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NUCLEAR REGULATORY COMMISSION ISSUANCES

October 1995

U.S. NUCLEAR REGULATORY COMMISSION

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NUCLEAR REGULATORY COMMISSION ISSUANCES

October 1995

This report includes the issuances received during the specified period from the Commission (CLI), the Atomic Safety and Licensing Boards (LBP), the Administrative Law Judges (ALJ), the Directors' Decisions (DD), and the Decisions on Petitions for Rulemaking (DPRM).

The summaries and headnotes preceding the opinions reported herein are not to be deemed a part of those opinions or have any independent legal significance.

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MASTER

COMMISSIONERS

Shirley A. Jackson, Chairman
Kenneth C. Rogers

B. Paul Cotter, Jr., Chief Administrative Judge, Atomic Safety and Licensing Board Panel

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONER:

Shirley Ann Jackson, Chairman[1]

In the Matter of **Docket No. 50-160-Ren**
(Renewal of License No. R-97)

GEORGIA INSTITUTE OF TECHNOLOGY
(Georgia Tech Research Reactor) **October 12, 1995**

The Commission considers the appeal of an Atomic Safety and Licensing Board decision, LBP-95-6, 41 NRC 281 (1995), which granted a request for intervention and for hearing on an application submitted by the Georgia Institute of Technology (Georgia Tech), and admitted two contentions. In a previous order, CLI-95-10, 42 NRC 1 (1995), the Commission remanded one contention to the Board. The Commission denies the appeals by Georgia Tech and the Nuclear Regulatory Commission (NRC) Staff, and affirms LBP-95-6, finding that the Petitioner meets threshold requirements for standing and an admissible contention.

RULES OF PRACTICE: STANDING TO INTERVENE

For standing, a petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision.

[1] This Decision was made by Chairman Jackson under delegated authority, as authorized by NRC Reorganization Plan No. 1 of 1980, after consultation with Commissioner Rogers. Commissioner Rogers has stated his agreement with this Decision.

RULES OF PRACTICE: STANDING TO INTERVENE

To derive standing from a member, an organization must demonstrate that the individual member has standing to participate, and has authorized the organization to represent his or her interests.

RULES OF PRACTICE: STANDING TO INTERVENE

Unless there has been a clear misapplication of the facts or law, the Licensing Board's judgment that a party has established standing is entitled to substantial deference.

RULES OF PRACTICE: STANDING TO INTERVENE

A presumption of standing based on geographic proximity may be applied in cases involving nonpower reactors where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences. Whether and at what distance a petitioner can be presumed to be affected must be judged on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source.

RULES OF PRACTICE: CONTENTIONS

A contention must include a specific statement of the issue of law or fact to be raised or controverted, a brief explanation of the bases of the contention, and a concise statement of the alleged facts or expert opinion that support the contention, together with references to those specific sources and documents on which the petitioner intends to rely to prove the contention. The petitioner must also demonstrate the existence of a genuine dispute with the applicant on a material issue of law or fact.

ATOMIC ENERGY ACT: LICENSEE'S CHARACTER

As part of its licensing and oversight responsibilities, the Commission may consider the adequacy of a licensee's corporate organization and the integrity of its management. The past performance of management may help indicate whether a licensee will comply with agency standards.

ATOMIC ENERGY ACT: LICENSEE'S CHARACTER

Allegations of management improprieties or lack of "integrity" must be of more than historical interest: they must relate directly to the proposed licensing action.

MEMORANDUM AND ORDER

I. INTRODUCTION

This proceeding concerns an application by the Georgia Institute of Technology (Georgia Tech) to renew the license for the Georgia Tech Research Reactor (GTRR). In LBP-95-6, 41 NRC 281 (1995), the Atomic Safety and Licensing Board granted a request by the Georgians Against Nuclear Energy (GANE) for intervention and admitted two contentions. Pursuant to 10 C.F.R. § 2.714a, Georgia Tech and the NRC Staff appealed the Board's decision. On appeal, Georgia Tech argues that GANE lacks standing, and both Georgia Tech and the NRC Staff contest the two admitted contentions. In a previous order, the Commission remanded one of the contentions to the Board. CLI-95-10, 42 NRC 1 (1995). The Commission now affirms LBP-95-6 in all other respects.

