

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Dale E. Klein
Kristine L. Svinicki

In the Matter of)
DETROIT EDISON CO.) Docket No. 72-72-EA
(Fermi Power Plant Independent Spent)
Fuel Storage Installation)

)

CLI-10-03

MEMORANDUM AND ORDER

On April 17, 2009, the NRC Staff issued an immediately effective Order modifying Detroit Edison Company's (Detroit Edison) general license for an independent spent fuel storage installation (ISFSI) at its Fermi Power Plant site.¹ That Order required Detroit Edison to take certain physical security measures, in addition to those already required by our regulations, to protect the spent fuel it plans to store in the new ISFSI. The following month, nine petitioners (Petitioners) jointly sought to intervene and requested a hearing in which to challenge the Staff Order.² The Atomic Safety and Licensing Board has issued its ruling on standing and

¹ In the Matter of Detroit Edison Company; Fermi Power Plant; Independent Spent Fuel Installation; Order Modifying License (Effective Immediately), 74 Fed. Reg. 17,890 (Apr. 17, 2009) (Staff Order).

² *Petition of Beyond Nuclear, Mark Farris, Michael Keegan, Shirley Steinman, Keith Gunter, Frank Mantei, Marcee Meyers, Leonard Mandeville and Marilyn R. Timmer for Leave to Intervene in, and/or Request a Hearing Upon, DTE Order Modifying License of ISFSI Security Provisions* (May 7, 2009)(Petition to Intervene).

contention admissibility, denying their request on the ground that Beyond Nuclear and each individual petitioner failed to demonstrate standing.³ Petitioners have appealed.⁴ We affirm.

I. THE BOARD'S DECISION

The Board ruled solely on the basis of Petitioners' failure to demonstrate standing to intervene. In so doing, the Board considered claims of organizational, representational and individual standing. The Board first found that Beyond Nuclear had failed to identify any "discrete institutional injury to itself, other than general environmental and policy interests of the sorts the [federal courts and NRC] repeatedly have found insufficient for organizational standing."⁵

Beyond Nuclear also claimed representational standing on behalf of the eight individual petitioners.⁶ All of these claims are based on the proximity of the individuals' residences to the Fermi site – seven live within 17 miles and one within 50 miles.⁷ Based on a finding that none of

³ LBP-09-20, 70 NRC ____ (Aug. 21, 2009)(slip op.).

⁴ *Petition of Beyond Nuclear, Mark Farris, Michael Keegan, Shirley Steinman, Keith Gunter, Frank Mantei, Marcee Meyers, Leonard Mandeville and Marilyn R. Timmer for Review of August 21, 2009 ASLB Order* (Aug. 31, 2009), at 10 (Appeal). Petitioners' appellate pleading is styled a "petition for review," but is appropriately considered an appeal pursuant to 10 C.F.R. § 2.311(c).

⁵ LBP-09-20, 70 NRC ____ (slip op. at 13), quoting *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409 (2007) (in turn quoting *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001)). The Board also found that Beyond Nuclear had made "no attempt to demonstrate how the [Staff Order] could result in any injury to [its organizational] interests" (*id.* at 13) – a prerequisite to organizational standing (*id.* at 11). Petitioners have not appealed the Board's ruling as to Beyond Nuclear's organizational standing, and we consider the argument waived. See *White Mesa*, CLI-01-21, 54 NRC at 253.

⁶ Each person also sought to intervene individually, in the event that Beyond Nuclear was not granted leave to intervene as his or her representative. See, e.g., *Declaration of Frank Mantei in Support of Beyond Nuclear Petition to Intervene in Docket 52-033 [sic] (ISFSI Security)*(May 7, 2009)(appended to Petition to Intervene), at ¶ 3. Each of the other seven individual declarations is identical in this respect.

⁷ LBP-09-20, 70 NRC ____ (slip op. at 14, 16 & n.65). On appeal, Petitioners assert for the first time, based on "recalculation," that several of their number live within just six to eight miles of

(continued . . .)

the petitioners had demonstrated how the Staff Order “creates any potential for offsite consequences,” the Board rejected all claims of presumptive proximity-based standing.⁸

Finally, the Board considered the redress requirement for standing⁹ and found that none of the individual petitioners had shown how a hearing on the Staff Order could lead to a redress of any asserted injuries.¹⁰ The Board recognized that the scope of this hearing is limited to the question of “whether [the Staff] Order should be sustained” and that, consequently, the only relief available to the petitioners is rescission of the Staff Order.¹¹ The Board concluded that, because the petitioners have failed to explain why they would “be better off in the absence of the [Staff Order],” they therefore had failed to make the required demonstration that “a hearing will redress their injury.”¹²

Petitioners filed a timely appeal, which challenges the Board’s rulings as to representational and individual standing, and raises additional administrative law issues. Both the Staff and Detroit Edison oppose Petitioners’ appeal.¹³

the site. Appeal at 10. We do not consider arguments or new facts raised for the first time on appeal unless their proponent can demonstrate that the information was previously unavailable, which does not appear to be the case here. See, e.g., *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 132-33 & n.38 (2007), *aff’d*, *New Jersey Dep’t of Envtl. Prot. v. NRC*, 561 F.3d 132 (3d Cir. 2009).

