

BEFORE THE PRESIDING OFFICER

ASLBP No. 02-803-04

## INTRODUCTION

Pursuant to an Order issued by the Presiding Officer on January 27, 2004, the Staff of the Nuclear Regulatory Commission (Staff) hereby responds to “Sierra Club Et Al.’s Application for Stay of NRC Staff Decision to Issue Second License Amendment for NFS BLEU Project” (Stay Request). As discussed below, the Stay Request should be denied.

Nuclear Fuel Services, Inc. (NFS) is the holder of Special Nuclear Materials License No. SNM-124 and is currently manufacturing high-enriched nuclear reactor fuel at its facility in Erwin, Tennessee. See *Nuclear Fuel Services, Inc.; Notice of Receipt of Amendment Request and Opportunity to Request a Hearing*. 68 Fed. Reg. 796 (2003). On October 11, 2003, NFS filed a request for an amendment to its license to authorize processing operations in the Blended Low-Enriched Uranium Preparation Facility (BPF).<sup>1</sup> *Id.* This request was the second of three license amendment requests planned to support operations associated with downblending and

<sup>1</sup> The amendment request also requested minor administrative changes. *Id.*

conversion of high-enriched uranium material to low-enriched oxides.<sup>2</sup> *Id.* On September 17, 2003, the Staff issued an environmental assessment (EA) and finding of no significant impact (FONSI) concerning the BPF amendment request. See Letter to B. Moore from M. Adams (Sept. 17, 2003)(ADAMS Accession No. ML032390408) attaching “Environmental Assessment and Finding of No Significant Impact for License Amendment Request Dated October 11, 2002, Blended Low-Enriched Uranium Preparation Facility” (ADAMS Accession No. ML032390422)(BPF EA). On January 13, 2004, the Staff issued the requested license amendment. See Letter to B. Moore from G. Janosko, (Jan. 13, 2004) (ADAMS Accession No. ML040130530) and Amended

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<sup>2</sup> The first amendment request was submitted on February 28, 2002. See Letter from B. Moore to Office of Nuclear Materials Safety and Safeguards (Feb. 28, 2002) (ADAMS Accession No. ML020730343); 67 Fed. Reg. 66172 (2002). In June 2002, the Staff issued “Environmental Assessment for Proposed License Amendments to Special Nuclear Materials License No. SNM-124 Regarding Downblending and Oxide Conversion of Surplus High-Enriched Uranium, June 2002 (June 2002 EA) (ADAMS Accession No. ML021790068) and published a Finding of No Significant Impact concerning the first license amendment request. 67 Fed. Reg. 45555 (2002). The Staff subsequently issued the first license amendment. Letter to B. Moore from S. Frant (July 7, 2003) (ADAMS Accession No. ML 031890743). The third request was submitted on October 23, 2003. See Letter From B. Moore to Office of Nuclear Materials Safety and Safeguards (Oct. 23, 2003) (ADAMS Accession No. ML033490408); 68 Fed. Reg. 74653 (2003). Hearing requests were received concerning the first and second amendment requests, however, the Presiding Officer designated to rule on the requests held both proceedings in abeyance pending the submission of the third and final amendment request. See *Nuclear Fuel Services, Inc.* (Erwin, Tennessee), LBP-03-01, 57 NRC 9 (2003). The Staff declined to be a party in both of these proceedings. On February 2, 2004, hearing requests concerning the third amendment were filed by a group of environmental organizations and an individual. See “Third Request for Hearing by State of Franklin Group of the Sierra Club, Friends of the Nolichucky River Valley, Oak Ridge Environmental Peace Alliance, and Tennessee Environmental Council, Regarding Nuclear Fuel Services’ Proposed BLEU Project,” February 2, 2004; “Third Request for Hearing by Kathy Helms-Hughes Regarding Nuclear Fuel Services’ Proposed Blended Low-Enriched Uranium Project,” Feb. 2, 2004..

