

June 7, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	IA-05-021
)	
ANDREW SIEMASZKO)	ASLBP No. 05-839-02-EA
)	
)	
)	

NRC STAFF RESPONSE TO HEARING REQUEST FILED BY
OHIO CITIZEN ACTION AND THE UNION OF CONCERNED SCIENTISTS

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h), the Staff of the Nuclear Regulatory Commission (“Staff”) hereby responds to the Request for Hearing (Hearing Request) filed by Ohio Citizen Action and the Union of Concerned Scientists (Petitioners).¹ For the reasons set forth herein, the Petitioners have failed to establish standing and, moreover, have proffered no admissible contentions. Therefore, the Hearing Request should be denied.

BACKGROUND

On April 21, 2005, the Staff issued an “Order Prohibiting Involvement in NRC-Licensed Activities” (Order) to Andrew Siemaszko, who was previously employed as a system engineer at the Davis-Besse Nuclear Power Station (Davis-Besse) operated by NRC licensee FirstEnergy Nuclear Operating Company (FENOC). 70 Fed. Reg. 22719 (May 2, 2005). The Order was based on a determination that Mr. Siemaszko engaged in deliberate misconduct that caused the Licensee to be in violation of 10 C.F.R. § 50.9 by deliberately providing to the

¹ “Request for Hearing in Response to Order (IA-05-021) Banning Andrew J. Siemaszko from Involvement in NRC-Licensed Activities,” dated May 13, 2005 (“Hearing Request”).

licensee information that he knew to be incomplete or inaccurate in violation of 10 C.F.R.

§ 50.5. *Id.* As more fully set forth in the Order, in the spring of 2002, the Licensee detected a 6-inch cavity in the reactor head, caused by leaking boric acid accumulated over a period of time. The NRC issued a \$5 million civil penalty to the Licensee for this violation of the “No Pressure Boundary Leakage” technical specification in the License. See EA-05-07, Davis-Besse (FirstEnergy Nuclear Operating Company), “Notice of Violation and Proposed Imposition of Civil Penalties” (April 21, 2005). Mr. Siemaszko, then employed by FENOC as a System Engineer at Davis-Besse, had been responsible for the reactor vessel head inspection during April 2000. Mr. Siemaszko deliberately provided materially incomplete and inaccurate information by writing “work performed without deviation” to close out Davis-Besse Work Order No. 00-001846-000, to “clean boron accumulation from top of reactor head,” when he knew that the reactor head had not been cleaned of all boric acid deposits. Further, Mr. Siemaszko deliberately provided materially incomplete and inaccurate information by providing information on Condition Report No. 2000-0137 that stated, “Accumulated boron deposited between the reactor head and the thermal insulation was removed during the cleaning process performed under W.O. (Work Order) 00-001846-000. No boric acid induced damage to the head surface was noted during the subsequent inspection.” Inspections and investigations conducted by the NRC Staff and Office of Investigations revealed that Mr. Siemaszko knew the head had not been cleaned of all boric acid deposits. 70 Fed. Reg. 22720. Mr. Siemaszko’s deliberate actions caused the Licensee to be in violation of NRC requirements.

The Order prohibits Mr. Siemaszko from any involvement in NRC-licensed activities for a period of five years from the effective date of the Order. The NRC considers NRC-licensed activities to be those activities that are conducted pursuant to a specific or general license issued by the NRC, including those activities of Agreement State licensees conducted pursuant to the authority granted by 10 C.F.R. § 150.20.

The Order specified that any person adversely affected by the Order may request a hearing within 90 days of the Order. On April 22, 2005, Mr. Siemaszko filed a timely hearing request and denied the allegations contained in the Order.² On May 13, 2005, Petitioners filed a timely Hearing Request. This Atomic Safety and Licensing Board (Board) was established on May 18, 2005.