⁸ LBP-09-20, 70 NRC ____ (slip op. at 16).

⁹ *Id.* (slip op. at 16-17).

¹⁰ Petitioners assert “various injuries related to a potential terrorist attack affecting on-site fuel storage at the Fermi site.” *Id.* (slip op. at 17).

¹¹ *Id.* (slip op. at 17 (citing 74 Fed. Reg. at 17,892)).

¹² *Id.* (slip op. at 17).

¹³ *Response of Detroit Edison Company in Opposition to Petition for Review of Beyond Nuclear and Eight Named Individuals* (Sept. 10, 2009) (Detroit Edison Response); *NRC Staff’s Response to Petition for Review of LBP-09-20 by Beyond Nuclear, Mark Farris, Michael Keegan, Shirley Steinman, Keith Gunter, Frank Mantei, Marcee Meyers, Leonard Mandeville, and Marilyn R. Timmer* (Sept. 10, 2009) (Staff Response).

II. DISCUSSION

. We generally defer to our licensing boards on issues of standing, absent an error of law or abuse of discretion.¹⁴ Here, we find the Board's decision on Petitioners' standing to be sound and well-reasoned, and we affirm that decision for the reasons stated by the Board. Below, we address the standing question briefly, and also explain why other issues Petitioners raise on appeal lack merit.

Petitioners fundamentally challenge the Board's determination that they failed to explain why they would be better off in the absence of the Staff Order.¹⁵ In particular, Petitioners disagree with the Board's conclusion that the result of the Staff Order will be "inevitably positive."¹⁶ In support of their claim of potential "negative effects," Petitioners express their concern that the Staff Order's "[i]mposition of new background vetting rules can create the negative of a false sense of security by emphasizing the formation of human security workforce over the substance of putting into place physical barriers and important technologies to protect the plant itself and significant public interests."¹⁷

In *Bellotti v. NRC*, the U.S. Court of Appeals for the District of Columbia Circuit upheld an NRC decision to limit the scope of an enforcement adjudication to the question of whether

¹⁴ See, e.g., *Crow Butte Resources, Inc.* (License Renewal for In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 336 (2009).

¹⁵ Appeal at 5.

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 12-13. They complain that the Board "restricted its analysis of potential harm to the ends of the new rules being imposed by the April 7 order (i.e., putting new background vetting practices into effect), instead of the possibility that those rules . . . might have zero positive effect, or even *negative effects* through bungling or incompetence, on Fermi 2 ISFSI security." *Id.* at 10 (emphasis added).

the order should be sustained.¹⁸ In subsequent enforcement cases, like the present one, we have consistently followed the *Bellotti* approach.¹⁹ Under *Bellotti*, Petitioners must provide factual support for their claim that injury could be redressed by a favorable Board ruling; that is, that they would be better off if the order were vacated.²⁰ Petitioners here have not made such a showing. Their argument is both cursory and unsupported. They do not explain why the “false sense of security” purportedly created by the Staff Order – whose security benefits Petitioners do not question – would be ameliorated by revoking the Order.²¹

Petitioners also fault the Board for limiting the scope of the proceeding to the Staff Order. In support, they refer merely to security “lapses” at another nuclear plant – the Palisades facility.²² But Petitioners do not explain how these “lapses” at another site are relevant to the Staff Order regarding the Fermi ISFSI or how they support the conclusion that Petitioners would be better off if that Order were vacated.

In sum, Petitioners’ assertions fail to demonstrate that implementation of the Staff Order would erode ISFSI or plant security at the Fermi site.

¹⁸ 725 F.2d 1380 (D.C. Cir. 1983). In other words, as the Board observed, under *Bellotti*, “a petitioner must show that he would be better off in the absence of any order at all.” LBP-09-20, 70 NRC ___ (slip op. at 13).

¹⁹ See, e.g., *State of Alaska Department of Transportation and Public Facilities*, CLI-04-26, 60 NRC 399 (2004)(Alaska DOT).

²⁰ See *id.* at 406 (requiring demonstration of an injury attributable to the confirmatory order at issue).

²¹ If Petitioners wish to propose security measures in addition to those laid out in the Staff Order, their remedy is to petition the NRC under 10 C.F.R. § 2.206 for further enforcement action. In the alternative, Petitioners may ask the NRC to institute a rulemaking to impose broader security measures. See 10 C.F.R. § 2.802.

²² See Appeal at 10; Petition to Intervene at 14-15 (citing an article in *Esquire* magazine and related correspondence between then-Chairman Klein and Representative Edward Markey).

