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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ADJUDICATORY STAFF

BEFORE THE PRESIDING OFFICER

In the Matter of)	
)	
MOLYCORP, INC.)	Docket No. 40-8778-MLA-2
)	
(Washington, Pennsylvania)	ASLBP No. 00-775-03-MLA
(Site Decommissioning Plan))	

NRC STAFF'S RESPONSE TO CANTON TOWNSHIP'S REQUEST FOR HEARING

INTRODUCTION

On December 13, 1999, Canton Township, Pennsylvania (Canton) requested a hearing in this Subpart L proceeding, pursuant to 10 C.F.R. §§ 2.1205(d) and 2.1205(h). *See* "Request for Hearing by Canton Township, Pennsylvania on Licensee's Amendment Request for Decommissioning of its Canton Township Facility" (Canton's Hearing Request). On December 23, 1999, Molycorp filed its response, opposing Canton's Hearing Request. *See* "Molycorp, Inc.'s Response to Request for Hearing by Canton Township, Pennsylvania on Licensee's Amendment Request for Decommissioning of its Canton Township Facility" (Molycorp's Response).¹

¹ By memorandum dated January 4, 2000, the NRC's Office of the Secretary forwarded Canton's Hearing Request and Molycorp's Response to the Chief Administrative Judge. On January 13, 2000, Judge Charles Bechhoefer was designated as the Presiding Officer to rule on Canton's Hearing Request, and to conduct any hearing ordered.

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Pursuant to 10 C.F.R. §§ 2.1213 and 2.1205(g), the NRC Staff has decided to participate as a party in this decommissioning proceeding, and files this answer to Canton's Hearing Request. For the reasons discussed below, the Staff requests the Presiding Officer to (1) deny Canton's consolidation request (*see* Canton's Hearing Request, at 4, ¶ 12); and (2) hold this proceeding in abeyance.

BACKGROUND

On November 16, 1999, a "Notice of Consideration of Amendment Request for Molycorp, Washington, Pennsylvania and Opportunity for a Hearing" (November 16 Notice) was published in the *Federal Register* concerning an application by Molycorp for authorization to decommission its Washington, Pennsylvania facility. *See* November 16 Notice, 64 Fed. Reg. 62227-28. This notice references a site decommissioning plan (SDP) submitted by Molycorp for its Washington facility, which the Staff had found acceptable for beginning its technical review. *Id.* It also stated that prior to any decision allowing Molycorp to proceed with decommissioning, the Staff will document its safety and environmental findings in a safety evaluation report (SER) and an environmental assessment (EA), respectively. *Id.* at 62228. The Staff is now drafting the SER and EA and has not yet reached any decisions as to whether Molycorp will be allowed to decommission its Washington, Pennsylvania facility as proposed in the SDP.

As a separate matter apart from its review of the SDP, the Staff is evaluating the proposed temporary storage (*i.e.*, for a period of 5-10 years) at Molycorp's Washington, Pennsylvania site of between 3,000 and 5,000 cubic yards of thorium-contaminated soil now

located at Molycorp's York, Pennsylvania facility. Notice of opportunity for hearing regarding this proposed action was published (*see* 64 Fed. Reg. 31021-22 (June 9, 1999)), and generated June 28, 1999 requests for hearing on behalf of Canton and the town of Washington, Pennsylvania, both of which Molycorp opposed.² The former presiding officer in the temporary storage proceeding encouraged the parties to negotiate a settlement and did not rule on the questions of whether Canton and the town of Washington had established their standing to participate in the proceeding. *See* "Memorandum and Order (Petitions for a Hearing)," dated August 25, 1999 (unpublished), slip op., at 2-3; *see also* "Memorandum and Order (Delay for Negotiation)," dated September 15, 1999 (unpublished). Thus, in the temporary storage proceeding, no decision has yet been reached as to whether a hearing will be held.

DISCUSSION

I. The Presiding Officer Should Deny Canton's Consolidation Request

Canton has requested that the decommissioning proceeding be consolidated with the temporary storage proceeding. *See* Canton's Hearing Request, at 4, ¶ 12. NRC adjudicatory proceedings are typically consolidated only when three factors are present: (1) the proceedings raise similar issues; (2) the parties to the proceedings are the same; and (3) the length or expense of litigation would be reduced. *See Safety Light Corp.* (Bloomsburg Site

² Counsel for the Staff informed the former Presiding Officer that the Staff did not wish to participate as a party in the temporary storage proceeding. Letter from M. Young to P. Bloch, dated July 26, 1999. The Staff has considered this question again and continues to have no interest in participating as a party in the temporary storage proceeding.

Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 89 (1992).³ None of these factors are present here, and Canton's consolidation request should therefore be denied.

Regarding the first factor, Canton's extensive incorporation by reference and reliance on its earlier filings in the temporary storage proceeding fails to establish its premise that the issues raised by the proposed transfer of contaminated soil from York to Molycorp's Washington site are the same as those raised by the proposed decommissioning of Molycorp's Washington facility. *See* Canton's Hearing Request, ¶¶ 3-6, and ¶ 12. The June 9 notice of opportunity for hearing on the proposed transfer concerns only the York waste, and makes no reference to the decommissioning of the Washington facility and its associated SDP. Conversely, the November 16 Notice is solely concerned with the Washington facility's SDP and decommissioning, and makes no reference to the York waste. Moreover, Molycorp's proposed permanent storage plan relates primarily to waste which is already at its Washington site, and is waste which would be kept separate and apart from where the York waste would be temporarily stored. *See* Molycorp's Response, at 14, ¶ 31; *see also* the December 4, 1997 draft EA issued for comment regarding the proposed transfer of soil from York, at 3-4 (due in part to the lower level of thorium contamination in the York soil, when compared to the levels of thorium contamination already present at Molycorp's

³ The Commission noted the lack of any provision in the subpart L rules pertaining to consolidation, and found that the general consolidation authority conferred by 10 C.F.R. § 2.716 would be applicable in subpart L proceedings. *See Bloomsburg*, 36 NRC at 87.

Washington site, these two sets of waste will not be commingled during the temporary storage period).

Thus, the June 9 notice of opportunity for hearing and the November 16 Notice reference significantly different proposed actions, and raise issues which are not sufficiently similar to warrant consolidation of the two proceedings.

The second consolidation factor identified by the Commission in *Bloomsburg*--whether the parties to the two proceedings would be the same--also weighs against consolidation here. The town of Washington would be a party in the temporary storage proceeding (assuming its hearing request is eventually granted), but the town has not sought to be a party in the decommissioning proceeding. Conversely, the Staff has elected party status in the decommissioning proceeding, but has not sought to be a party in the temporary storage proceeding. Thus, the parties in the two proceedings are not likely to be the same.

This lack of party similarity ties into the third factor identified by the Commission--whether the length or expense of litigation would be reduced by consolidation--which also weighs against consolidation here. Consolidation would involve the town of Washington in the decommissioning proceeding, and make the Staff part of the temporary storage proceeding. This would likely lead to an increased expenditure of time and/or money

by both the town of Washington and the Staff,⁴ over what would be required should consolidation not occur. Moreover, neither Canton nor Molycorp (the two parties wishing to participate in both proceedings) express concern about the length or expense of litigation if the two proceedings are adjudicated separately.

Accordingly, the absence of the three factors traditionally found to favor consolidation of NRC adjudicatory proceedings argues strongly in favor of denying Canton's consolidation request. Therefore, for the reasons discussed above, the Staff requests the Presiding Officer to deny Canton's consolidation request.

II. The Presiding Officer Should Hold this Decommissioning Proceeding in Abeyance

The Staff has identified two factors which favor holding this proceeding in abeyance: (1) the Staff's SER and EA regarding Molycorp's proposed decommissioning of its Washington facility have not yet been finalized; and (2) the potential settlement of a dispute between Molycorp and Canton regarding a water main which, if it occurs, may resolve other concerns raised by Canton.

⁴ Granting Canton's consolidation request will impose a significant resource burden on the Staff's low-level waste group. Because the Staff had noticed the two proposed actions separately in the *Federal Register*, it had reasonably expected that any hearing requests would be adjudicated separately, and had budgeted accordingly. The basis of the Staff's expectation in this regard is the well-recognized principle that a *Federal Register* notice of opportunity for hearing establishes the scope of the subsequent proceeding. *See, e.g., Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980)*. Thus, absent consolidation, the Presiding Officer in this decommissioning proceeding will lack jurisdiction over issues raised by Canton in the ongoing temporary storage proceeding.