II. BACKGROUND

On September 26, 1994, the NRC Staff published in the *Federal Register* a notice of opportunity for hearing on a license renewal application filed by Georgia Tech.[2] The renewal would extend by 20 years Georgia Tech's license to operate the GTRR, located on Georgia Tech's campus in Atlanta. GANE filed its initial petition for leave to intervene on October 26, 1994.[3] In a Memorandum and Order dated November 23, 1994, the Licensing Board found that GANE had not demonstrated standing, but pursuant to 10 C.F.R. § 2.714(a)(3), provided GANE an opportunity to amend its petition, and scheduled a prehearing conference. GANE timely filed an amended petition on December 30, 1994.[4] Attached were the affidavits of forty-four individuals, claiming health and safety concerns about the GTRR, and stating their interest in having GANE represent

[2] "Georgia Institute of Technology; Consideration of Application for Renewal of Facility License," 59 Fed. Reg. 49,088 (Sept. 26, 1994).

[3] *See* Georgians Against Nuclear Energy Petition for Leave to Intervene in Consideration of Application for Renewal of Facility License ("Petition") (Oct. 26, 1994).

[4] Amended Petition for Leave to Intervene in Consideration of Application for Renewal of Facility License ("Amended Petition") (Dec. 30, 1994).

them. The affidavits contained the individuals' home and work addresses, and the distances from the addresses to the reactor site. The Amended Petition also set forth GANE's ten contentions.

Because none of the affiants claimed membership in GANE, the Licensing Board conducted a telephone conference call to inquire whether any of the forty-four individuals were GANE members. In the conference call, GANE representative Ms. Glenn Carroll informed the Board that several of the individuals indeed were members. The Board then authorized GANE to supplement its Amended Petition to identify the organization members. GANE in response filed a supplemental affidavit of Mr. Robert Johnson, who affirmed his membership in GANE, and attached a copy of his application for membership.[5] Both Georgia Tech and the NRC Staff opposed GANE's intervention on the grounds that GANE lacked standing to intervene and failed to submit an admissible contention.

In LBP-95-6, the Licensing Board agreed with GANE that its standing could rest on the interests of member Mr. Robert Johnson, who works approximately ½ mile from the reactor, and believes his "life and health are jeopardized" by the reactor's continued operation.[6] The Board reasoned that Mr. Johnson works within sufficient proximity of the reactor that he can be presumed to be affected by operation of the facility. 41 NRC at 287. In addition, the Board found sufficient for standing the statement of GANE's representative, Ms. Glenn Carroll, that she drives by the reactor "a couple of times a day." 41 NRC at 289 n.5.

The Board also admitted two of GANE's ten submitted contentions. One admitted contention challenges the GTRR's security (Contention 5), and the other alleges that management problems at the GTRR render the facility unsafe (Contention 9). The Board found the security contention admissible, on the ground that even if the existing GTRR security plan complies with Commission regulations, regulatory authority exists to temporarily modify the security plan to account for special circumstances — in this case, security enhancements alleged necessary for the 1996 summer Olympic Games in Atlanta. 41 NRC at 291-96. The Board also found GANE's management contention admissible, because it raised pertinent material questions about the GTRR's director and current management organization. 41 NRC at 295-99. The Board found GANE's other eight contentions inadmissible. 41 NRC at 299-308.

Georgia Tech and the NRC Staff appealed the Licensing Board's decision. Georgia Tech also requested the Commission to stay discovery pending the appeal. The NRC Staff joined in the request for a stay. On June 9, 1995,

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[5] Georgians Against Nuclear Energy Supplemental Affidavit of Robert Johnson Affirming Membership in GANE (Jan. 13, 1995).

[6] Affidavit, Robert Johnson, at 1, attached to GANE's Amended Petition.

the Commission issued a temporary stay of discovery on GANE's security contention.[7] A month later, in July, the Commission vacated the Licensing Board's original ruling on the admissibility of the security contention (Contention 5), and remanded that contention to the Board for reconsideration in the light of the new facts. CLI-95-10, *supra.* The Commission also lifted as unnecessary the earlier-imposed temporary stay of discovery on the security contention. The Commission now addresses the other issues, GANE's standing and its management contention, which remain pending on appeal from LBP-95-6.

III. ANALYSIS

A. GANE's Standing

Under section 189a of the Atomic Energy Act (AEA), the Commission must grant a hearing upon the request of any person "whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a). To determine whether a petitioner has alleged a sufficient interest to intervene, the Commission has long applied judicial concepts of standing. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993) (*Perry*). For standing, the petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision. *See generally Lujan v. Defenders of Wildlife,* 112 S. Ct. 2130, 2136 (1992); *Perry,* 38 NRC at 92. Injury may be actual or threatened. *Kelley v. Selin,* 42 F.3d 1501, 1508 (6th Cir. 1995); *Wilderness Society v. Griles,* 824 F.2d 4, 11 (D.C. Cir. 1987). To evaluate a petitioner's standing, we construe the petition in favor of the petitioner. *See Kelley v. Selin,* 42 F.3d at 1508.