DISCUSSION

I. Standing

A. Legal Requirements for Standing

The Petitioners, in addition to raising concerns outside the scope of this enforcement proceeding, do not satisfy the standing requirements of 10 C.F.R. § 2.309(d), having failed to demonstrate cognizable interests that could be affected by the outcome of this proceeding. Concerning an Order such as the one at issue in this proceeding, it is well established that the rights of any person to request a hearing and the scope of issues that may be considered at hearing are set forth by the terms of the Order. *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983). As stated in the Order, only persons adversely affected by the order have the right to request a hearing. 70 Fed. Reg. 22722. This requirement is premised upon the fundamental principle that any person who requests a hearing or seeks to intervene in a Commission proceeding must demonstrate that it has standing to do so. Section 189a(1) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a) (“Act” or “AEA”), provides:

In any proceeding under this Act, for the granting, suspending, or amending of any license . . . , the Commission shall grant a hearing upon the request of *any person whose interest may be affected by the proceeding*, and shall admit any such person as a party to such proceeding.”

² On May 19, 2005 the Board issued an Order granting Mr. Siemaszko's hearing request.

(emphasis added). To establish standing, the petitioner must meet the requirements set forth in 10 C.F.R. § 2.309(d), which include “the nature of the requestor’s/petitioner’s right under the Act to be made a party to the proceeding . . . , the nature and extent of [the petitioner’s] property, financial or other interest in the proceeding; and [t]he possible effect of any decision or order that may be issued in the proceeding on the [petitioner’s] interest.” 10 C.F.R. § 2.309(d)(1). Additionally, a petitioner may only intervene in an enforcement action upon a showing of injury from the contemplated action set out in the order. See *FirstEnergy Nuclear Operating Company* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 158 (2004). A petitioner who seeks a stricter penalty than the NRC proposes has no standing to intervene because it is not injured by the lesser penalty. *Alaska Department of Transportation and Public Facilities*, CLI-04-26, 60 NRC 399, 404 (2004); see also *Maine Yankee Atomic Power Company* (Maine Yankee Atomic Power Station), CLI-04-05, 59 NRC 52, 57-58 (2004).

In determining whether a petitioner has established the requisite interest, the Commission has traditionally applied contemporaneous judicial concepts of standing. See, e.g., *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994). 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. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998), citing *Steele Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998); *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988).

In NRC proceedings, a petitioner who suffers only economic injury unrelated to potential radiological or environmental effects lacks standing to challenge an agency action under NEPA or the AEA. See *International Uranium (USA)* (Receipt of Material from Tonawanda, New York), CLI-98-23, 48 NRC 259, 265 (1998). (“The appropriate party to raise safety

objections about a specific licensing action is the party who, because of the licensing, may face some radiological harm. . . . As such, it has long been [NRC practice] to reject standing for petitioners asserting a bare economic injury, unlinked to any radiological harm.”)

The injury must be “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A petitioner must have a “real stake” in the outcome of the proceeding to establish injury in fact for standing; while this stake need not be a “substantial” one, it must be “actual,” “direct” or “genuine.” *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-7910, 9 NRC 439, 447-48 (1979), *aff’d*, ALAB-549, 9 NRC 644 (1979). A mere academic interest in the outcome of a proceeding or an interest in the litigation is insufficient to confer standing. *Puget Sound Power & Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981 (1982), *citing Allied General Nuclear Services* (Barnwell Fuel Receiving And Storage Station), ALAB-328, 3 NRC 420, 422 (1976). Similarly, an abstract, hypothetical injury is insufficient to establish standing to intervene. *International Uranium Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117-18 (1998).

In order for an organization to establish standing, it must either demonstrate standing in its own right or claim standing through one or more individual members who have standing. *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995). Thus, an organization may meet the injury-in-fact test by showing an effect upon its organizational interests. *Houston Power and Lighting Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48 (1979).