Petitioners also claim that the Staff Order constitutes an inappropriate “*ad hoc* rulemaking,” observing that “[r]ules adopted on a case-by-case basis without due consideration of the reality of practice can create unfortunate and unintended consequences.”²³ But this argument fails as a matter of law. It is well established that the Commission has discretion under the Administrative Procedure Act (APA) to impose binding, prospectively applicable legal requirements either by rulemaking or adjudication. Indeed, in our 2005 decision in *All Power Reactor Licensees*, we considered in some detail essentially the same question that Petitioners raise here – namely, whether issuance of a post-9/11 security order, similar in form to the Staff Order, amounted to a regulation. We concluded that it did not.²⁴ An order modifying a license, such as the Staff Order, falls well within the APA’s definition of “adjudication.”²⁵ As such, the Staff Order did not trigger the notice-and-comment procedures applicable to rulemakings.²⁶

Petitioners are incorrect in claiming an unlawful deprivation of hearing “rights.”²⁷ As *Bellotti* held, the scope of a hearing in an adjudication on an enforcement order is limited to

²³ Appeal at 7. Based on this argument, Petitioners appear to claim standing on the grounds that they have a procedural interest in notice of the imposition of security measures. See *id.* at 13.

²⁴ See *All Power Reactor Licensees and Research Reactor Licensees Who Transport Nuclear Fuel*, CLI-05-6, 61 NRC 37 (2005)(concluding that certain NRC security orders did not amount to unlawfully promulgated regulations). CLI-05-6 involved an immediately effective order imposing enhanced security measures for spent nuclear fuel shipments. As in the 2005 security order case, the Staff Order at issue here neither repudiates nor rescinds any NRC safety and security requirements, but rather imposes new, more stringent security requirements that supplement those already found in NRC regulations. See generally *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *SEC v. Chenergy Corp.*, 332 U.S. 194 (1947).

²⁵ *All Power Reactor Licensees*, CLI-05-6, 61 NRC at 41.

²⁶ See *id.* at 39, 41.

²⁷ See Appeal at 13 (citing 42 U.S.C. § 2239.a).

whether the order should be sustained.²⁸ As in the *All Power Reactor Licensees* case, this matter involves the enforcement of security via adjudication. Although the scope of the hearing is limited, the agency meets its “hearing” obligations under the Atomic Energy Act in this matter by offering a hearing on the order. Therefore, the NRC proceeded properly in issuing its Order, subject to a hearing opportunity. As noted above, the NRC provides a separate process, under 10 C.F.R. § 2.206, for any interested person to seek enforcement actions beyond those adopted in the Staff Order. Petitioners may raise their concerns with the Commission at any time by filing a petition under that section.²⁹

Finally, Petitioners maintain that this proceeding “is the first and only opportunity they have had to request a hearing to critique the December 10, 2007 nonpublic notice sent by [Detroit Edison] to the NRC wherein the utility asserted its choice of Holtec casks for its ISFSI.”³⁰ This is essentially a restatement of one of Petitioners’ three contentions, raised in its initial petition.³¹ Although the Board did not expressly rule on Petitioners’ proposed contentions, and we need not decide the issue here, it appears that none of Petitioners’ proposed contentions relates directly to the ISFSI, let alone argue that the Staff Order should not be sustained.³² Therefore, they are beyond the scope of this proceeding.

²⁸ See *Alaska DOT*, CLI-04-26, 60 NRC at 404-06; *Bellotti*, 725 F.2d at 1381-82. See generally *Public Service Co. of Indiana* (Marble Hill Nuclear Generating station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441-43 (1980)(articulating policy reasons for limiting the scope of enforcement proceedings).

²⁹ See *Bellotti*, 725 F.2d at 1383. As stated above, members of the public may also submit views on the proper scope or content of the NRC’s security requirements via a petition for rulemaking under 10 C.F.R. § 2.802.

³⁰ Appeal at 11.

³¹ See Petition to Intervene at 15-20.

³² The proposed contentions are somewhat diffuse. Petitioners generally assert that both the Fermi site and the Holtec dry casks are vulnerable to attack and that adequate security measures must therefore be implemented. They provide a number of references for the general (continued . . .)

III. CONCLUSION

For the reasons set forth both here and by the Board, LBP-09-20 is *affirmed*.

IT IS SO ORDERED.

For the Commission

(NRC Seal)

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of January, 2010.

propositions that “security vulnerabilities have long been identified” and that they seek to intervene to “ensure that adequate security is instituted” at Fermi “over its on-site stored irradiated nuclear fuel.” Petition to Intervene at 7-15. Petitioners also request an independent quality assurance inspection of the Holtec HI-STORM 100 dry casks prior to their introduction into the Fermi site. *Id.* at 15-20. Finally, they request that the NRC prepare an environmental impact statement, including a sociological impacts analysis that considers potential infringements of civil liberties. *Id.* at 20-23.