License SNM-124 (ADAMS Accession No. 040130574).<sup>3</sup> On January 26, 2004, the Sierra Club, et al. (Petitioners) filed their Stay Request.<sup>4</sup>

### DISCUSSION

In considering applications for a stay of the Staff's action in issuing an amendment to a materials license, the Presiding Officer must consider the following four factors: 1) whether the moving party has made a strong showing that it is likely to prevail on the merits; 2) whether the party will be irreparably injured unless a stay is granted; 3) whether the granting of the stay would harm other parties; and 4) where the public interest lies. See 10 C.F.R. § 2.1263 referencing 10 C.F.R. § 2.788. In addressing the stay criteria, a party must provide more than general or conclusory assertions in order to demonstrate it is entitled to relief. *Babcock & Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility) LBP-92-31, 36 NRC 255, 263 (1992), citing *U.S. Dep't of Energy* (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 544 (1983). While no criteria is dispositive, the Commission has stated that the most crucial of these criteria is whether there is irreparable injury. See *Public Service Co. of New Hampshire* (Seabrook Station Units 1 and 2), CLI-90-3, 31 NRC 219, 260 (1990), *aff'd on other grounds sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C.Cir.), cert. denied, 112 S.Ct. 275 (1991). See also *International Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-02-9, 55 NRC 227, 232 (2002). Further, a movant's failure to make an adequate showing relative to the first two stay criteria makes an extensive

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<sup>3</sup> On January 15, 2003, the Staff issued Board Notification No. 2004-02, informing the Presiding Officer and Special Assistant, as well as the petitioners, of the issuance of the BPF amendment. As noted in the Board Notification, the Safety Evaluation Report which provided the basis for approving the amendment contained proprietary information and was not available to the public. On January 30, 2004, the Staff issued Board Notification 2004-03 informing the Presiding Officer and Special Assistant, as well as the petitioners, that the public, non-proprietary version of the SER was available.

<sup>4</sup> In addition to filing its Stay Request, the Petitioners filed a request for an extension of time to file the stay application. "Petitioner's Request for Extension of Time to File Application for Stay of Issuance of Second License Amendment to NFS." In its January 27, 2004, Order, the Presiding Officer granted this request.

analysis of the third and fourth factors unnecessary. See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985); *B&W*, LBP-92-31, 36 NRC at 266. As discussed below, Petitioners fail to demonstrate that they will suffer irreparable injury if the stay is not granted and fail to make a strong showing that they are likely to prevail on the merits. Their Stay Request should, therefore, be denied.

The most crucial criterion, whether the party will be irreparably injured unless a stay is granted, requires the moving party to demonstrate that the injury that will take place in the absence of a stay will be "both certain and great." *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plan), ALAB-820, 22 NRC 743, 747 (1985) citing *Cuomo v. NRC*, 772 F.2d 972, 976 (D.C. Cir. 1985). Petitioners argue that they will suffer irreparable injury in the form of an unacceptable risk to their health and environment. Stay Request at 9. As the only basis for their claim, Petitioners cite to a statement in the June 2002 EA. *Id.* The statement indicates that an accidental uncontrolled release of hazardous material could pose a risk to the environment as well as to workers and public health and safety. See June 2002 EA at 5-7. This statement, without any further support from Petitioners, fails to demonstrate that Petitioners will suffer a concrete, irreparable injury. See *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 & 2), ALAB-814, 22 NRC 191, 196 (1985) ("[a] party must reasonably *demonstrate*, not merely allege, such harm."). Petitioners do not identify any specific accident, make no assertions concerning the likelihood of such accidents, and do not specify what the actual harm would be. See *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1634 (1984)(finding that an affidavit totally lacking in specificity with respect to the probability and the significance of an accident did not support a finding of irreparable injury.) Moreover, it is well settled that speculation about an occurrence of a nuclear accident does not constitute irreparable injury. See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 259 (1990); *Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-5, 19 NRC 953, 964 (1984)

citing *New York v. NRC*, 550 F.2d 745, 756-57 (2d. Cir. 1977); *Catawba*, ALAB-794, 20 NRC at 1635. Accordingly, Petitioners have failed to demonstrate that they will suffer irreparable injury in the absence of a stay.

Because Petitioners have failed to establish that they will be irreparably harmed if the stay is denied, they face a heavy burden in showing that they are likely to succeed on the merits. See *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269 (1990) (absent a showing of irreparable harm, movant must demonstrate that the reversal of the licensing board is a "virtual certainty"); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 439 (1987). Petitioners assert that they are likely to prevail on their claim that the Staff's environmental review is insufficient to support issuance of the BPF amendment. Stay Request at 6. Petitioners claim that the BPF EA is incomplete because it is neither "independent nor final."<sup>5</sup> *Id.* The BPF EA is not "independent" because, according to Petitioners, the Staff relied on NFS's evaluation of accidents without independent confirmation. *Id.* at 6-7. However, Petitioners point to no requirement that would preclude the Staff from relying on NFS's evaluation of accidents.