B. Petitioners Have Not Established the Elements of Standing

1. Petitioners’ asserted interests are not cognizable injuries-in-fact

Petitioners claim to have an organizational interest in seeking accountability and consistent enforcement of Commission regulations. Petitioners assert, “This misguided

enforcement action has a very real potential for undermining worker and public confidence in the NRC's oversight capability." Petition at 4. Petitioners further claim that the results of this proceeding could allow "other individuals with far greater responsibility for said problems [to] remain employed in the nuclear industry where they are free to repeat the behavior that produced the Davis-Besse near-miss." Such diffuse interest, however, is not sufficiently "concrete and particularized" to confer standing. See *Lujan*, 504 U.S. at 560. If any person with a general public interest in NRC oversight could intervene in any NRC enforcement action, the NRC's standing requirements would serve no function and NRC proceedings would be flooded with a limitless number of intervenors raising an interminable range of issues. See *Bellotti*, 725 F.2d at 1381. NRC precedent clearly requires that an injury must be more than academic or abstract. See *International Uranium*, CLI-98-6, 47 NRC at 117-118; *Puget Sound Power & Light Co.*, LBP-82-74, 16 NRC 981, citing *Allied General Nuclear Services* (Barnwell Fuel Receiving And Storage Station), ALAB-328, 3 NRC 420, 422 (1976). Petitioners' general interest in promoting NRC accountability does not, therefore, amount to a cognizable injury-in-fact for the purposes of standing.

In addition to the foregoing basis, Petitioners assert a financial interest due to the substantial fees they have spent in obtaining legal counsel to consult on this matter. UCS asserts that this is "a very clear indication of the value placed on the matter of accountability for the Davis-Besse problems by UCS and its commitment to it." Petition at 4. OCA also claims to have "devoted considerable time and effort to the matter of safety at Davis-Besse." *Id.* Together, Petitioners argue that they have "simply invested too much time and money in this effort to see it squandered by this ill-advised, misguided NRC enforcement action." *Id.* Petitioners' asserted financial interests in this matter do not amount to the requisite injury-in-fact necessary to establish standing. Petitioners have voluntarily spent their funds to develop their research and to prepare their legal analysis relating to this enforcement proceeding. The Order

at issue in this proceeding has not imposed any financial or other obligations on Petitioners, and Petitioners do not assert that they have incurred economic harm arising directly from the Order. The Commission has determined that standing on the basis of economic interests will not be found where the underlying agency action did not actually impose any financial requirements on the petitioner. *See Maine Yankee*, CLI-04-5, 59 NRC at 59. (State of Maine did not establish standing notwithstanding that it anticipated that it would expend funds in order to cooperate with licensee who was subject to an NRC order.) Similarly in this case, the research and advocacy expenses Petitioners have voluntarily incurred relating to their following of this matter have not been required by the Order. Indeed, the funds were spent prior to the issuance of the Order; thus, Petitioners have not shown that such “injury” is sufficient to establish standing in this proceeding.

2. Petitioners’ asserted injuries are not redressable in this hearing

Petitioners have not demonstrated that their asserted injuries, even if cognizable, could be redressed through a rescission or relaxation of the Order, as their claimed injuries cannot be traced directly to the Order. In an enforcement order proceeding, the threshold question, intertwined with both standing and admissibility issues, is “whether the hearing request is within the scope of the proceeding outlined in the enforcement order itself, i.e., whether the . . . Order should be sustained.” *Davis-Besse*, CLI-04-23, 60 NRC at 157. *See also Bellotti*, 725 F.2d at 381; *Alaska DOT*, CLI-04-26, 60 NRC at 404. Accordingly, the only matters for which this hearing may provide redress are the requirements in the Order itself. The measure called for in the instant Order is a prohibition barring Mr. Siemaszko from involvement in NRC-licensed activities for a five-year period (and associated reporting requirements affecting only Mr. Siemaszko). Petitioners have not, however, made an effort to show how the Order banning Mr. Siemaszko from involvement in NRC licensed activities for five years would directly cause Petitioners themselves any harm. Thus, Petitioners have not asserted an injury that can be

redressed within the scope of this proceeding. See *Maine Yankee*, CLI-04-5, 59 NRC at 58.