An organization may base its standing on either immediate or threatened injury to its organizational interests, or to the interests of identified members. *Warth v. Seldin,* 422 U.S. 490, 511 (1975); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646-47 (1979). To derive standing from a member, the organization must demonstrate that the individual member has standing to participate, and has authorized the organization to represent his or her interests. *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 390-96 (1979).

At the heart of the arguments on standing in this case are the parties' estimations of the geographic area that could be affected by an accidental release of radiation from the Georgia Tech reactor. Georgia Tech submits that even a worst-case accident at the reactor, as depicted in the GTRR's Safety Analysis

[7] Order Issuing Housekeeping Stay (June 9, 1995).

Report (SAR), cannot affect public health and safety beyond a 100-meter radius.[8] Georgia Tech therefore argues that Mr. Johnson and Ms. Carroll are beyond the "zone of danger" for the GTRR.[9] GANE, on the other hand, believes that a serious accident at the GTRR could result in radiation escaping the containment building and dispersing at least ½ mile, to "where [GANE member] Rob Johnson works . . . . [i]f the wind's blowing in that direction."[10]

The Licensing Board concluded that Mr. Robert Johnson, whose office is approximately ½ mile from the reactor site, "works close enough to the GTRR to be presumed to be affected by operation of the facility." 41 NRC at 287. The Board also found that GANE's standing alternatively could be derived from GANE representative Ms. Glenn Carroll, who drives by the reactor "a couple of times a day." *Id.* at 289 n.5.

Unless there has been a clear misapplication of the facts or law, the Licensing Board's judgment that a party has established standing is entitled to substantial deference. *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47-48 (1994). "[W]e are not inclined to disturb a Licensing Board's conclusion that the requisite affected interest . . . has been established unless it appears that that conclusion is irrational." *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-273, 1 NRC 492, 494 (1975).[11]

The Licensing Board's judgment that GANE has shown sufficient interest for standing is reasonable. A presumption of standing based on geographic proximity may be applied in cases involving nonpower reactors where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences. *See Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994) (*SFC*); *Armed Forces Radiobiology Institute* (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 153-54 (1982) (*AFRI*); *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 43 n.1, 45 (1990). *Cf. Lujan,* 112 S. Ct. at 2142-43 n.7. Whether and at what distance a petitioner can be presumed to be affected must be judged on a case-by-case basis, taking into

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[8] Georgia Tech's Notice of Appeal from the ASLB's Memorandum and Order dated April 26, 1995 (Georgia Tech Appeal Brief) at 8 (May 11, 1995).

[9] *See id.* at 8-11.

[10] Georgia Tech Research Reactor Prehearing Conference Transcript at 89 (January 31-February 2, 1995) ("Transcript"); *see also* Transcript at 81, 82, 105, 108. Only Georgia Tech raises standing on appeal. The NRC Staff does not.

[11] *Quoting Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 193 (1973), *aff'd on other grounds,* CLI-73-12, 6 AEC 241 (1973), *aff'd sub nom. BPI v. AEC,* 502 F.2d 424 (D.C. Cir. 1974). *See also Duquesne Light Co.* (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244 (1973); *cf. Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 57 n.5 (1979).

account the nature of the proposed action and the significance of the radioactive source. *See SFC,* 40 NRC at 75 n.22; *AFRI,* 16 NRC at 153-54.

Here, for threshold standing purposes, the Board found it neither "extravagant" nor "a stretch of the imagination" to presume that some injury, "which wouldn't have to be very great," could occur within ½ mile of the research reactor.[12] The Board noted that Georgia Tech's own SAR describes accident scenarios in which noble gases could be dispersed beyond the reactor site. LBP-95-6, 41 NRC at 287. Under questioning by the Board, the GTRR's director conceded that noble gases would escape the steel containment building if the reactor core melted.[13] Georgia Tech stresses that such hypothetical scenarios described in the SAR are simply "incredible" because they would first require three independent redundant safety systems to fail.[14] The Board, however, was not convinced that a combined failure of three systems altogether strains credibility. The Board's view is not "irrational." *See River Bend,* 40 NRC at 47-48. At the threshold standing stage, the Commission will not disturb the Board's presumption that some injury could occur within a ½ mile radius of the reactor.[15]

Alternatively, the Licensing Board reasonably held that GANE's standing can be based on Ms. Glenn Carroll, a GANE member who daily "drives by" the reactor.[16] *See North Anna,* 9 NRC at 57 (recreational canoeing in vicinity of plant sufficient for standing); *Pathfinder,* 31 NRC at 45 (regular commute once or twice a week past plant site to be decommissioned found sufficient to establish requisite interest that petitioner might be affected by decommissioning). Ms. Carroll's commute presumably brings her even closer to the reactor site than ½ mile. Like Mr. Johnson, Ms. Carroll can be presumed to frequent regularly a geographic area potentially at some risk of radiation releases, and therefore to have a personal stake in the license renewal proceeding.