A. Lack of Final SER and EA

In the Staff's view, the most significant factor favoring abeyance is the present lack of a Staff SER and EA evaluating Molycorp's proposed decommissioning of its Washington facility under the terms of the SDP. As stated above, the Staff has not yet reached any decisions as to whether Molycorp will be allowed to decommission its Washington, Pennsylvania facility as proposed in the SDP. Proceeding with adjudication now may thus result in the needless expenditure of resources, since issues in dispute now may become non-issues, depending on the outcome of the ongoing Staff reviews. Moreover, until those Staff safety and environmental evaluations are issued, any hearing file in this proceeding would be incomplete, and detailed written presentations could not be filed. *See* 10 C.F.R. §§ 2.1231(a)-(b), and 2.1233. Similar considerations in the Hydro Resources, Inc. (HRI) subpart L proceeding led the presiding officer there to hold that proceeding in abeyance until the Staff's review of the proposed action was complete.⁵ The Staff urges the Presiding Officer here to follow the *HRI* precedents in this regard.

Accordingly, the Staff requests the Presiding Officer here to hold this proceeding in abeyance, pending completion of the SER and EA.

⁵ *See* LBP-97-23, 46 NRC 311-12 (1997) (ruling that the Staff's issuance of an SER in December 1997, accompanied by notice the Staff would issue a license in thirty days, justified lifting the two-year suspension of the HRI proceeding, with leave granted for the petitioners there to amend their hearing requests based on any new information found in the SER). Based on the subsequently filed amended hearing requests, rulings on standing were then made. *See HRI*, LBP-98-9, 47 NRC 261 (1998).

B. Potential Settlement of Water Main Dispute

The second factor favoring abeyance of this proceeding is the potential settlement of a dispute between Molycorp and Canton regarding a water main which runs under Molycorp's Washington site. See Canton's Hearing Request, at ¶ 7 (i). Molycorp anticipates that by later this year, this water main will no longer be used. See Molycorp's Response, at ¶ 24. If settlement of the water main issue is reached, this may resolve other concerns raised by Canton.

III. Canton's Standing is not yet Established

Should the Presiding Officer decide not to hold this proceeding in abeyance, then on the present record, Canton's request for hearing pursuant to 10 C.F.R. § 2.1205(h) should be denied. As discussed below, Canton has not yet established its standing.

Pursuant to 10 C.F.R. § 2.1205(e), where a request for hearing is filed by any person other than the applicant in connection with a materials licensing action under 10 C.F.R. Part 2, Subpart L, the request for hearing must describe in detail:

- (1) The interest of the requestor in the proceeding;
- (2) How the interests may be affected by the results of the proceeding, including the reasons why the requestor should be permitted a hearing, with particular reference to the factors set out in [§ 2.1205(h)];
- (3) The requestor's area of concern about the licensing activity that is the subject matter of the proceeding; and
- (4) The circumstances establishing that the request for a hearing is timely in accordance with [§ 2.1205(d)].

Pursuant to 10 C.F.R. § 2.1205(h), in ruling on any request for hearing filed under 10 C.F.R. § 2.1205(d), the Presiding Officer is to determine "that the specified areas of concern are germane to the subject matter of the proceeding and that the petition is timely."

The rule further provides as follows:

The presiding officer also shall determine that the requestor meets the judicial standards for standing and shall consider, among other factors -

- (1) The nature of the requestor's right under the [Atomic Energy] Act to be made a party to the proceeding;
- (2) The nature and extent of the requestor's property, financial, or other interest in the proceeding; and
- (3) The possible effect of any order that may be entered in the proceeding upon the requestor's interest.

In order to determine whether a petitioner has met these standards and is entitled to a hearing as a matter of right under Section 189a of the Atomic Energy Act, the Commission applies contemporaneous judicial concepts of standing. *See, e.g., Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992), *review denied sub nom. Environmental & Resources Conservation Organization v. NRC*, 996 F.2d 1224 (9th Cir. 1993); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983); *Envirocare of Utah, Inc.* (Byproduct Material Waste Disposal License), LBP-92-8, 35 NRC 167, 172 (1992).

