October 21, 1996

UNITED STATES ENRICHMENT CORPORATION
RESPONSE TO "DONHAM/HANSON" PETITION FOR
COMMISSION REVIEW OF DIRECTOR'S DECISION

I. INTRODUCTION

On September 13, 1996, the Director of Nuclear Material Safety and Safeguards of the Nuclear Regulatory Commission (NRC) issued an initial certification decision (Director's Decision) and proposed certificates of compliance for the United States Enrichment Corporation (USEC) authorizing continued operation of the Portsmouth, Ohio and Paducah, Kentucky gaseous diffusion plants (GDPs) under 10 C.F.R. Part 76 (1996). The Director's Decision concluded that USEC's certification applications, the Department of Energy's (DOE) Compliance Plans, and the certificate conditions imposed by the NRC provide "reasonable assurance of adequate safety, safeguards, and security and compliance with NRC requirements." 61 Fed. Reg. 49,360, 49,361 (Sept. 19, 1996).

By letter dated October 2, 1996, Mr. Mark Donham and Ms. Kristi Hanson (Petitioners) submitted a petition to the Director requesting full Commission review of the Director's Decision issuing a proposed certificate of compliance for the Paducah plant under 10 CFR § 76.62(c). Petition at p. 1. Section 76.62(c) authorizes "any person whose interest may be affected and who submitted written comments in response to the [certificate of compliance] application[s] or compliance plan[s] . . . or provided oral comments at any meeting held on the application[s] or compliance plan[s] . . ." to file such a petition requesting Commission review.

The Director's Decision is the product of a thorough and detailed NRC Staff review that has spanned 16 months. The Portsmouth and Paducah applications each contain over 2,000

pages and discuss in detail how USEC satisfies, or intends to come into full compliance with, applicable NRC regulations. Those applications are likely the most detailed applications ever submitted to the NRC for a fuel cycle or materials applicant. The Staff review involved over 50 public meetings between USEC, the Staff, and the DOE, and over 2,000 detailed written Staff questions. This comprehensive and thorough process produced two Staff Compliance Evaluation Reports (CERs) which describe in detail the bases for the Director's Decision.

For the reasons set forth below, Petitioners lack legal standing to petition the Commission for review and have provided no substantive information that should cause the Commission to review the results of the Staff's thorough assessment process. Therefore, we respectfully request that the petition be denied, and that the Director's Decision be permitted to become effective and final without modification.

II. PETITIONERS LACKS LEGAL STANDING TO PETITION FOR COMMISSION REVIEW

Section 76.62(c) permits only certain persons "whose interest may be affected" by the Director's Decision to submit a petition for Commission review. This language is identical to that used in Section 189a of the Atomic Energy Act of 1954, as amended (AEA) and in various NRC regulations. It is intended to require a demonstration of "legal standing" as the basis for participation in certain NRC proceedings. *See, e.g.* 42 U.S.C. § 2239a (1994); 10 C.F.R. §§ 2.714(a)(1), 2.1205(a); Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 N.R.C. 72, 80 (1993). To demonstrate such standing, a person or organization must show: (1) that it could suffer an actual "injury in fact" as a result of the action

to be taken by the NRC; and (2) that its interests are within the "zone of interests" protected by the relevant statutes.[1]

Petitioners state that they "own[ ] land and reside downwind from the [Paducah] facility," that prior DOE documents indicate a "potential area of impact around the facility [of] nearly 50 miles," and that the "most significant long term risk to the public" is the "slow, low level accumulation of radioactive materials in the environment." Petition at p.1. They provide an address in Brookport, Illinois. Petition at p.2.

Petitioners have failed to demonstrate that they have legal standing to challenge the Director's Decision on the Paducah application.[2] Their assertion that they reside some unspecified distance "downwind" from the Paducah plant is plainly inadequate. For example, in the Apollo case, the petitioners lived less than one eighth of a mile to approximately two miles from the Apollo facility. In concluding that they lacked standing, the Atomic Safety and Licensing Board discussed the distance standard often used in reactor licensing cases to help determine standing:

> the "fifty-mile" presumption does not apply in materials licensing actions. Instead, a petitioner must show . . . what particular impact the planned licensing action will have upon its legitimate (*e.g.*,

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1/ Director, OWCP v. Newport News Shipbuilding, 115 S.Ct. 1278, 1283 (1995); Kelley v. Selin, 42 F.3d 1501, 1508 (6th Cir.), cert. denied, 115 S.Ct. 2611 (1995); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25 (1993).