B. GANE's Management Contention

A petitioner for intervention must proffer at least one admissible contention. *See* 10 C.F.R. § 2.714(b)(2) and (d)(2). A contention must include a specific statement of the issue of law or fact to be raised or controverted, a brief

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[12] Transcript at 10.

[13] *Id.* at 22-23.

[14] *Id.* at 23-24; Georgia Tech Appeal Brief at 8-9.

[15] Georgia Tech argues that Mr. Johnson joined GANE too late — i.e., after GANE's request for a hearing — to serve as the source of GANE's standing. But, as the Board found, there is ample evidence that GANE considered Mr. Johnson a member, and that Mr. Johnson actively participated in GANE affairs, prior to GANE's request for a hearing. *See* LBP-95-6, 41 NRC at 288-89. By contrast, there is no evidence that GANE contrived Mr. Johnson's membership merely to sustain standing. The Commission declines to rest its standing determination on the technicality of when he signed his membership card. *Cf. South Texas,* ALAB-549, 9 NRC at 649.

[16] Transcript at 35.

explanation of the bases of the contention, and a concise statement of the alleged facts or expert opinion that support the contention, together with references to those specific sources and documents on which the petitioner intends to rely to prove the contention. Additionally, the petitioner must present sufficient information to show a genuine dispute with the applicant on a material issue of law or fact. Proffered contentions must fall within the scope of the issues set forth in the notice of the proposed licensing action. *See Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

An intervenor need not, however, prove its case at the contention stage. The factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form, or be of the quality necessary to withstand a summary disposition motion.[17] What is required is a "minimal showing" that material facts are in dispute, indicating that a further inquiry is appropriate.[18]

The Licensing Board admitted only two of the ten contentions proffered by GANE. One admitted contention (Contention 5) alleges deficient physical security at the GTRR. New facts received after the Board's decision may have rendered this contention moot. The Commission therefore has remanded the security contention to the Board for reconsideration. *See* CLI-95-10, *supra.*

The only contention remaining before us, Contention 9, alleges that management problems at the GTRR are so great that public safety cannot be ensured. Specifically, GANE alleges that:

> 1) The Commission in the late 1980s shut down the reactor for safety reasons following a cadmium-115 contamination incident that arose from poor management. The same management is still in place.
>
> 2) The current director of the GTRR is the same director who in 1987 withheld information from the NRC about the cadmium-115 contamination incident.
>
> 3) A safety officer who advised the NRC of the cadmium incident was later demoted and left the GTRR claiming harassment.
>
> 4) Since the cadmium incident, the GTRR has been restructured. The restructuring has increased the authority of the director over the Office of Radiation Safety.
>
> 5) Although the GTRR safety officer can report directly to individuals with higher authority than the director, he may be reluctant to do so because he works for the director and "the threat of reprisal would be a huge disincentive to defying the director."

Amended Petition at 10; *see also* Petition at 5.

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[17] *River Bend,* 40 NRC at 51; Final Rule, Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

[18] *Id.*

GANE's central concern appears to be that there is a need to restructure the GTRR's management to make radiation safety personnel "independent" of the director, and to ensure independent oversight over the director's office.[19] GANE believes that the GTRR director withheld safety-related information from the NRC, and was responsible for alleged retaliation against radiation safety personnel who reported the cadmium-115 contamination incident to the NRC in the late 1980s. GANE alleges that management changes after the 1987 incident further "consolidat[ed] the power under the harasser,"[20] making it less likely that radiation safety personnel would feel free to report safety concerns. GANE also questions the effectiveness of the Nuclear Safeguards Committee, a committee of twelve safety experts tasked with monitoring the GTRR's operations.[21] Because the GTRR's management is now "being put forth again to be re-okayed," GANE requests that the current structure not be reapproved.[22]

In accepting the contention, the Board noted that GANE had presented evidence of a serious incident in 1987, allegedly involving the GTRR's current director, and that simply because the NRC Staff had been satisfied with the resolution of the incident, a party is not precluded from now raising the adequacy of the reactor's management, particularly when this is the first time a member of the public could seek to adjudicate the management issue. *See* LBP-95-6, 41 NRC at 297.