The United States Supreme Court has stated the "irreducible constitutional minimum" requirements for standing are that the litigant suffer an "injury-in-fact" which is "concrete and particularized and . . . actual or imminent, not conjectural or hypothetical," that there is

a causal connection between the alleged injury and the action complained of, and that the injury will be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. ___, 117 S. Ct. 1154, 1163 (1997). See also *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1991). In addition to this constitutional component of standing, there are "prudential" (i.e., judicially self-imposed) standing requirements, one of which is that the litigant's asserted interests must arguably fall within the "zone of interests" of the governing law. See *Bennett*, 117 S. Ct. at 1167. See also *Port of Astoria v. Hodel*, 595 F. 2d 467, 474 (9th Cir. 1979).

The Commission applies the constitutional and prudential aspects of the standing doctrine. See, e.g., *Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2)*, CLI-93-16, 38 NRC 25, 32 (1993) (to show an interest in the proceeding sufficient to establish standing, a petitioner must show that the proposed action will cause "injury in fact" to its interest and that its interest is arguably within the "zone of interests" protected by the statutes governing the proceeding); *Public Service Co. of New Hampshire (Seabrook Station, Unit 1)*, CLI-91-14, 34 NRC 261, 266 (1991) (citing *Three Mile Island, supra*, 18 NRC at 332).

Requirements for standing have been applied to requests for hearing in numerous informal Commission proceedings held under Subpart L. See, e.g., *Sequoyah Fuels Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding)*, LBP-94-5, 39 NRC 54, 66-67 (1994); *Babcock and Wilcox Co. (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania)*, LBP-94-4, 39 NRC 47, 49 (1994); *Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility)*, LBP-93-4, 37 NRC 72, 80-81 (1993); *Umetco*

Minerals Corp. (Source Materials License No. SUA-1358), LBP-92-20, 36 NRC 112, 115 (1992); *Sequoyah Fuels Corp.* (Source Material License No. SUB-1010), LBP-91-5, 33 NRC 163, 164-65 (1991); *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 312-13 (1989).

Purely economic interests (*i.e.*, interests not related to harm stemming from adverse environmental impacts of a proposed action) are not within the zone of interest protected by the AEA or the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4231 *et seq.*) and are not sufficient to confer standing. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992); *Public Service Co. of New Hampshire* (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1447 (1984).

Further, it has been held that in order to establish standing, the petitioner must establish (a) that he personally has suffered or will suffer a "distinct and palpable" harm that constitutes injury in fact; (b) that the injury can fairly be traced to the challenged action; and (c) that the injury is likely to be redressed by a favorable decision in the proceeding.⁶ *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988); *Vogle, supra*, 38 NRC at 32; *Babcock and Wilcox, supra*, LBP-93-4, 37 NRC at 81; *Envirocare, supra*, 35 NRC at 173.

⁶ A presiding officer has the authority to approve, deny or condition any licensing action that comes under his or her jurisdiction. *See e.g., Sequoyah Fuels Corp.* LBP-96-12, 43 NRC 290, 206 (1996).

A petitioner must have a "real stake" in the outcome of the proceeding to establish injury-in-fact for standing. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48, *aff'd*, ALAB-549, 9 NRC 644 (1979). While the petitioner's stake need not be a "substantial" one, it must be "actual," "direct" or "genuine." *Id.* at 448. A mere academic interest in the outcome of a proceeding or an interest in the litigation is insufficient to confer standing; the requester must allege some injury that will occur as a result of the action taken. *Puget Sound Power and Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 983 (1982), *citing Allied General Nuclear Services* (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976); *Id.* LBP-82-26, 15 NRC 742, 743 (1982). Similarly, an abstract, hypothetical injury is insufficient to establish standing to intervene. *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 252 (1991), *aff'd in part on other grounds*, CLI-92-11, 36 NRC 47 (1992).

A person may obtain a hearing or intervene as of right on his own behalf but not on behalf of other persons whom he has not been authorized to represent. *See, e.g., Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (individual could not represent plant workers without their express authorization); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977) (mother could not represent son attending university unless he is a minor or under legal disability); *Combustion Engineering, Inc.* (Hematite Fuel

Fabrication Facility), LBP-89-23, 30 NRC 140, 145 (1989) (legislator lacks standing to intervene on behalf of his constituents).