Petitioners instead request a remedy beyond the scope of this proceeding – namely, to “correct programmatic problems with the NRC’s enforcement policy and its implementation.” Petition at 3. It is well-established that broad challenges to the NRC enforcement policy fall outside the scope of the Licensing Board’s jurisdiction: “[Hearing] requestors may not undertake to represent the general public as if they were private attorneys general.” *Babcock and Wilcox Co.* (Pennsylvania Nuclear Services Operations, Parks Township, PA), LBP-94-4, 39 NRC 47, 50 (1994). See also *Alaska DOT*, CLI-04-26, 60 NRC at 407:

In evaluating whether to pursue enforcement relief, and in considering various enforcement remedies, the NRC Staff acts like a prosecutor. Our adjudicatory process is not an appropriate forum for petitioners . . . to second-guess enforcement decisions on resource allocation, policy priorities, or the likelihood of success at hearings.

Petitioners nominally seek rescission of this Order, really requesting different or additional enforcement measures as well as an evaluation of NRC enforcement policy. In fact, Petitioners plainly state that several of their contentions have “broader implications than correcting injustice to a single individual, which would likely be the narrower scope of the proceeding if we were excluded.” *Id.* This hearing cannot provide redress to such requests because examination of NRC enforcement policy would exceed the scope of the hearing and the Board’s jurisdiction. Consequently, Petitioners do not have standing to raise their broader enforcement policy issues in this hearing.

Petitioners also appear to request that the NRC extend the scope of this enforcement action to go beyond Mr. Siemaszko and to include other individuals. The Petition notes that Mr. Siemaszko is one of nine individuals whom the Petitioners assert may have “played a role in the incomplete and inaccurate information provided to the NRC . . . most of whom are senior to Mr. Siemaszko and none of whom have been sanctioned by the NRC.” Hearing Request at 2. The Hearing Request further appears to assert in its concluding statement that more individuals

should be the subject of this enforcement proceeding: “IF MR. SIEMASZKO’S PERFORMANCE TRULY WARRANTS HIS REMOVAL FROM THE NUCLEAR GAME, HE SHOULD NOT BE THE ONLY PERSON SITTING ON THE BENCH.” *Id.* at 20 (emphasis in original). This apparent request does not challenge the Order but unambiguously seeks, contrary to the teachings of *Bellotti*, to impose actions going well beyond those encompassed by the Order. Petitioners attempt what the Commission rejected in *Alaska DOT*, where the Commission held, “[Petitioner] seeks rescission of the order because he speculates that other remedies would be more effective. This is really a request to impose either different or additional enforcement measures – in contravention of Commission doctrine in enforcement actions, as approved in *Bellotti*.” *Alaska DOT*, CLI-04-26, 60 NRC at 405. The Commission reached a similar conclusion in *Maine Yankee*, stating, “[I]f a petitioner could avoid the Commission’s limitation on the scope of an enforcement order simply by characterizing its petition as opposing the order unless additional measures are granted, the Commission would never be able to limit its proceedings.” *Maine Yankee*, CLI-04-5, 59 NRC at 58. Petitioners do not appear to propose a rescission of the sanction against Mr. Siemaszko, so much as they seek to increase the scope of the order to include other individuals. As with the Petitioners’ desire to address the NRC’s broader enforcement policies, this request exceeds the scope of the Order, exceeds the Board’s jurisdiction, and is thus not redressable in this hearing.