Both Georgia Tech and the NRC Staff stress on appeal that GANE has failed to demonstrate any problem with the GTRR's current management, and at best points only to a 1987 incident that was long ago investigated and resolved to the NRC Staff's satisfaction.[23] The Staff rejects any link between the cited 1987 cadmium-115 incident and a license renewal to authorize future operations.[24] Staff explains that the cadmium incident resulted in an exhaustive review by the NRC Office of Investigations (OI), and that by November of 1988, the NRC Staff had determined that the Licensee had corrected any major deficiencies and should be permitted to restart.[25] Staff thus concludes that GANE "must show . . . something in recent history which would give you a reason to think that the plant is not being operated safely or may not be expected to operate safely in the future."[26] Georgia Tech argues that because "[t]he Commission has approved the current management, and as long as the GTRR continues to operate within

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[19] Transcript at 365.
[20] *Id.* at 399.
[21] *See id.* at 349-50, 396-97.
[22] *See id.* at 398.
[23] *See* Georgia Tech Appeal Brief at 16-18; NRC Staff's Petition for Commission Review and Appeal of the Atomic Safety and Licensing Board's Prehearing Conference Order of April 26, 1995 (Staff Appeal Brief) at 26-28 (May 11, 1995).
[24] Staff Appeal Brief at 29.
[25] Transcript at 373.
[26] *Id.* at 377.

the regulations, the Board has no basis upon which to act."[27] Both parties also claim that, having admitted the contention despite a lack of factual basis, the Board now improperly has allowed GANE discovery to attempt to uncover a basis for the contention.[28]

At the outset, the Commission rejects Georgia Tech's broad claim that a license renewal proceeding is *per se* an inappropriate forum in which to raise management allegations. As part of its licensing and oversight responsibilities, the Commission may consider the adequacy of a licensee's corporate organization and the integrity of its management.[29] When relevant, the Commission has evaluated whether a licensee's management displays the "climate," "attitude," and "leadership" expected.[30] In determining whether to grant a license (or, by logical extension, to renew a license), the Commission makes what is in effect predictive findings about the qualifications of an applicant.[31] The past performance of management may help indicate whether a licensee will comply with agency standards.[32] When a licensee files a license renewal application, it represents "an appropriate occasion for apprais[ing] . . . the entire past performance of [the] licensee."[33] Of course, the past performance must bear on the licensing action currently under review.

Moreover, the NRC Staff conclusion in 1988 that Georgia Tech had corrected all deficiencies and could be permitted to restart operations is not itself enough to preclude GANE from raising questions about the GTRR's management, particularly in the absence of any clear prior opportunity for GANE to pursue claims at a hearing. A Staff conclusion alone does not defeat the right to litigate a contention. *River Bend,* 40 NRC at 52.

Allegations of management improprieties or poor "integrity," of course, must be of more than historical interest: they must relate directly to the proposed licensing action.[34] Accordingly, this proceeding cannot be a forum to litigate whether Georgia Tech made mistakes in the past, but must focus on whether

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[27] Georgia Tech Appeal Brief at 2.

[28] *See* Staff Appeal Brief at 29-32; Georgia Tech Appeal Brief at 17-18.

[29] *See Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 30 (1993) (*Vogtle*).

[30] *Vogtle,* CLI-93-16, 38 NRC at 31; *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1137 (*TMI*), *aff'd sub nom. In re Three Mile Island Alert, Inc.,* 771 F.2d 720 (3d Cir. 1985), *cert. denied,* 475 U.S. 1082 (1986).

[31] *See* Vogtle, CLI-93-16, 38 NRC at 31.

[32] *See id.* at 31; *Hamlin Testing Laboratories, Inc.,* 2 AEC 423, 428 (1964) (*Hamlin*), *aff'd sub nom. Hamlin Testing Laboratories v. AEC,* 357 F.2d 632 (6th Cir. 1966).

[33] *Hamlin,* 2 AEC at 428.

[34] *See, e.g., Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386, *aff'd,* ALAB-470, 7 NRC 473 (1978) (whether Detroit Edison violated Commission regulations in the past not within scope of proceeding on adding new owners); *TMI,* CLI-85-9, 21 NRC at 1128 (1985) (personnel changes mooted the significance in restart proceedings of leak rate falsifications from 6 years before).

the GTRR as presently organized and staffed can provide reasonable assurance of candor and willingness to follow NRC regulations.

Here, while the question is a close one, the Commission declines to disturb the Board's finding that GANE's management allegations are relevant to the proposed license renewal. This is a proceeding to extend a license for 20 years. GANE seeks assurance that the facility's current management encourages a safety-conscious attitude, and provides an environment in which employees feel they can freely voice safety concerns. GANE's allegations bear directly on the Commission's ability to find reasonable assurance that the GTRR facility can be safely operated. If GANE can prove that the GTRR's current management either is unfit or structured unacceptably, it would be cause to deny the license renewal or condition renewal upon modifications.

