UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS

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Richard A. Meserve, Chairman
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INTERNATIONAL URANIUM (USA) CORPORATION (White Mesa Mill)	)	Docket No. 40-8681-MLA-11

CLI-02-10

MEMORANDUM AND ORDER

I. Introduction

This case arises out of a license amendment granted to the International Uranium (USA) Corporation ("IUSA") to receive and process, at its White Mesa Mill in Utah, waste material from a Molycorp site in California. Before us are two appeals, and a number of motions seeking expedition, stays, and the striking of an opponent's brief. We affirm the Presiding Officer's decision that two intervenors, William Love and the Sierra Club, have standing, have asserted a germane area of concern, and can proceed to hearing.[1] We deny the intervenors' motion to stay the effect of the license amendment pending the hearing.[2] And we deny IUSA's motion to

[1] LBP-02-06, 55 NRC ___ (Jan. 30, 2002).

[2] Recently, the Presiding Officer denied a request to stay the effect of the license amendment. See LBP-02-09, 55 NRC ___ (March 13, 2002). The intervenors purport to appeal that decision, and seek a temporary Commission stay pending the outcome of that appeal. See Sierra Club's Memorandum in Support of Request for Stay, Appeal of LBP-02-09, and Request for Expedited Review (filed March 18, 2002); see also William E. Love's Memorandum for the Appeal of LBP-02-09. No NRC rule authorizes such appeals. We construe the "appeals" as requests that the Commission issue a full stay. On April 2, 2002, IUSA filed responses opposing the intervenors' appeals.

strike the Sierra Club's appellate brief. We find all other pending motions or requests for relief moot.

II. Background

The challenged license amendment authorizes IUSA to receive and process particular alternate feed material from the Molycorp facility in Mountain Pass, California. The material results from extraction of lathanides and other rare earth metals from bastnasite ores. IUSA proposes to receive and process the material for its uranium content, and to dispose of the byproduct material in tailings cells at the IUSA White Mesa mill. The NRC staff issued the license amendment on December 11, 2001.

At the outset, the Commission notes that this is the second NRC adjudicatory proceeding involving the Molycorp license amendment. The previous adjudication ended in November of last year with a finding that the hearing petitioners lacked standing to obtain a hearing.[3] However, after the NRC staff completed its review of the environmental impacts of the amendment, it inexplicably issued another federal notice and provided a second "opportunity for hearing."[4] It is unusual, to say the least, for there to be two separate adjudicatory hearings on the same license amendment involving the same materials and activities. The common practice is to give notice "relating to the receipt of the application or to NRC environmental findings relating to the licensing request," not both.[5] Given the substantial agency resources expended on the adjudicatory hearings process, it is the Commission's

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[3] See CLI-01-21, 54 NRC 247 (2001).

[4] See 66 Fed. Reg. 64,064 (Dec. 11, 2001).

[5] "Final Rule, Informal Hearing Procedures for Materials Licensing Adjudications," 54 Fed. Reg. 8,269, 8,271 (Feb. 28, 1989)(emphasis added).

general intent "that only one proceeding ... be conducted" on a single materials licensing action.[6]

Nonetheless, for unexplained reasons, the NRC staff did in fact offer two hearing opportunities here. The second notice generated three fresh petitions requesting a hearing. In LBP-02-06, the Presiding Officer rejected one of the hearing requests for lack of standing, but found standing and granted a hearing with respect to two other petitioners: the Sierra Club and Mr. Love. The Presiding Officer held that these petitioners had introduced new allegations not considered in the first Molycorp adjudication: high toxic lead content, petitioners' ongoing use of water and air in the area of the White Mesa Mill, and inadequate monitoring by IUSA.[7] These allegations, he held, sufficed for standing.

On appeal, IUSA emphasizes the earlier Molycorp proceeding. There, the Presiding Officer and the Commission concluded that the petitioners lacked standing to intervene because they had failed to "show in enough detail how the proposed license amendment would affect [them]."[8] Comparing the two cases, IUSA argues that the allegations made this time are virtually the same as those raised previously.[9] IUSA therefore concludes that LBP-02-06's standing determination cannot be squared with the prior decision rejecting standing on nearly the same facts. In addition, IUSA argues that the Presiding Officer committed several legal errors in LBP-02-06, including inappropriately applying a "geographic proximity test" for

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[6] Id. at 8,272; see also id. at 8,271-72.

