, dated April 8, 1999, requesting that the hearing, if granted, be placed in abeyance pending the outcome of the bankruptcy proceeding. By a filing dated April 26, 1999, Ms. Fields has opposed that motion and seeks the continuation of this proceeding.

A. Hearing Requirements. In proceedings under 10 C.F.R. Part 2, Subpart L, such as this one, a petitioner is required to set forth (1) its interest in the proceeding-- i.e., its standing; (2) how its interest may be affected by the results of the proceeding; (3) its areas of concern about the licensing activity that is the subject matter of the proceeding; and (4) the timeliness of the petition. 10 C.F.R. § 2.1205(e). To admit Ms. Fields, I must find that her specified areas of concern are germane to the subject matter of the proceeding, that her petition was timely (or, if not timely, that the late-filed criteria set forth in 10 C.F.R. § 2.1205(l) have been satisfied), and that the petitioner has standing. 10 C.F.R. § 2.1205(h).

1. Turning to the foregoing criteria, I find Ms. Fields' petition clearly to have been timely submitted. It was filed on February 18, 1999, in response to the January 19, 1999 Federal Register notice that provided for filing of requests within 30 days of publication.

2. Ms. Fields' area of concern is the extended delay in her being able to enjoy subsistence, educational and recreational activities along the affected area of the Colorado River, within one and one-half miles of the Atlas site. As a result of chemical leaching from the tailings pile on the Atlas site, this portion of the river and its banks, according to Ms. Fields, has been closed to public use.

She advises that currently, and periodically since October, 1996, and previously from 1987-88, she has lived in Moab, Utah, less than three miles from the Atlas site; and that she engages daily in activities such as camping, cooking, hiking, birding, wild-life observation and astronomical observation along the Colorado River upriver from the Atlas site. She adds that, while on the Colorado River, she makes use of river water for all bathing and dishwashing and some clothes washing; burns driftwood from the river for all cooking and heating; and, during the spring, summer and fall consumes fish that have lived their entire lives in the river. Deprivation of these activities on both public and private land in the affected site area and in the river for at least an additional seven years--Ms. Fields claims more than seven years based on the calculation methodology used--constitutes a concern that is clearly germane to the subject matter of this proceeding.

3. As for standing, there has been no opposition to Ms. Fields' statements regarding her standing. Nonetheless, I cannot use the default of other parties as a basis for determining standing--i.e., before determining that Ms. Fields has standing, I must be satisfied from the record before me that Ms. Fields does in fact have standing. I turn now to that question.

The standing requirement in NRC's Rules of Practice--including that applicable in informal 10 C.F.R. Part 2,

Subpart L proceedings such as this one¹--arises from the hearing authorization in § 189.a(1) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a)(1), providing a hearing "upon the request of any person whose interest may be affected" by a proceeding (emphasis supplied). Through a long series of cases, the Commission has held that, in determining standing, it will look to "contemporaneous judicial concepts of standing." Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); see also Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992); Envirocare of Utah, Inc. (Byproduct Material Waste Disposal License), LBP-92-8, 35 NRC 167, 172 (1992); Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995); Quivera Mining Co. (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1 (1998) (a case arising under 10 C.F.R. Part 2, Subpart L).

A contemporary delineation of judicial concepts of standing appeared in a recent Supreme Court decision, Bennett v. Spear, 520 U.S. 154, 161, 117 S. Ct. 1154, 1160

¹The same standing requirements govern Subpart L proceedings as govern formal, Subpart G proceedings. See Chemetron Corp. (Bert Avenue, Harvard Avenue, and McGean-Rohco Sites, Newburgh Heights and Cuyahoga Heights, Ohio), LBP-94-20, 40 NRC 17, 18 (1994).

(1997) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). In Bennett, the Court observed that constitutional minimum standards of standing are that (1) the plaintiff suffer injury in fact, both actual or imminent, not conjectural or hypothetical, (2) there is a causal connection between the injury and the conduct in question, and (3) the injury likely will be redressed by a favorable decision. In addition, a "prudential" standing requirement is that the plaintiff's grievance must arguably fall within the "zone of interests" protected or regulated by the statutory or constitutional provisions invoked in the suit (here, the Atomic Energy Act and the National Environmental Policy Act (NEPA)). 520 U.S. at 161-63, 117 S. Ct. at 1160-62.

Commission decisions are consistent with these requirements. To satisfy "judicial" standing, the Commission has held that a petitioner must demonstrate, inter alia, that it could suffer an actual "injury in fact" to its interest, that the injury occur as a consequence of the proceeding and that the petitioner's interest is "arguably" within the "zone of interests" to be protected by the statute(s) under which the petitioner seeks to intervene. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993); Rancho Seco, CLI-92-2, supra, 35 NRC at 56. To conform to the "injury in fact" requirement, the injury must also be

"concrete and particularized, fairly traceable to the challenged action, and likely to be redressed by a favorable decision." Vogtle, CLI-93-16, supra, 38 NRC at 32; Envirocare, LBP-92-8, supra, 35 NRC at 173; Dellums v. NRC, 863 F.2d 968, 971 (D.C. Cir. 1988).

