

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

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In the matter of

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ATLAS CORPORATION

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(Moab, Utah Facility)

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Docket No. 40-3453-MLA

ASLBP No. 97-723-02-MLA

OFFICE OF SECRETARY
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LICENSEE'S RESPONSE TO PETITIONER'S APPEAL

Pursuant to Materials License SUA-917A, Atlas Corporation (Atlas) operates a uranium mill tailings facility near Moab, Utah. A condition in that license required Atlas to complete placement of the final radon barrier by December 31, 1996 as part of the facility's revised reclamation plan. However, the company has been unable to even start placement of the barrier because the Nuclear Regulatory Commission (NRC) has not yet finalized its environmental review of the revised plan. Specifically, NRC must finish its environmental impact statement (EIS), a task that it predicts it will accomplish by October or November, 1997. Once the agency completes the EIS, it will decide whether to approve the revised reclamation plan.

Because it would violate NRC regulations for Atlas to commence placement of the final radon barrier prior to receiving NRC approval, the company had no option but to apply for an amendment to its license that would grant a time extension.^{1/} Shortly after publication of the required notice of this application in the Federal Register, Petitioner John Francis Darke (Darke or

^{1/} NRC agreed that Atlas' inability to complete placement of the final radon barrier is due to factors beyond the company's control and approved the amendment in March, 1997. See Letter from Joseph J. Holonich, Chief, Uranium Recovery Branch, NRC, to Richard Blubaugh, Vice President of Environmental and Governmental Affairs, Atlas Corporation (March 4, 1997) and attached Technical Evaluation Report for the License Amendment.

Petitioner) filed a request for a hearing with the NRC. On May 16, 1997, the Atomic Safety and Licensing Board Panel (ASLBP or Panel) denied Darke's request for a hearing, finding that he did not have standing to participate in a hearing. Memorandum and Order (Denying Hearing Request) (May 16, 1997). On June 2, 1997, Petitioner filed an Appeal with the Commission.

I. Petitioner's Claims on Appeal

On appeal, Petitioner claims that the ASLBP made two errors. First, Petitioner claims that his request, and any resulting hearing, should be subject to the NRC rules at 10 C.F.R. Subpart G applicable to Formal Hearings, rather than the rules at 10 C.F.R. Subpart L applicable to Informal Hearings. Second, Petitioner claims that he has demonstrated standing to participate in a hearing.

II. Argument

The Commission should affirm the Panel's finding that this request for a hearing falls within the scope of 10 C.F.R. Subpart L. In addition, the Commission should affirm the Panel's determination that the Petitioner failed to establish that he meets the judicial standards for standing.

A. The Atomic Safety and Licensing Board Panel Properly Found that the Informal Hearing Rules Apply to this Materials License Amendment

The NRC regulations provide that Informal Hearing procedures apply to, among other things, a "licensee-initiated amendment of a materials license." 10 C.F.R. § 2.1201(a)(1). Atlas' application for an amendment to its materials license fits clearly within the scope of these

procedures. The company has simply requested (i.e., initiated) an amendment to its license. The Panel is absolutely correct when it says that "[t]here is not the slightest doubt . . . [that the request] properly is the subject of Subpart L informal procedures. Memorandum and Order (Denying Hearing Request) at 12. The Panel correctly rejected Darke's attempt to characterize the application as a staff-imposed amendment so that formal hearing procedures would apply. Id.

In his Appeal, Darke states that "the reclamation schedule date is an enforceable milestone derived from and [sic] interagency agreement" Petitioner's Appeal at 2. Darke asserts that this agreement, a Memorandum of Understanding (MOU) between the NRC and the Environmental Protection Agency (EPA), is relevant to the license amendment application. Specifically, he states that because Atlas was not a signatory of the MOU, the company is prohibited from initiating an action that would change the conditions in its license. Petitioner's Appeal at 8. However, this simply is not the case. Petitioner is correct that the MOU memorialized the agreement between EPA and NRC with regard to stabilization of tailings piles. Nevertheless, a review of Appendix A to 10 C.F.R. Part 40, which incorporates the terms of the MOU, shows that the agreement clearly allow the licensee's to seek amendments to their materials licenses.

In sum, Petitioner appears to be confused about NRC's role in a license amendment proceeding. He does not understand that just because NRC can promulgate changes to its regulations does not mean that a licensee cannot submit an application to have a permit condition amended. While it is certainly true that NRC must approve a license amendment request,

Petitioner is off the mark when he suggests that only NRC may initiate a license amendment. See, Petitioner's Appeal at 8.^{2/}

B. The Atomic Safety and Licensing Board Panel Properly Determined that Petitioner Darke Failed to Demonstrate his Standing to Intervene

The NRC regulations provide that a Petitioner's hearing request must, among other things, demonstrate that "the requester meets the judicial standards for standing" and that the requester's "areas of concern are germane to the subject matter of the proceeding." 10 C.F.R. § 2.1205(h). The ASLBP found that Darke had demonstrated that his areas of concern are germane to the subject matter of the proceeding. See, Memorandum and Order (Denying Hearing Request) at 11.^{3/} On the other hand, the Panel properly determined that Darke failed to carry his burden of demonstrating that he meets the standards for standing. Babcock and Wilcox, 1993 NRC Lexis 6, *1.