[7] See LBP-02-06, 55 NRC at __, slip op. at 5-8.

[8] CLI-01-21, 54 NRC 247, 252 (2001)(agreeing with Presiding Officer that allegations lacked specificity).

[9] See IUSA's Memorandum in Support of Appeal of LBP-02-06 ("IUSA Appeal Brief")(Feb. 11, 2002) at 3, 10-12, 14-15, 17-18.

standing, and looking only to see whether the petitioners' allegations were "germane," but not to whether they alleged an actual "injury-in-fact" from this license amendment.

Subsequent to the filing of appellate briefs, IUSA moved to strike the Sierra Club's brief as untimely, and also moved to expedite its appeal and to halt proceedings before the Presiding Officer in the meantime. The Sierra Club and William Love, in turn, have asked the Commission to stay the effect of the Molycorp license amendment pending the upcoming hearing. The Presiding Officer previously had rejected their stay requests as untimely and unjustified under Commission stay standards.[10] The Presiding Officer has set a filing schedule for the Subpart L hearing, with initial submissions due April 1.

III. Standing and Germane Areas of Concern

We see no basis for overturning the Presiding Officer's standing decision. Absent a "clear misapplication of the facts or law," or an "irrational" conclusion, the Commission generally defers to a Presiding Officer's finding on standing.[11] The Presiding Officer has a greater familiarity than the Commission with the precise allegations and nuances in the factual record before him. Here, we see no obvious error or other reason to reverse his finding, and therefore exercise our customary deference. Indeed, this particular Presiding Officer also presided over other cases involving IUSA, and thus was uniquely well-positioned to parse and judge the distinctions in the petitioners' claims.

IUSA's appeal is premised on the notion that the allegations in this proceeding are essentially identical to those raised in the previous Molycorp proceeding. IUSA thus objects to

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[10] See LBP-02-09, 55 NRC at ___, slip op. at 4-7 (timeliness), 7-10 (stay standards).

[11] Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995). Accord Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-01-02, 53 NRC 9, 14 (2001); International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-98-06, 47 NRC 116, 118 (1998).

the different result in this proceeding. The Commission finds, however, that while there may be similarities, the case record is not the same. There are new affidavits by different individuals, and the intervention petitions themselves present new allegations. "Standing jurisprudence is a highly case-specific endeavor, turning on the precise allegations of the parties seeking relief."[12] Here, "contrary to the insistence of the Licensee," the Presiding Officer found that "the Love and Sierra [Club] hearing requests, unlike the one rejected last year in LBP-01-15, satisfy the conditions precedent to their grant."[13] He drew several distinctions between the cases.

The Presiding Officer pointed out, for instance, that in the prior case Sierra Club member Mr. McHarg had alluded to drinking from "waters that he believes might be affected by the materials handled at the mill," but "provide[d] not the slightest illumination respecting where those waters might be located."[14] Here, the Presiding Officer found that Mr. Weisheit's affidavit indicates that "both his professional and his personal activities bring him in close proximity to the facility,"[15] and that while "Mr. Love might have been more precise with regard to how far from the mill [his] specified activities take place," the allegations were nevertheless sufficient to show that he has actual contacts with the mill area.[16]

IUSA argues that the Presiding Officer "ignore[d] his prior decision" and "abuse[d] his discretion" when he found that Mr. Love sufficiently had alleged a distinct new threat posed by the lead content of the Molycorp material.[17] IUSA argues that in the earlier case there also

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[12] National Wildlife Fed'n v. Hodel, 839 F.2d 694, 703 (D.C. Cir. 1988).

[13] LBP-02-06, 55 NRC at __, slip op. at 3 (emphasis added).

[14] LBP-01-15, 53 NRC 344, 350 (2001).

[15] LBP-02-06, 55 NRC at __ , slip op. at 7.