Petitioners also argue that the EA is not final because the EA contains a statement that indicates that the Staff lacks the necessary "additional confidence."<sup>6</sup> *Id.* at 7. However, Petitioners misunderstand the statement in the EA. The statement in the EA does not provide that the Staff

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<sup>5</sup> Petitioners claim that the Staff's actions are also contrary to representations it made in a telephone conference call which were relied upon by the Commission in denying Petitioners emergency request concerning the first amendment request. *Id.* at 6 referencing *Nuclear Fuel Services, Inc.* (Erwin, Tennessee), CLI-03-3, 57 NRC 239 (2003). However, as discussed below, Petitioners misinterpreted Staff's statements.

<sup>6</sup> Petitioners also seem to argue that because the SER supporting the issuance of the BPF amendment is not yet public, that somehow the Staff's environmental review is incomplete. See *id.* However, Petitioners fail to demonstrate how this is a relevant factor as the basis for the Staff's environmental review is provided in the BPF EA and referenced documents. In addition, as noted in the Board notification, a public version of the SER will be made available.

requires additional confidence concerning its findings in the BPF EA. The findings in the BPF EA are based on the information provided by NFS and are discussed in two referenced EAs.<sup>7</sup> BPF EA at 4. The EA simply goes on to provide that additional confidence that potential accidents have been evaluated will be provided by the Staff's review of the integrated safety analysis (ISA) as part of its technical review of the amendment request. BPF EA at 4. Moreover, nothing precludes the Staff from issuing an EA and FONSI before it has completed its safety review. *See Nuclear Fuel Services, Inc.* (Erwin, Tennessee), CLI-03-3, 57 NRC 239, 247 n. 46 (2003) *citing Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 206, 220 (2002). *See also* 10 C.F.R. § 51.101. Accordingly, Petitioners fail to make a strong showing that there is a likelihood that they will prevail on the merits.

Petitioners also argue that they are likely to prevail on their claim that the environmental impacts of the BPF amendment are significant and that the Staff's rationales for not preparing an environmental impact statement (EIS) are not lawful. Stay Request at 7. According to Petitioners, the EA<sup>8</sup> "on its face" demonstrates that there will be significant impacts from the BPF amendment. *Id.* The June 2002 EA, according to Petitioners, indicates that the BPF operations pose a significant risk of an accident that could have an effect on the environment. *Id.* However, the June 2002 EA simply describes the potential hazards of the BLEU project. *See* June 2002 EA Section 5. The fact that the June 2002 EA discusses these hazards and possible accidents does not indicate

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<sup>7</sup> The BPF EA states that some of the activities proposed in the BPF amendment were already authorized. For these activities, the environmental effects are discussed in the "Environmental Assessment for Renewal of Special Nuclear Materials License No. SNM-124," January 1999 (ADAMS Accession No. ML031150418) (1999 EA) issued in connection with the renewal of the NFS license in 1999. BPF EA at 4. The environmental impacts of new operations to be authorized by the BPF amendment were analyzed in the June 2002 EA. *Id.*

<sup>8</sup> It appears that Petitioners are referring to the same statement in the June 2002 EA it used in support of their assertion that they will suffer irreparable injury. *See id.* at 9.

that there will be significant impacts from the BPF amendment. To the contrary, the June 2002 EA found that there would be no significant impacts. June 2002 EA at 5-1; 67 Fed. Reg. 45555.