II. Contentions

A. Legal Standards for Contentions

In addition to satisfying the standing requirements, a petitioner (who is not the subject of the order) must also provide at least one admissible contention in order to be admitted into an NRC proceeding. 10 C.F.R. § 2.309(a). It is well established that contentions may only be admitted in an NRC proceeding if they fall within the scope of the proceeding and comply with the requirements of 10 C.F.R. § 2.309(f). *Id.* See also *Davis-Besse*, CLI-04-23, 60 NRC at

158. A petitioner must state with particularity the contentions sought to be raised. 10 C.F.R. § 2.309(f)(1). Furthermore, each contention must be accompanied by: (1) a specific statement of the issue of law or fact to be raised or controverted, (2) a brief explanation of the basis for the contention, (3) a demonstration that the issue is within the scope of the proceeding, (4) a demonstration that the issue is material to the findings the NRC must make regarding the action subject to the proceeding, (5) a concise statement of the alleged facts or expert opinions which support the contention and on which the petitioner intends to rely at hearing, including references to the specific sources and documents, and (6) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(i)-(vi).

The application of these requirements has been further developed by NRC case law. To be admissible, contentions must fall within the scope of the proceeding as defined by the notice of hearing. See *Alaska DOT*, CLI-04-26, 60 NRC at 404; *Davis-Besse*, CLI-04-23, 60 NRC at 158; *Maine Yankee*, CLI-04-05, 59 NRC at 56. Moreover, a contention must present a genuine dispute on a material issue of law or fact. See *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994). The petitioner must present the factual information and expert opinions necessary to support its contention adequately. See *Georgia Institute Technology* (Georgia Tech Research Reactor), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *aff'd in part*, CLI-95-12, 42 NRC 111 (1995). Neither mere speculation nor bare assertions alleging that a matter should be considered will suffice to allow the admission of a proffered contention. See *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). If a petitioner neglects to provide the requisite support to its contentions, it is not within the Board's power to make assumptions of fact that favor the petitioner. See *Georgia Tech*, LBP-95-6, 41 NRC at 305.

With these general principles in mind, the Staff, notwithstanding the Petitioners failure to establish standing, addresses each contention in turn.

B. Contention No. 1:

The NRC would not have shut down Davis-Besse had it known with completeness and accuracy the scope and results of the reactor vessel head cleaning performed for and under Condition Report No. 2000-1037 and Work Order No. 00-001846-000 during the 12th refueling outage (12 RFO).

Hearing Request at 4.

Petitioners' basis for this contention is that the NRC knew the reactor vessel head had not been completely cleaned in RFO12, and was provided with a map of the reactor vessel head showing the size of the boric acid blanket atop the reactor vessel head at Davis-Besse. Hearing Request at 6. Petitioners further state that the NRC staff based its decision to allow Davis-Besse to continue operating in the Fall of 2001 on an assumption that one or more CRDM nozzles were leaking, and had rejected compliance with regulations in its decision-making process. *Id.* The Hearing Request cites the Office of Inspector General (OIG) report regarding the staff's handling of the Davis-Besse Fall, 2001 bulletin response to demonstrate that the Staff used a purportedly inappropriate risk-based criterion of the likelihood of a nozzle ejection. *Id.* Petitioners assert that the NRC would not have shut down Davis-Besse regardless of the information provided by Mr. Siemaszko because the decision-making process was not based on compliance with federal regulations but on an unapproved, non-promulgated analysis that totally eliminated any and all information from 12RFO. *Id.* at 7.

This contention is inadmissible since petitioners are attempting to litigate the Staff interactions with the Licensee, FirstEnergy, in the context of the Fall, 2001 Davis-Besse bulletin response, a matter outside the scope of the proceeding. It is well established that issues in enforcement proceedings are only those set out in the order. *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 & 2.), CLI-80-10, 11 NRC 438, 442 (1980).

Issues concerning the conduct of the Staff as it carries out its regulatory functions are outside the purview of a Licensing Board. See *FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1)*, LBP-04-11, 59 NRC 379, n.2 (2004), citing *Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2)*, CLI-04-06, 59 NRC 62, 74 & n.23(2004).