[16] Id. at 5 n.4.

[17] IUSA Appeal Brief at 10.

were allegations concerning the "presence of lead in the material," and yet the Presiding Officer in that case rejected the notion that the mere existence of lead would pose any incremental threat of harm to the petitioners.[18] But, as the Presiding Officer stressed, in this case petitioners focus not simply on the mere presence of lead, but on the potential new risk associated with an asserted high concentration of lead, an allegation which surfaced only in this case.[19]

The Presiding Officer emphasized that whether the concerns over high lead content and various "asserted deficiencies in the Licensee's protective and monitoring capabilities" will prove correct is a merits question to be decided later.[20] IUSA, though, apparently suggests that the Presiding Officer should have found at the threshold that the processing of the Molycorp material at the White Mesa Mill simply cannot pose any new hazard.[21] To that effect, IUSA cites particular comments from the Commission's decision in the earlier case, where we indicated that particular groundwater or air impacts are "unlikely" or "implausible."[22] IUSA treats these statements as incontrovertible findings of fact. But in actuality they were simply the Commission's characterization of the earlier case record bearing on standing, with the intent to emphasize that the petitioners in that case had nowhere plausibly traced how particular forms of contamination might harm them.

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[18] See id. at 10-12.

[19] See, e.g., LBP-02-06, 55 NRC at __ , slip op. at 7 ("As has Mr. Love, Mr. Weisheit focuses on the high concentration of lead in the Molycorp material"). See also John Weisheit Affidavit at 1; William Love Affidavit at 1; Sierra Club Petition for Hearing at 2.

[20] LBP-02-06, 55 NRC at __, slip op. at 6.

[21] See IUSA Appeal Brief at 14 n.9, 15; see also LBP-02-06, 44 NRC at __, slip op. at 6 ("the Licensee vigorously insists that Mr. Love's concerns are unfounded," but whether the "concern[s] advanced are ... meritorious is for later consideration").

[22] See IUSA Appeal Brief at 14 n.9, 15.

IUSA argues that, just as before, the petitioners' standing allegations fail to adequately detail potential harm to the intervenors. But this argument takes inadequate account of the differing allegations in the two cases. In the current case the Sierra Club's petition and attached letter focus at great length and detail upon alleged deficiencies in the NRC Staff's Environmental Assessment and FONSI [Finding of No Significant Impact]. Many of these allegations are entirely new, particularly given that the Environmental Assessment had not yet been issued at the time of the earlier proceeding. There are also new allegations about "deficiencies in the Licensee's protective and monitoring capabilities" which the Presiding Officer accepted as plausible.[23] These include concerns that: (1) there currently is no testing for a number of contaminants, including lead, and thus no way to be assured that leakage of these contaminants has not and will not occur; and (2) State of Utah data suggest that the White Mesa Mill has contaminated the groundwater with chloroform, and that other contaminants could spread in the same fashion. Unlike the earlier case record, the record here contains sufficiently detailed allegations of "the company's inability to protect ... the surrounding area from lead contamination."[24]

IUSA makes a number of additional points on appeal, but we find them unpersuasive. First, IUSA claims that the Presiding Officer improperly relied upon "the geographic proximity presumption" in according Mr. Love standing to intervene.[25] More specifically, IUSA claims that

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[23] See LBP-02-06, 55 NRC at __, slip op. at 5-6.

[24] See id. at 6. This is not to suggest that the allegations will prove true, only that we think that the Presiding Officer reasonably declined to reject them out of hand at the threshold standing stage. Notably, the hearing file in this case now contains documents in which the NRC staff brings up questions similar to those raised by the Sierra Club and by Mr. Love. See, e.g., Hearing File (Tab 1) (NRC staff letter to IUSA dated January 14, 2002); Hearing File (Tab 7) (NRC staff letter to IUSA dated Nov. 27, 2001).