2/ Petitioners do not challenge the Director's Decision as it applies to the Portsmouth plant nor would they have standing to do. Brookport, Illinois is approximately 300 miles from the Portsmouth plant. Such a distance, even in the commercial power reactor cases (which take into account the "potential effects at significant distances from the facility of the accidental release of fissionable materials") would make it extremely difficult to demonstrate standing. Apollo, 37 N.R.C. at 83.

> health, safety, or environmental) interests . . . . [I]t is not enough . . . simply to assert they live close to the Apollo facility.

Id. at 83-84. In this case, Petitioners have not provided any information on their proximity to the Paducah plant.

Furthermore, Petitioners have failed to identify any specific or "particularized" injury that they may suffer if the Director's Decision becomes effective or the extent to which those interests are within the "zone of interests" protected by the relevant statutes. Instead, the petition contains only generalized claims about the impacts of Paducah plant operations on the environment. Thus, it falls far below the standard set in a long line of NRC cases.[3] It is well recognized that in order to establish standing:

> [a petitioner's] asserted injury must be "distinct and palpable" and "particular [and] concrete" as opposed to being "conjectural . . . hypothetical' . . . or abstract." The injury need not have occurred but when future harm is asserted, it must be "threatened," "'certainly impending,'" and 'real and immediate.'"

Apollo, 37 N.R.C. at 81, quoting Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 N.R.C. 114, 121 (1982) (footnotes omitted); *See also* Lujan v. Defenders of Wildlife, 119 L. Ed. 2d 351, 364 (1992). In this case, Petitioners' brief, unsupported and vague allegations of environmental harm are clearly inadequate to establish their standing to seek Commission review of the Director's Decision.

Therefore, for the reasons stated above, Petitioners lack standing to petition for Commission review. Their petition should be denied on that basis alone.

3/ *E.g.* Georgia Power, 38 N.R.C. at 32; Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 N.R.C. 327, 332-33 (1983); Northern States Power (Pathfinder Atomic Plant), LBP-89-30, 30 N.R.C. 311 (1989); Apollo, 37 N.R.C. 72.

III. RESPONSE TO PETITIONERS' CLAIMS

USEC's response to each of the claims in the petition is presented below.

1. Offsite Impacts and USEC's Accident Analysis

a. Offsite Impacts

Petitioners first make a number of related claims regarding releases of radioactive materials offsite and the adverse impacts of those releases. Those claims generally are made without any supporting basis or reference to technical data that would provide a measure of factual support and credibility. In particular, Petitioners state that:

- there have been "significant, regular releases of radioactive materials offsite for the entire history of operation . . ."
- there is evidence such materials are "accumulat[ing] in the food chain offsite" and
- there is "groundwater contamination offsite." Petition at p. 1.

Releases of small quantities of liquids and gases occur regularly as a part of normal plant operations. USEC is required to comply with the 10 CFR Part 20 limitations on doses to the public due to releases. The methods of evaluating these doses are described in Section 5.1.3 of the Paducah SAR and were reviewed and accepted by the NRC in Chapter 9 of the CER. These methods account for inhalation, ingestion (vegetables, beef, etc.), and direct exposure pathways. The estimated dose to the public from all pathways is a small fraction (less than 10%) of the 10 CFR Part 20 limit.

As indicated in the latest plant environmental report[4], referenced by the Petitioners, the levels of plutonium activity found in deer are very low and of no safety concern. There is no evidence that the levels of plutonium, or other contaminants, have increased significantly in the three years since USEC assumed operation of the enrichment plant. The Environmental Monitoring Program is described in Section 5.1.2 of the Paducah SAR and was reviewed and accepted by the NRC in Chapter 9 of the CER. Environmental monitoring data is trended for radionuclide levels in the vicinity of the plant site. Monitoring includes samples from air, soil, surface water, sediment, and vegetables. Radionuclide levels over the last three years have shown random fluctuations with no apparent trends of accumulation in these media.

Groundwater contamination has been identified at the Paducah site, and the extent of contamination is being studied by the Department of Energy as a part of a large-scale groundwater investigation. The contamination of groundwater is the result of DOE's now closed waste management facilities or past materials storage practices and not due to USEC's operations.