Petitioners' attempt to bring the Staff's handling of the Davis-Besse matter into the scope of the proceeding by noting that the Order issued to Mr. Siemaszko states that the NRC would likely have taken immediate regulatory action to shut down the plant if the agency had known about the inaccurate information provided by Mr. Siemaszko. Petitioners then spend several pages outlining their disagreement with the staff decision-making process in the Fall of 2001. See Hearing Request at 7-9. The comment in the Order that the Staff would have shut down the plant, had they known the inaccurate information goes to the severity of the sanction imposed by the Order on Mr. Siemaszko. It explains how seriously the Staff views Mr. Siemaszko's provision of incomplete and inaccurate information. While petitioners may, in hindsight, disagree with the Staff decisionmaking process, this is not an admissible contention. The Licensing Board has no general supervisory authority over the Staff. This is not the proper forum for an analysis of the Staff action. Generalized views of what applicable policies ought to be are not proper for adjudication. See *generally Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1)* LBP-86-10, 23 NRC 283, 285 (1986).

C. Contention No. 2

The facts do not support the NRC's conclusion that Mr. Andrew J. Siemaszko provided incomplete and inaccurate information in condition Report No. 2000-1037 and Work Order No. 00-001846-000.

Hearing Request at 9.

Although Contention 2 appears to challenge the facts in this proceeding, the bases offered in support of this contention reveal that it is actually a broader challenge to the NRC's enforcement policy. In discussing their claim that the Staff mistakenly perceives the facts of this proceeding, Petitioners assert that "while the NRC develops procedures to guide its efforts (e.g., Inspection Procedures, Management Directives, etc.), the agency seldom uses procedures to document completion of its efforts...." Hearing Request at 11. Petitioners further state, "It is duplicitous and just plain bad taste for the NRC to fault Mr. Siemaszko for incomplete and inaccurate recordkeeping when the agency itself keeps no records for its work process." *Id.* This is similar to a contention the Commission rejected in *Alaska DOT*, in which the petitioner challenged an order on the grounds that it was not based on an accurate assessment or analysis of the available facts. The Commission denied the contention, finding that the "claim of a factual dispute is illusory" and that the petitioner was actually disputing the penalty chosen according to the Staff's enforcement discretion. *Alaska DOT*, CLI-04-26, 60 NRC at 410. Because challenges to Staff enforcement policy fall beyond the scope of the Board's jurisdiction, the Commission found the contention to be inadmissible. *Id.* at 411. Similarly, Contention 2 – a criticism of the Staff enforcement policy masquerading as a challenge to the facts – should not be admitted in this proceeding.

D. Contention No. 3

The NRC did not establish that Mr. Andrew J. Siemaszko deliberately violated 10 C.F.R. § 50.9.

Hearing Request at 12.

In contrast to the language of the contention itself which appears to focus on Mr. Siemaszko's actions, the basis put forward by the Petitioners is that "there is a consistency of enforcement issue that needs to be addressed via Contention No. 3." Hearing Request at 12, n. "#". Petitioners further assert that the agency often does not take action against

supervisors or managers who retaliate against a worker for raising nuclear safety concerns, on the basis that the agency was unable to prove that said individuals knew their actions violated the requirements of 10 C.F.R. § 50.7. *Id.* at 13. Petitioners claim that this enforcement action taken against Mr. Siemaszko is part of a continuing pattern of “bias in the severity of NRC’s enforcement actions against workers as opposed to enforcement actions taken (or not taken) against supervisors, managers, and senior managers.” *Id.* at 14.

This contention is inadmissible. An enforcement proceeding is limited to whether the facts as stated in the order are true and whether the remedy selected is supported by those facts. See *Alaska DOT*, CLI-04-26, 60 NRC at 404; *Davis-Besse*, CLI-04-23, 60 NRC at 158; *Maine Yankee*, CLI-04-05, 59 NRC at 56. Petitioners cannot expand the proceeding to include broad issues of policy and speculation regarding potential enforcement actions not taken by the Staff in the instant Order. Similar to Contention 2, Contention 3 is an illusory challenge to the facts underlying the Order and actually seeks to take issue with broader issues of the Staff enforcement policy. Consequently, Contention 3 exceeds the scope of this proceeding and is inadmissible.