[25] IUSA Appeal Brief at 6-7. "The rule of thumb generally applied in reactor licensing proceedings (a presumption of standing for persons who reside or frequent the area witin a 50-mile radius of the facility) is not applied in materials licensing cases." Sequoyah Fuels Corp.

the Presiding Officer merely looked to whether Mr. Love was "geographically proximate to the proposed activity" and had expressed a germane "area of concern," but did not require Mr. Love to set forth an "injury-in-fact" from the license amendment.[26] We disagree. While the Presiding Officer's analysis was terse, it is clear that he listed several allegations going to Mr. Love's "threatened injury-in-fact," all dealing with potential contamination of groundwater, air, or vegetation in areas frequented by Mr. Love.[27] The Presiding Officer found these allegations sufficient to assert a "risk to [Mr. Love's] health and well-being."[28]

Next, IUSA takes exception to the Presiding Officer's failure to specifically address whether Mr. Love's "alleged injuries are likely to be redressed by a favorable decision."[29] But, as the Presiding Officer held, Mr. Love alleged new risks to himself, stemming from the high concentration of lead in the Molycorp material. Presumably, if there proves to be any basis to Mr. Love's concerns, they could be redressed by conditions placed on the license or other measures taken to prevent any harm from occurring due to the receipt, processing, and disposal of this particular material. Given Mr. Love's allegations, we find the "redressability" question easy and its answer obvious. The absence in the Presiding Officer's decision of an explicit analysis of redressability does not constitute reversible error.

Finally, IUSA claims that the Presiding Officer accepted Mr. Love's areas of concern without analyzing how detailed, "concrete[]," or "particulari[ze]" those concerns were.[30] The

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(Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994).

[26] IUSA Appeal Brief at 8.

[27] See LBP-02-06, 55 NRC at __, slip op. at 6.

[28] Id.

[29] IUSA Appeal Brief at 9.

[30] Id.

Presiding Officer found that Mr. Love had "set forth with particularity one or more germane areas of concern."[31] That conclusion plainly is reasonable, as Mr. Love's concerns on their face relate to the subject matter of the license amendment at issue, the safe storage and handling of the Molycorp materials.

Under current NRC regulations and practice governing materials licensing adjudications, a petitioner need only provide a "concise statement of the areas of concern the requestor desires to raise at the hearing."[32] The statement of concerns "need not be extensive, but ... sufficient to establish that the issues the requester wants to raise regarding the licensing action fall generally within the range of matters that properly are subject to challenge in such a proceeding."[33] Areas of concern "provide the Presiding Officer with the minimal information needed to ensure the intervenor desires to litigate issues germane to the licensing proceeding and therefore should be allowed to take the additional step of making a full written presentation under § 2.1233."[34] We cannot say that the Presiding Officer erred in finding that Mr. Love had satisfied these "modest" standards.[35]

IV. Procedural Matters

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[31] LBP-02-06, 55 NRC at __, slip op. at 7.

[32] "Final Rule, Informal Hearing Procedures for Materials Licensing Adjudications," 54 Fed. Reg. 8,269, 8,271-72 (Feb. 28, 1989). See also 10 C.F.R. § 2.1205(e)(3). The Commission is considering a proposed rule that would change the requirements for intervention in materials licensing cases by requiring detailed "contentions" rather than germane "areas of concern." See "Proposed Rule: Changes in Adjudicatory Process," 66 Fed. Reg. 19,609 (2001).

[33] Id. at 8,272 (emphasis added).

[34] Id. (emphasis added); see also Northern States Power Co. (Pathfinder Atomic Plant), 31 NRC 40, 46-47 (1990)(explaining reasons behind "relaxed standard" for areas of concern).

[35] See Sequoyah Fuels Corp., CLI-01-02, 53 NRC at 16.

The Commission also has before it a number of procedural matters. The first is IUSA's motion to strike the Sierra Club's response to IUSA's appeal. IUSA correctly points out that the response was due within "fifteen days (15) of the service of the appeal brief."[36] Our rules also add five days to filing deadlines when service is by mail.[37] IUSA, though, claims that it "served" the Sierra Club by electronic mail or facsimile, and that therefore the added five days does not apply. IUSA thus concludes that the Sierra Club's response -- which was filed 18 days after IUSA's appeal -- was 3 days late.