Petitioners also alleged that the Staff's reliance on safety controls to ensure that the impacts will not be significant is inconsistent with NRC case law and long-established agency practice. *Id.* According to Petitioners, the NRC has prepared many EISs for nuclear facilities and none had been based on the supposition that the facility will not comply with the regulations. Stay Request at 8. It appears that Petitioners are arguing that because the NRC has prepared EISs in the past for activities where regulatory compliance is assumed, the Staff should not have relied on regulatory compliance as a basis for making a finding of no significant impact and the decision not to prepare an EIS. Petitioners make no specific reference to any NRC case law or "long-established agency practice" that would support their argument. Moreover, Petitioners' logic is faulty as impacts to the environment could be caused by non-radiological matters not directly regulated by the NRC.<sup>9</sup> In addition, for many types of licensed activities EISs are automatically prepared without first preparing an EA for a variety of reasons.<sup>10</sup> See 10 C.F.R. § 51.20. Therefore, Petitioners have not made a strong showing of likelihood that they will prevail on the merits.

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<sup>9</sup> For example, for the renewal of an operating license for a nuclear power plant, among the impacts considered were the impacts on public services due to increase need for services. See 10 C.F.R. § Part 51, Subpart A, Appendix B.

<sup>10</sup> Petitioners reliance on *Limerick Ecology Action v. NRC* is also misplaced. See *id.* The court in *Limerick* did hold, as Petitioners state, that simply meeting the requirements of the Atomic Energy Act did not exempt the Commission from complying with NEPA. *Limerick Ecology Action v. NRC*, 869 F.2d 719, 741 (3<sup>rd</sup> Cir. 1989). However, *Limerick* did not hold that the NRC could not rely on compliance with its regulations as a basis for concluding that the environmental impacts would not be significant. At issue in *Limerick* was the fact that the NRC excluded any consideration of design alternatives to mitigate the effects of a severe accident on the basis of a policy statement that stated that the existing designs of nuclear power plants were sufficiently safe to exclude consideration of alternatives. *Id.* at 733. The court ruled that the Commission failed to comply with NEPA by failing to either resolve the issue of design alternatives generically via rulemaking or to demonstrate that the likelihood of a severe accident was so remote and speculative as to not warrant consideration. *Id.* at 734-741. Here, the Staff did address the potential impacts from both accidents and normal operations. BPF EA at 4; June 2002 EA, Section 5.

Petitioners also note that NFS's ISA Summary identified "an array of credible accidents" and allege that the Staff has failed to independently assess the likelihood or consequences of those accidents or measures that could mitigate them. Stay Request at 8-9. See *also id.* at 3-4. This failure, according to Petitioners, violates NEPA's two-fold goals, which are to carefully consider the environmental impacts of agency decisions and to inform the public. *Id.* Petitioners' assertions are unsupported and cannot demonstrate that they are likely to prevail on the merits. First, Petitioners point to no case law or requirement that the Staff cannot rely on NFS's ISA Summary as a basis for its environmental review. Further, Petitioners fail to note that in addition to identifying potential accidents, an ISA also must identify items relied on for safety (IROFS) to either prevent such accidents or mitigate their consequences. See NUREG-1520, Standard Review Plan for the Review of a License Application for a Fuel Cycle Facility (March 2002) at 3-1 (SRP). The ISA Summary is a synopsis of the results of the ISA and is submitted as part of the license application. 10 C.F.R. § 70.4. Accordingly, Petitioners fail to make a strong showing of likelihood of success on the merits.

Finally, Petitioners argue that the Staff's reliance on previous EAs as a basis for its decision not to prepare an EIS for the BPF amendment fails to meet the NEPA requirement that an agency take a "hard look" at the environmental impacts. Stay Request at 9. Petitioners argue that the BPF amendment uses qualitative and non-specific language in referencing the other EAs. *Id.* Again, Petitioners point to no regulation or case law that prohibits reliance on previous environmental reviews, nor do Petitioners explain how the language used in the BPF EA indicates that the Staff did not take a "hard look" at environmental impacts. Reliance on other documents is expressly permitted by NRC regulations and regulations issued by the Council on Environmental Quality (CEQ).<sup>11</sup> See 10 C.F.R. Part 51, App. A, *citing* 40 C.F.R. § 1502.21. Furthermore, the June 2002

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<sup>11</sup> See *also* "Environmental Review Guidance for Licensing Actions Associated with NMSS  
(continued...)"



EA and the 1999 EA, which are referenced in the BPF EA, contained detailed information concerning the potential environmental impacts from the BPF operations. See June 2002 EA at Section 5; 1999 EA at Section 5. Petitioners fail to indicate how these discussions are insufficient. Again, Petitioners fail to make a strong showing of likelihood that they will prevail on the merits.