Petitioners' claims largely focus on the alleged impacts of past DOE operation of the Paducah plant. They refer to releases during the "entire history" of the plant, criticize the NRC for "refusing to give a hard look at . . . past releases," and state that the existing "environmental burden" should be considered. Petition at p.1.

Petitioners' focus on the alleged impacts of past DOE operation is contrary to the Energy Policy Act and the NRC's implementing regulations, raises issues beyond the scope of NRC

4/ Paducah Site Annual Environmental Report Summary for 1994, U.S. Department of Energy, 1996.

jurisdiction, and ignores the fact that DOE has conducted numerous safety and environmental studies of such operations, and that the NRC has reviewed those studies. Section 1101 of the Energy Policy Act required the NRC to establish standards governing USEC's operation of the GDPs . . . 42 U.S.C. § 2297f. It did not confer any responsibility or authority on the NRC to review or regulate past DOE operations, and such an inquiry would be beyond the NRC's statutory jurisdiction. As the NRC stated during the Part 76 rulemaking process:

> Several comments were received concerning . . . existing environmental conditions at the facilities . . . . As established by the [Energy Policy] Act, the NRC will issue a certificate only for the current operations of the facility and will not evaluate preexisting conditions. All preexisting conditions are outside of NRC authority.

Statements of Consideration on Final Rule "Certification of Gaseous Diffusion Plants," 59 Fed. Reg. 48,944 at 48,948 (Sept. 23, 1994) (emphasis added).

Furthermore, DOE has conducted environmental reviews at the Paducah plant which were considered by the NRC during the Part 76 rulemaking process:

> The Department of Energy prepared . . . an Environmental Assessment of the Paducah facility in 1982. The NRC has reviewed [that document], as well as environmental reports prepared by DOE . . . in 1992 and environmental audits prepared by DOE prior to turning operation . . . over to the Corporation in 1993. The NRC also conducted extensive site visits . . . . The NRC has reviewed comments concerning . . . existing site environmental contamination.

Statements of Consideration, 59 Fed. Reg. at 48,948. Thus, even though the NRC's certification jurisdiction does not extend to prior DOE operations, those operations were considered during the development of the regulations.

b. Accident Analysis

Petitioners also argue that USEC's accident analysis, prepared in accordance with 10 CFR § 76.85, "is inadequate" for failing to consider "plant operating history." Petition at p.1. Petitioners correctly observe that Section 76.85 requires USEC to consider "[p]lant operating history" in its accident analysis, and that is precisely what USEC did. Section 4.1 of the Paducah SAR reviews significant incidents that have occurred over the life of the plant as an input to the accident analysis. In the Paducah CER, the Director reviewed and approved USEC's accident analysis[5] and specifically stated that the "operating history" of not only the Paducah plant, but also the Portsmouth and (now shut down) Oak Ridge GDPs was reviewed. Paducah CER Sections 5.1, 1.5.

Petitioners also state without any support, that the Staff's response to their comments in its CER is "totally inadequate under the Administrative Procedures Act . . . ." Petition at p.1. The Administrative Procedure Act does not require the NRC to take any particular action in response to such comments. 5 USC § 551 et seq.

2. **The NRC's Finding of No Significant Impact**

Petitioners also argue that the NRC's Finding of No Significant Impact (FONSI) under the National Environmental Policy Act is "inadequate." Petition at p.2. They first state that the FONSI and Environmental Assessment (EA) were prepared with "no notice to the local community and no opportunity to comment," and that this "does not meet the intent of NEPA". Petition at p.2. On the contrary, neither NEPA nor the NRC's implementing regulations in

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5/ Furthermore, the Director was correct in differentiating between an analysis of potential "accidents" and an assessment of the "[c]umulative effects from past operations . . . ." Petition at p.1; Paducah CER p.A-5.

10 CFR Part 51 require such prior notice and opportunity to comment. Courts interpreting NEPA have generall declined to mandate any prior notice or public participation at the EA stage unless expressly required by agency regulations. *E.g.* Como-Falcon Community Coalition, Inc. v. Dep't of Labor, 609 F.2d 342, 345 (8th Circ. 1979); Fund for Animals, Inc. v. Rice, 85 F.3d 535, 549 (11th Cir. 1996); National Association of Government Employees v. Rumsfeld, 418 F. Supp. 1302, 1307 (E.D. Pa. 1976); City of Irving, Texas v. FAA, 539 F. Supp. 17, 32 (N.D. Texas, 1981).[6] As stated in Como-Falcon, 609 F.2d at 345:

> [T]here is no statutory requirement that the agency provide [opportunity for public comment] . . . and we are unwilling by judicial decision to legislate such a requirement into the Act.