Contrary to suggestions by Georgia Tech and the NRC Staff, this is not a case where the Licensing Board simply relied on a years-ago incident to allow GANE an opportunity to uncover additional information through discovery. Although the Board expressed some concern about GANE's ability to have obtained documents that may have "buttress[ed]" the contention, the Board clearly found the information GANE actually submitted, as clarified and further detailed in the prehearing conference, a sufficient basis for the contention.[35] The Board's view of the contention is reasonable.

GANE's allegations may well turn out to lack any factual substance, and if so, they will not survive summary disposition. But as required by the Commission's contention rule, GANE at this stage has presented "alleged facts or expert opinion"[36] and made a "minimal showing" that material facts about the GTRR's management organization are in dispute and that further inquiry may be appropriate. GANE refers not just to the 1987 cadmium incident, but also to the NRC inspection and investigation reports on the incident, the GTRR's own SAR in support of its license renewal request, newspaper articles, and, significantly, to at least one expert witness in support of the contention.

Although the cadmium-115 incident that GANE highlights is far from recent, it was a significant Severity Level III violation that resulted in two immediately effective suspension orders, an NRC investigation, an enforcement conference, and a civil penalty,[37] and ultimately was attributed to management failures that "could have resulted in very serious safety consequences."[38] The incident involved allegations of harassment and reprisals by Georgia Tech management

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[35] *See* LBP-95-6, 41 NRC at 297-98.

[36] *See* 10 C.F.R. § 2.714(b)(2).

[37] *See* Georgia Institute of Technology, Order Modifying License, Effective Immediately, 53 Fed. Reg. 2663 (Jan. 29, 1988); Georgia Institute of Technology, Confirmatory Order Modifying License, Effective Immediately, 53 Fed. Reg. 9718 (Mar. 24, 1988); NRC Office of Investigation Report No. 2-88-003; Enforcement Action 88-32.

[38] *See* Letter to Dr. J.P. Crecine, President, Georgia Tech, from Malcolm Ernst, Acting Regional Administrator, NRC, at 3 (Nov. 15, 1988).

against employees who reported safety concerns to the NRC. These allegations led to an extensive NRC Office of Investigations (OI) review that proved inconclusive.[39] GANE takes the view that the management problems leading to the 1987 incident remain and indeed have been exacerbated by more recent changes in the GTRR management structure.

The 1987 incident is not one in which all of the principal individuals alleged to have played a role have since left the facility or moved to positions unassociated with day-to-day operations. *Compare TMI,* CLI-85-9, 21 NRC at 1128 (personnel changes diminished significance of violations alleged to have occurred 6 years before). The GTRR director at the time of the 1987-1988 events continues as the facility's director, responsible for ensuring the safe day-to-day operation of the reactor.[40] GANE alleges that the reactor operator responsible for the cadmium incident also remains at the facility.[41]

In light of what GANE calls the "public history" of alleged reprisals against employees who report safety issues,[42] GANE's contention particularly raises questions about the appropriateness of having the manager of the Office of Radiation Safety work under and directly report to the GTRR director, an arrangement depicted in the management hierarchy chart found in the GTRR's SAR. GANE points to this chart on the facility's management organization as indicative of the need for "checks and balances" to ensure that radiation safety personnel will not hesitate to report safety concerns.

GANE also concludes, based on the GTRR SAR, that the director's office lacks sufficient independent oversight, and indeed now receives less independent review than at the time prior to the cadmium incident. Although select officers other than the director — Georgia Tech's President, and the Vice President for Interdisciplinary Affairs, for example — have authority to shut down the reactor, GANE claims these individuals may either lack (1) the nuclear physics expertise or (2) sufficient day-to-day knowledge of ongoing reactor affairs to recognize a need to shut down operations or take other corrective action.[43]

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[39] OI did, however, conclude that one of the reasons two health physics technicians were fired was "specifically related to [their] discussing or reporting potential health and safety concerns with [the] NRC." NRC Office of Investigations Report No. 2-88-003 at 6. The report also characterized the general GTRR environment as conducive to potential reprisals, and in a severe state of disharmony due to poor management at all levels. *See* Letter to J.P. Crecine, President, Georgia Tech, from Malcolm Ernst, Acting Regional Administrator, NRC, at 2-3 (Nov. 15, 1988).

[40] *See* Safety Analysis Report for the 5 MW Georgia Tech Research Reactor (SAR) at 156 (April 1994).

[41] *See* Transcript at 339 (citing January 1994 "Alternatives" magazine article).