We disagree. IUSA's Certificate of Service indicates that the appeal was "served by electronic mail or facsimile ... and by first class mail."[38] Our rules do not contemplate official service upon other parties by electronic mail or facsimile unless explicitly authorized in a case-specific order in which all parties received prior notice.[39] Accordingly, for the purpose of calculating the Sierra Club's deadline, we must consider that the Sierra Club received official service by mail, and thus enjoyed the additional five days in which to respond. Its response to IUSA's appeal therefore was timely.

IUSA also filed a motion for expedited Commission appellate review of LBP-02-06, and further requested that the Commission direct the Presiding Officer to hold the hearing in abeyance until the Commission completes its review of the standing issue. In view of today's decision, IUSA's requests now are moot.

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[36] Motion to Strike the Glen Canyon Group of the Sierra Club's Response to IUSA's Appeal of LBP-02-06 (Mar. 6, 2002) at 2 (quoting 10 C.F.R. § 2.1205(o)).

[37] See 10 C.F.R. § 2.710.

[38] Certificate of Service (Feb. 11, 2002)(emphasis added).

[39] See 10 C.F.R. § 2.712(e). In contrast, service on the Secretary may be accomplished by facsimile. See id. at § 2.712(d)(4(iii). The Commission is considering a proposed rule that would address service upon parties by electronic mail or facsimile. See 66 Fed. Reg. at 19,634.

Finally, we turn to the intervenors' request that the Commission stay the effectiveness of the Molycorp license amendment pending the upcoming hearing.[40] We decline to issue a stay for the reasons given by the Presiding Officer.[41] Although, as the Presiding Officer explained, Mr. Love and the Sierra Club did not receive prompt notice of the NRC staff's issuance of the license amendment on December 11, 2001, the Presiding Officer reasonably found that both had knowledge of the amendment's issuance well before they sought stays in late February, 2002.[42] Our rules make clear that speedy requests -- a Subpart L stay must be sought within ten days of staff action or at the time of a hearing request, whichever is later -- are a prerequisite to obtaining stay relief.[43]

Besides their procedural default, the intervenors' stay requests also are substantively deficient. Thus far, they have submitted only allegations. Until substantiated, these fall, as the Presiding Officer said, "well short" of meeting the key "likelihood of success" and "irreparable injury" requirements for a stay.[44] If in fact the intervenors prevail at the hearing, effective

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[40] See note 2, supra, and accompanying text.

[41] See LBP-02-09, 55 NRC at __, slip op. at 4-10.

[42] See id. at 5.

[43] See 10 C.F.R. § 2.1263. The Presiding Officer found that the Sierra Club had learned of the amendment's issuance in mid-January and that Mr. Love had learned of it during the week of February 11. See LBP-02-09, 55 NRC at __, slip op. at 3-4, 5, 6-7. Moreover, IUSA's December 31 response to Mr. Love's hearing request had called attention to issuance of the license. See id. at 6 n.2. The Sierra Club filed its stay request on February 26, and Mr. Love filed his on February 28. See id. at 1. The long and short of the matter is that even if we were to consider the intervenors' lack of actual notice of the amendment as tolling section 2.1263's 10-day deadline, they did not act promptly -- i.e., within 10 days -- when the amendment did come to their attention.

[44] See LBP-02-09, 55 NRC at ___, slip op. at 7 (citing 10 C.F.R. § 2.788).

remedies may well be available -- e.g., imposition of additional environmental or safety conditions or, if appropriate, revocation of the amendment. [45]

V. Conclusion

For the reasons stated in this decision, the Commission hereby affirms LBP-02-06, denies IUSA's motion to strike the Sierra Club's response, denies the intervenors' requests for a stay, and declares moot the requests to expedite review of this appeal and to direct the Presiding Officer to hold this proceeding in abeyance.

IT IS SO ORDERED.

For the Commission[46]

/RA/

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Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 3rd day of April 2002.

[45] See also id. at 9 n.4 ("There might well remain issues pertaining to the storage of the residue").

[46] Commissioner Diaz was not present for the affirmation of this Order. If he had been present, he would have approved it.