Furthermore, under the NRC's regulations implementing NEPA, while there are requirements to publish a notice of intent to prepare a full Environmental Impact Statement (10 CFR § 51.26), there is no similar requirement to publish notice in advance of the preparation of an EA and the issuance of a FONSI. Indeed, 10 CFR § 51.32 specifically states that the FONSI and related environmental documents, once issued, will be made available for public inspection, and 10 CFR § 51.35 requires the FONSI to be published in the Federal Register. The Director has fulfilled these requirements.

Petitioners next argue that NEPA requires the NRC to consider "the cumulative effects of an actions [sic], which includes the impacts of past, present, and . . . future actions . . . [including] all of the waste management activities in combination with the operation of the plant

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6/ While a contrary view was expressed in Hanly v. Kleindienst, 471 F.2d 823, 836 (2d Cir. 1972), that case preceded the above cases, was subject to a strong dissent by Chief Judge Frienaly (*Id.* at 836-37), and has not been followed in the cases cited above.

and the implementation of the compliance plan." Petition at p.2. USEC has explained above why the impacts of past DOE operations are outside the scope of the NRC's jurisdiction. Furthermore, Petitioners' argument does not raise any questions with respect to the Director's Decision, but is instead an improper challenge to the regulation itself, since the NRC established the scope and parameters of its NEPA review in the rulemaking. *See* 10 CFR §§ 51.22(c)(19); Statements of Consideration, 59 Fed. Reg. at 48,957-58. Such a challenge to the regulations in an individual proceeding is improper.[7] If Petitioners desired to challenge the regulations themselves, they should have participated in the rulemaking proceeding and sought judicial review of Part 76 if they were dissatisfied with the result.

Petitioners next request a "mechanism" for "public input and/or notification into the implementation of the compliance plan in regard to seismic upgrading." Petition at p.2. This request does not challenge the Director's Decision in any way and provides no basis for Commission review of that decision. Furthermore, if as a result of the implementation of the Paducah Compliance Plan action on seismic analysis (Compliance Plan Issue 36), additional facility upgrades are required and those upgrades necessitate a certificate amendment, Part 76 already provides the requisite "mechanism" for public input. 10 CFR § 76.45.

7/ *See* 10 CFR § 2.758; Citizens for Safe Power v. NRC, 524 F.2d 1291, 1300 (D.C Cir. 1975) (failure of party to utilize rulemaking or amendment procedures to challenge radiological standards incorporated into the Commission's regulations foreclosed them from challenging them during licensing proceeding), Pacific Gas & Electric Co. v. Fed. Power Com'n, 506 F.2d 33, 38 (D.C.Cir 1974). UCS v. AEC, 499 F.2d 1069, 1090 (D. C. Cir. 1974) (rulemaking procedure, not licensing hearing, proper forum for challenging Commission "interim acceptance criteria" that had been adopted via rulemaking proceeding). *See also* Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 N.R.C. 399, 416-417 (1989); American Nuclear Corp. (Revision of Orders to Modify Source Material Licenses) CLI-86-23, 24 N.R.C. 704, 707 (1986).

Finally, Petitioners state that the 15 day comment period specified in 10 CFR § 76.62(c) is inadequate. Petition at p.2. This claim does not raise any question regarding the Director's Decision, improperly challenges the regulations themselves, fails to demonstrate "good cause" for an extension in accordance with 10 CFR § 76.74(b), and ignores the fact that the NRC specifically considered, but chose not to extend this period during the rulemaking process. Statements of Consideration, 59 Fed. Reg. 48,951-52.

IV. CONCLUSION

The Director has issued a well-supported and documented decision based upon a thorough evaluation of USEC's application for the Paducah plant, its responses to Staff questions, public comments and other information in the record. Petitioners lack standing to challenge that decision and their petition provides no basis for the Commission to question the Director's determination. For the reasons stated above, USEC respectfully requests that the petition for Commission review be denied.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of U. S. ENRICHMENT CORPORATION (Paducah, Kentucky and Piketon, Ohio)	Docket No.(s) 70-7001/7002

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing USEC RESPONSE TO DONHAM/HANSON 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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Docket No.(s)70-7001/7002
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