[42] Transcript at 343-44, 346-47. GANE believes that the current director was personally responsible for reprisals against the individual who allegedly reported the 1987 contamination incident. GANE bases its belief upon a November 1987 newspaper article in the *Atlanta Journal-Constitution,* entitled "Radiation expert resigns to protest changes at the Neely Nuclear Research Center." Transcript at 342.

[43] *Id.* at 395-96, 398. The NRC Staff in a recent Board Notification (95-15) advises that effective October 1, 1995, the position of the Vice President for Interdisciplinary Affairs was replaced with the position of the Dean of the College of Engineering. The Licensing Board has requested the parties to comment on whether this organizational

(Continued)

To support its position that the GTRR's current management setup is inappropriate, GANE seeks to call as a witness an individual with the Environmental Protection Division of Georgia (EPD), who informed GANE that the EPD had strongly objected to the GTRR's management changes.[44] GANE asserts that the EPD "may have expressed problems with [the changes] and may have been overruled by the NRC, who I think ultimately did sanction these changes."[45] In addition, GANE informed the Board that it gleaned information about problems associated with the management changes from an anonymous "expert" witness who once worked for the GTRR director, but resigned after being demoted, allegedly in retaliation for protesting his position being made "unindependent."[46] GANE also relies upon magazine articles on the GTRR, including one article that refers to the current manager of the GTRR Office of Radiation Safety as "confirm[ing] that the setup which has his department under the control of the director is unusual."[47]

In response, Georgia Tech stresses the oversight role of the Nuclear Safeguards Committee, comprised of twelve independent safety experts charged with reviewing and approving all safety matters.[48] The Licensing Board, however, surmised that the descriptions in the SAR (cited by GANE) depict the Nuclear Safeguards Committee and the various officers tasked with overseeing the director as "appear[ing] to exercise . . . audit-type functions, as claimed by GANE (Tr. 349), rather than day-to-day operational functions." LBP-95-6, 41 NRC at 296. GANE notes from the SAR that one of the Nuclear Safeguards Committee's chief functions is to review "reportable occurrences."[49] GANE, though, fears that the Nuclear Safeguards Committee will not be able to provide adequate independent oversight if "reportable occurrences" are not reported to it.[50]

In sum, the Commission declines to second-guess the Licensing Board's decision that GANE satisfied the minimum threshold for showing that material facts about the current GTRR management are in dispute. GANE has raised

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change has any significant effect upon Contention 9. *See* Memorandum and Order (Effect of Organizational Changes on Contention 9) (Sept. 26, 1995). We leave to the Licensing Board the task of assessing the significance of this change.

[44] Transcript at 342-43, 367.

[45] *Id.* at 343.

[46] Transcript at 353-54. GANE does not wish to unveil this person but hopes that he will of his own accord overcome his "fear to come out and discuss these issues about the reactor." After being informed by the Board that this individual could be subpoenaed, GANE told the Board to disregard this potential witness as a basis for the contention because he had not consented to making his knowledge public. Transcript at 365.

[47] "Checking Out the Hottest Spot on Campus," *Creative Loafing* at 28 (Dec. 17, 1994). As evidence of recent problems at the GTRR, GANE refers to one inspection report provided by the NRC Staff on a 1994 violation. *See* Transcript at 329, 336, 338 (referring to Inspection Report 50-160/94-01).

[48] Georgia Tech Appeal Brief at 16.

[49] *See* SAR at 158.

[50] Transcript at 349-50.

questions about the appropriateness and effect of an alleged "consolidation" of authority by the GTRR director over the office of radiation safety, and the adequacy of independent oversight over the director's office. Whether the present GTRR management's structure and staffing satisfy all Commission requirements and provide reasonable assurance that any past failings are unlikely to be repeated are matters left for the Licensing Board's consideration when the merits of the dispute are reached, either on summary disposition or after a hearing.

IV. CONCLUSION

For the reasons stated in this Decision, the appeals by Georgia Tech and the NRC Staff are *denied,* and the Licensing Board's order in LBP-95-6 is *affirmed.*

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of October 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONER:

Shirley Ann Jackson, Chairman[1]

In the Matter of **Docket No. 50-344**

PORTLAND GENERAL ELECTRIC COMPANY
(Trojan Nuclear Power Station) **October 12, 1995**

The Commission decides that under *Citizens Awareness Network v. NRC,* 59 F.3d 284 (1st Cir. 1995), the Licensee is not required to halt its substantially completed Large Component Removal Project (LCRP), but finds that the Licensee cannot conduct any further "major dismantling" of the Trojan facility until final NRC approval of the Trojan decommissioning plan, thus restoring effect to the NRC's pre-1993 interpretation of its 1988 decommissioning rules.