To establish standing, a party must show that there has been "a distinct and palpable harm that constitutes injury in fact within the zone of interests arguably protected by the governing statute, that the injury is fairly traceable to the challenged action, and that the injury will be redressed by a favorable decision. Yankee Atomic Electric Company (Yankee Nuclear Power Station, 43 N.R.C. 1 (1996). The Panel found that Darke had sufficiently alleged a potential injury that could result from granting the license amendment. Memorandum and Order (Denying

^{2/} Moreover, Darke's allegations regarding other documents discussing enforcement actions, other license amendments, etc., have no bearing on this appeal or on this license amendment application. See, Petitioner's Appeal at 5.

^{3/} Atlas does not concede that Petitioner has carried his burden and established areas of concern germane to the subject matter of this license amendment.

Hearing Request) at 18-19.^{4/} However, the Panel determined that Darke failed to show that there was any nexus between this potential injury and the Petitioner. Specifically, the ASLBP noted that "a petitioner who wants to establish 'injury in fact' for standing purposes must make some specific showing outlining how the particular . . . impacts . . . can reasonably be assumed to accrue to the petitioner." Memorandum and Order (Denying Hearing Request) at 18. The Panel gave Darke every opportunity to make this showing,^{5/} and explicitly requested that he do so by stating the distance he lives from the facility, or the distance from the facility to where he engages in activities. Memorandum and Order (Permitting Additional Filing) at 2. However, Darke has failed repeatedly to make this showing, even in his Appeal. Rather than providing simple information concerning how far he lives or conducts activities from the tailings pile, Darke protests that the ASLBP sought "the adjudicatory equivalent of an industrial time motion study of the petitioner's daily life" Petitioner's Appeal at 9-10. While Petitioner is correct that the AEA "does not contemplate an invasion of privacy at the behest of industrial time motion study parameters," Petitioner must keep in mind that he has filed a request for a hearing at the NRC. Id. at 10. It is not asking too much to insist that he provide basic information upon which the agency can make a determination as to whether he has a right to that hearing.^{6/}

^{4/} Atlas disagrees with the Panel on this finding and believes that Darke has failed to show that he will suffer any injury at all.

^{5/} The Panel specifically requested that Darke demonstrate his standing on three occasions: (1) the Memorandum and Order (Initial Order) (February 12, 1997); (2) the Memorandum and Order (Permitting Additional Filing) (March 11, 1997); (3) the Order (Permitting Reply Filing) (April 11, 1997). In addition, the NRC notice published in the Federal Register concerning Atlas license amendment application informed Darke that he must demonstrate standing. See, 62 Fed. Reg. 3313 (Jan. 1997).

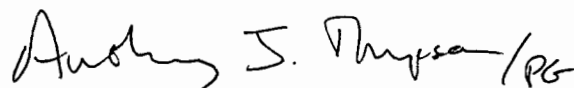
^{6/} The Panel noted that Darke did allege that he makes various uses of water from the Colorado River and other sources near the Atlas facility. Memorandum and Order (Denying Hearing Request) at 16. However, Darke alleged only that these uses were "in close proximity" to the facility, or "a short walk" from the facility. He fails

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III. Conclusion.

The Commission should affirm the decision of the ASLBP. The Panel found correctly that the rules for informal hearings are the appropriate rules to apply to Mr. Darke's request. The Panel also found correctly that Petitioner, despite repeated opportunities to establish his standing, has failed to demonstrate how this license amendment would cause him harm.

Respectfully submitted,

Handwritten signature of Anthony J. Thompson, followed by the initials "PG".

Anthony J. Thompson
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037-1128
Telephone: (202) 663-9198
Fax: (202) 663-8007

Counsel for Licensee

Date: June 23, 1997

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to state whether these uses are upstream or downstream from the tailings pile, making it impossible to determine whether there is any injury in fact. Id. at 20. Therefore, these statements fail to establish "any reasonable nexus between [Darke] and any purported radiological impacts." Id. at 19.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Licensee's Response on Appeal were served upon the persons listed below by Certified Mail, return receipt requested, this 23rd day of June, 1997.

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attn: Docketing and Service Branch

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Administrative Judge
Charles N. Kelber
Special Assistant
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Richard Blubaugh
Atlas Corporation
Republic Plaza
370 17th Street, Suite 3050
Denver, CO 80202

Administrative Judge
G. Paul Bollwerk, III
Presiding Officer
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

John F. Darke
P.O. Box 603
Moab, UT 84532-0603

P.O. Box 1072
Los Alamos, NM 87544-1072

Sherwin Turk, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Anthony J. Thompson / PG
Anthony J. Thompson

Dated: June 23, 1997

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