In materials license proceedings, such as this one, a petitioner must demonstrate that the risk of injury resulting from the contemplated action extends sufficiently far from the facility so as to have the potential to affect its interests. *See, e.g., Boston Edison Co. (Pilgrim Nuclear Power Station)*, LBP-85-24, 22 NRC 97, 99 (1985), *aff'd on other grounds*, ALAB-816, 22 NRC 461 (1985) (risk of injury from proposed spent fuel pool expansion was not demonstrated where petitioner resided 43 miles from the facility); *c.f. Sequoyah Fuels Corp., supra*, LBP-94-5, 39 NRC at 67-91 (residence adjacent to contaminated fuel fabrication facility might not be sufficient to confer standing if the proposed action has no potential to affect the requester's interests); *Babcock and Wilcox Co., supra*, LBP-94-4, 39 NRC at 51-52 (standing and injury-in-fact can be inferred in some cases by proximity to the site, but a greater demonstration of injury may be required where the activity has no obvious offsite implications); *Babcock and Wilcox, supra*, LBP-93-4, 37 NRC at 83-84 and n.28 (petitioners' residences within one-eighth of a mile to approximately two miles from a fuel fabrication facility were insufficient to confer standing in a decommissioning proceeding, absent "some evidence of a causal link between the distance they reside from the facility and injury to their legitimate interests)."

In cases without obvious offsite implications, such as this one, a petitioner must allege some specific "injury in fact" will result from the action taken. *Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2, CLI-89-21, 30 NRC 325, 329-30*

(1980). Petitioners need not set forth all of their concerns until they have been given access to a hearing file. *Babcock & Wilcox*, LBP-94-4, 39 NRC 47, 52 (1994).

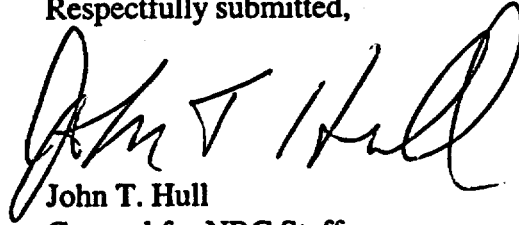
An organization may establish its standing either (1) by showing an effect upon its organizational interests, or (2) by showing that at least one of its members would suffer injury as a result of the challenged action, sufficient to confer upon it "derivative" or "representational" standing. *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646-47 (1979), *aff'g* LBP-79-10, 9 NRC 439, 447-48 (1979). An organization seeking to intervene in its own right must demonstrate a palpable injury in fact to its organizational interests that is within the zone of interests protected by the AEA or NEPA. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-30 (1991). Where the organization relies upon the interests of its members to confer standing upon it, the organization must show that at least one member (with standing in an individual capacity) has authorized the organization to represent his or her interests in the proceeding. *Id.*; *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 393-94, 396 (1979); *Babcock and Wilcox Co., supra*, LBP-94-4, 39 NRC at 50.

Here, Canton has submitted no affidavits of local residents establishing potential harm from the proposed decommissioning action, or otherwise specified how the decommissioning of Molycorp's Washington site--as distinct from the proposed transfer and temporary storage of the York waste--would cause harm to its interests.

CONCLUSION

For the reasons discussed above, the Staff requests the Presiding Officer to deny Canton's consolidation request, and to hold this decommissioning proceeding in abeyance.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John T. Hull". The signature is written in a cursive style with a large, looping "H" and "U".

John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 24th day of January 2000

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

OFFICE OF THE SECRETARY
RULEMAKING AND
ADJUDICATION STAFF

In the Matter of)
) Docket No. 40-8968-ML
MOLYCORP, INC.)
)
(Washington, Pennsylvania)
Site Decommissioning Plan))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO CANTON TOWNSHIP'S REQUEST FOR HEARING" in the above-captioned proceeding have been served on all of the following by U.S. Mail, first class, except for those indicated by a single asterisk who have been served through deposit in the Nuclear Regulatory Commission's internal mail system this 24th day of January 2000:

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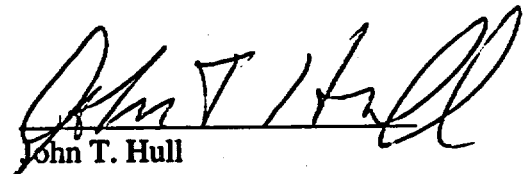
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