E. Contention No. 4

First Energy was under no legally enforceable obligation to completely clean boric acid from the reactor vessel head during the 12th refueling outage at Davis-Besse.

Hearing Request at 14.

This contention is outside the scope of the proceeding, and thus, inadmissible. The Order to Mr. Siemaszko found that Mr. Siemaszko had provided information that was incomplete and inaccurate regarding the cleaning of the reactor vessel head during the 12th refueling outage. 70 Fed. Reg. 22720. The Order is based on the incomplete and inaccurate information provided, not the underlying lack of cleaning of the reactor vessel head. Whether or not the boric acid was legally required to be completely removed is, quite simply,

irrelevant to the proceeding.

F. Contention No. 5

The NRC cannot single out Mr. Andrew J. Siemaszko for enforcement action because his actions and his actions alone were not responsible for either the severity or longevity of the problems at Davis-Besse.

Hearing Request at 16.

As a basis for this contention, petitioners assert that "Mr. Siemaszko was but one of many passengers on the Davis-Besse bus as it sped along with an improper safety focus. The NRC should ticket the driver of the bus or the driver and all the passengers. The NRC cannot drag one passenger from the rear of the bus and persecute him alone." Hearing Request at 16. In this contention petitioners are arguing that the Staff should have taken a different enforcement approach. It is well established that one cannot seek to intervene in an enforcement proceeding to have NRC impose a different penalty than what the NRC seeks. *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 442 (1980). Much as with respect to Contention 3, whether the Staff should take enforcement actions against other individuals is outside the scope of the proceeding. Thus, this contention is inadmissible.

CONCLUSION

For the reasons described above, since the Petitioners have failed to establish standing, the Hearing Request should be denied.

Respectfully submitted,

/RA by Melissa L. Duffy/

Melissa L. Duffy
Sara E. Brock
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 7th day of June, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of) IA-05-021
)
ANDREW SIEMASZKO) ASLBP No. 05-839-02-EA
)
)
)
)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO HEARING REQUEST FILED BY OHIO CITIZEN ACTION AND THE UNION OF CONCERNED SCIENTISTS" in the above captioned proceeding have been served on the following persons by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**) on this 7th day of June, 2005.

Administrative Judge * **
Lawrence McDade, Chair
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: lqm1@nrc.gov

Administrative Judge * **
E. Roy Hawkens
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: erh@nrc.gov

Administrative Judge * **
Peter S. Lam
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: psl@nrc.gov

Billie Pirner Garde * **
Sandy Shepherd
Clifford & Garde
1707 L Street, NW, Suite 500
Washington, D.C. 20036
E-mail: bpgarde@aol.com
sshepherd@cliffordgarde.com

Atomic Safety and Licensing Board Panel *
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555

Office of Commission Appellate Adjudication *
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
Washington, D.C. 20555

Adjudicatory File *
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555

Office of the Secretary * **
Attn: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
Washington, D.C. 20555
E-mail: hearingdocket@nrc.gov

David Lochbaum * **
Nuclear Safety Engineer
Union of Concerned Scientists
1707 H Street NW, Suite 600
Washington, D.C. 20006
E-mail: dlochbaum@ucsusa.org

Sandy Buchanan * **
Executive Director
Ohio Citizen Action
614 W. Superior Avenue, Suite 1200
Cleveland, OH 44113
E-mail: sbuchanan@ohiocitizen.org

Jonathan Rund * **
Board Law Clerk
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: jmr3@nrc.gov

/RA/

Melissa L. Duffy
Counsel for NRC Staff