In making a standing determination, I must "construe the [intervention] petition in favor of the petitioner." Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995). As set forth in her petition, Ms. Fields will clearly suffer injury in fact if her ability to use the affected portion of the Colorado River is delayed for seven years or more (as she claims). My denying the requested license amendment, the result she seeks, would appear to alleviate, in part, that injury, inasmuch as it would at least maintain an earlier goal for the attainment of ground-water corrective actions. Further, the injury suffered by Ms. Fields appears to fall within the zone of interests protected by NEPA. Under these circumstances, I find Ms. Fields to have standing to participate in this proceeding.

Accordingly, because Ms. Fields has satisfied all of the requirements for a hearing, as outlined above, I am granting her request for a hearing. A Notice of Hearing will be issued in the near future.

B. Motion to place hearing in abeyance pending outcome of bankruptcy proceedings. As set forth above, the Licensee

has moved, in the event that Ms. Fields' hearing request were granted (which it has been), to place this proceeding in abeyance pending the outcome of bankruptcy proceedings as to which it is a party. The Licensee explains as follows (Atlas' motion, dated April 8, 1999, at 2, footnote omitted):

Atlas filed for Chapter 11 bankruptcy in September, 1998 [prior to the noticing of this proceeding]. Atlas' existing financial difficulties would be exacerbated by the commencement of another administrative proceeding requiring it to retain attorneys, experts, etc., to defend its license request. The U.S. Trustee, appointed in Atlas' bankruptcy proceeding, requires that Atlas minimize outside expenditures, including legal fees, etc. In addition, Atlas has been engaged in extensive settlement negotiations with the NRC, the Department of the Interior, specifically the U.S. Fish and Wildlife Service, the State of Utah, the U.S. Trustee, several environmental organizations and others regarding a proposed plan to dedicate Atlas' Moab, Utah assets to a trust for use in remediating the Mill site. Pursuant to the proposed plan, Atlas would be released from its license under relevant provisions of the Atomic Energy Act. At present, the proposed plan, which has been agreed to in its general terms, is before the parties to finalize the details. Once finalized by the parties, the plan will be submitted to the bankruptcy court for approval of part of the bankruptcy plan.

Before acting upon Atlas' motion, I need further information that is not currently part of the record before me. Because of this need for further information, and reflecting the Licensee's expressed inability to participate fully in resolving issues raised in this proceeding, I find that the Staff's participation would materially aid me in the resolution of issues in this proceeding and, pursuant to 10 C.F.R. § 2.1213, I am hereby directing the Staff to

participate as a party and to respond to the questions I have set forth below. Responses should be provided by the NRC Staff (as well as by the Licensee, if it should choose to respond):

1. As provided by 10 C.F.R. § 2.1205(m), the granting of Ms. Fields' request for a hearing and petition for leave to intervene need not delay NRC staff action regarding a license amendment such as is sought here. Has the NRC Staff granted Atlas' proposed amendment or, if not, does it propose to do so prior to the conclusion of any delay of this proceeding pending outcome of the bankruptcy proceedings that I might grant? (If the Staff indicates that it plans to issue the amendment prior to the expiration of any delay I might grant, I would be inclined not to delay conclusion of this proceeding, irrespective of the Licensee's ability fully to participate.)

2. Has the NRC Staff approved the revised ground-water corrective action plan (referenced by Ms. Fields) that is to constitute the starting point for the proposed seven-year extension? If not, what is the Staff's likely schedule for doing so?

3. Given the circumstance that this proceeding was noticed subsequent to the initiation of bankruptcy proceedings, has any effort been made (since receipt of Ms. Field' timely hearing request) to include Ms. Fields in the

above-referenced settlement negotiations concerning the bankruptcy proceedings?

4. What would be the effect on the above-referenced settlement if I were to grant Ms. Fields' request by default and deny the proposed license amendment? Would that course of action have any effect on the priorities that might be assigned by the bankruptcy court for the expenditure of available funds?

5. What is the relationship (if any) between this proceeding and that currently pending before Administrative Judge Thomas Moore (Docket No. 40-3453-MLA-3)?

Responses by the NRC Staff (and the Licensee if it elects to do so) should be provided to me by Monday, June 14, 1999. In the interim, the Staff's obligation to establish and furnish a hearing file (see 10 C.F.R. § 2.1231) is hereby deferred pending further notice from me.



Charles Bechhoefer
ADMINISTRATIVE JUDGE
Presiding Officer

Rockville, Maryland
May 14, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATLAS CORPORATION
(Moab, Utah)

Docket No.(s) 40-3453-MLA-4

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O-GRANT'G HEAR'G REQUEST have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
13 day of May 1999


Office of the Secretary of the Commission