Because Petitioners have failed to demonstrate that they have met either of the first two criteria for a stay, it is not necessary to discuss in detail the final two criteria. *Shoreham*, ALAB-810, 21 NRC at 1620. The third criteria, whether the stay would cause harm to other parties, may weigh in Petitioners' favor in that it is possible that NFS would not be harmed if a stay were granted. However, the fourth criteria, where the public interest lies, militates against the stay. Petitioners claim that the Staff's conduct of the NEPA process for the BLEU project has been misleading. Stay Request at 10. However, as discussed above, Petitioners fail to demonstrate such is the case. Thus, Petitioners fail to demonstrate the public interest warrants a stay.<sup>12</sup>

As discussed above, Petitioners have failed to demonstrate that they meet the three of the four criteria for a stay. Most significantly, the Petitioners have failed to demonstrate they will suffer

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<sup>11</sup>(...continued)

Programs, Final Report, NUREG-1748, Section 1.6.4. The Staff notes that this section recommends that the incorporated analysis should be referenced by page or section number and the analysis summarized. The BPF EA did summarize the analyses in the two prior EAs, however, specific page or section numbers were not provided. However, the basis for the Staff's finding should be comprehensible to the reader.

<sup>12</sup> Petitioners also assert that the Staff cannot rely on the June 2002 EA because it is incomplete. Stay Request at 9. In support, Petitioners reference a Commission decision in this proceeding. *Nuclear Fuel Services*, CLI-03-3, 57 NRC 239. Although not fully explained, it appears Petitioners believe that a statement, quoted in this decision, from counsel for the Staff indicates that the June 2002 EA was not complete. Specifically a statement that the June 2002 EA was not final. See *id.* Staff Counsel was clarifying that an EA would be prepared for the second and third amendments and that the June 2002 EA was not final for all three amendments. Transcript, Telephone Conference Call, January 17, 2003 at 38-39 (ADAMS Accession No. ML030230518). However, this statement does not mean that the FONSI supported by the June 2002 EA was not final for the first amendment. Moreover, nowhere did Staff counsel imply that any subsequently issued EA would not rely on findings already made. To the contrary, references to the June 2002 EA were specifically addressed. *Id.* at 40-41.

an irreparable injury if a stay is not granted and have failed to make a strong showing of likelihood of success on the merits. Their Stay Request should, therefore, be denied.

CONCLUSION

For the reasons set forth above, Petitioners' Stay Request should be denied.

Respectfully submitted

**/RA/**

Marian L. Zabler  
Counsel for NRC Staff

**/RA/**

Angela B. Coggins  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 5th day of February, 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of	)	
	)	Docket No. 70-143-MLA-2
NUCLEAR FUEL SERVICES, INC.	)	SRM License 124
	)	
Blended Low Enriched Uranium Project	)	
(Request for Material License Amendment)	)	ASLBP No. 02-803-04
	)	

NOTICE OF WITHDRAWAL

Notice is hereby given that effective February 5, 2004, I will withdraw my appearance in the above-captioned proceeding. All mail and service lists should be amended to delete my name after that date.

Respectfully submitted,

**/RA/**

Marian L. Zobler  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 5th day of February, 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of	)	
	)	Docket No. 70-143-MLA-2
NUCLEAR FUEL SERVICES, INC.	)	SRM License 124
	)	
Blended Low Enriched Uranium Project	)	
(Request for Material License Amendment)	)	ASLBP No. 02-803-04
	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b) the following information is provided.

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Respectfully submitted,

**/RA/**

Angela B. Coggins  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 5th day of February, 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of	)	
	)	Docket No. 70-143-MLA-2
NUCLEAR FUEL SERVICES, INC.	)	SRM License 124
	)	
Blended Low Enriched Uranium Project	)	
(Request for Material License Amendment)	)	ASLBP No. 02-803-04
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO SIERRA CLUB ET AL.'S APPLICATION FOR STAY OF NRC STAFF DECISION TO ISSUE SECOND LICENSE AMENDMENT FOR NFS BLEU PROJECT," "NOTICE OF WITHDRAWAL," and "NOTICE OF APPEARANCE" in the above-captioned proceeding have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (\*), and by electronic mail as indicated by a double asterisk (\*\*) on this 5th day of February, 2004.

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