REGULATIONS: DECOMMISSIONING

The NRC will exercise its enforcement discretion and not halt a substantially completed Large Component Removal Project (LCRP): where both the Licensee and the NRC Staff have prepared safety analyses that conclude that the LCRP presents no undue risk to public health and safety; where the party seeking to stop the LCRP has failed to ask for a hearing in a timely fashion; where the balance of harm to the parties does not weigh heavily against either party; and where there will be an opportunity for a hearing on the remaining 99% of the decommissioning plan.

[1] This Decision was made by Chairman Jackson under delegated authority, as authorized by NRC Reorganization Plan No. 1 of 1980, after consultation with Commissioner Rogers. Commissioner Rogers has stated his agreement with his Decision.

NEPA: ENVIRONMENTAL ASSESSMENT

In some limited cases, NRC Staff review of a Licensee's preliminary environmental document may satisfy the requirement for an Environmental Assessment.

REGULATIONS: DECOMMISSIONING

Where the radioactivity involved in a Licensee's LCRP is only 1% of the facility's total nonfuel radioactivity, halting further dismantling at the facility pending final decommissioning plan approval gives ample effect to a court decision concerned that the "decommissioning plan approval process" should be followed before "the actual decommissioning activities are already completed[]."

MEMORANDUM AND ORDER

I. INTRODUCTION

The Commission has before it the question whether the First Circuit's decision in *Citizens Awareness Network v. NRC,* 59 F.3d 284 (1st Cir. 1995), prevents further decommissioning activities at the Trojan reactor which is owned by the Portland General Electric Company ("PGE"). We recently solicited public comments on this question. *See* 60 Fed. Reg. 46,315 (Sept. 6, 1995). The Don't Waste Oregon Council ("DWOC") and other groups opposed to PGE's current decommissioning activities ("Petitioners") have asked for a halt in these activities, pending NRC approval of a decommissioning plan for Trojan. PGE seeks to proceed with its decommissioning activities, including its Large Component Removal Project or "LCRP," which currently is nearing its end.

The Commission has decided that under *Citizens Awareness Network* PGE cannot conduct any further "major dismantling" of the Trojan facility until completion of the NRC's decommissioning plan approval process. The Commission has also decided not to interfere in PGE's completion of its LCRP, which is almost done and affects just 1% of (nonfuel) radioactivity from the plant. The LCRP "involves the removal of Trojan's four steam generators and the pressurizer from the containment building, preparing the components as transportation packages, and transporting the component packages from the Trojan site. . . ." *See* PGE's Sept. 18, 1995 Comments at 1.

II. BACKGROUND

As recounted in *Citizens Awareness Network,* prior to 1993 the Commission interpreted its regulations on decommissioning (10 C.F.R. §§ 50.82, 50.75,

51.53, 51.95) to require Commission approval before a licensee may in the course of decommissioning make "major structural changes to radioactive components of the facility or other major changes. . . ." 53 Fed. Reg. 20,418, 24,025-26 (1988).[2] In 1993, the Commission issued a Staff Requirements Memorandum altering this interpretation and permitting licensees to take any decommissioning action authorized under their licenses in advance of decommissioning plan approval, including actions that could be justified under 10 C.F.R. § 50.59. *See Citizens Awareness Network,* 59 F.3d at 289.

In *Citizens Awareness Network,* the First Circuit struck down the Commission's interpretive change as "arbitrary and capricious" because in the court's view it had not been adequately explained, it had not been preceded by notice-and-comment or any form of hearing, and it was "seemingly irrational." 59 F.3d at 291-92. The court's ruling has the effect of restoring the Commission's pre-1993 interpretation of its decommissioning rules.

III. ANALYSIS AND DISCUSSION

The Petitioners, including DWOC, have stated their opposition to further decommissioning at Trojan in court filings and comments to the agency. In their view the Commission should order an immediate halt to the LCRP. If the LCRP presented a significant safety problem, the Commission would clearly have the authority to issue such an order and would unquestionably exercise it. However, both the Licensee and the NRC Staff have prepared safety analyses that conclude that the LCRP presents no undue risk to public health and safety. DWOC has not shown any flaws in these analyses.[3]

DWOC does say that *Citizens Awareness Network* renders further work on the LCRP in violation of the Commission's pre-1993 rule interpretation. But that is not obviously correct. PGE argues that there are significant differences between the Trojan LCRP and the Yankee Nuclear Power Station removal program at issue in *Citizens Awareness Network.* PGE points out that the LCRP affects less than 1% of nonfuel residual radioactivity from the plant, in contrast to the

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[2] *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 73 n.5 (1991); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 61 n.7 (1992).

[3] Petitioners allege that the NRC has not prepared an EA or an EIS for the LCRP in compliance with the National Environmental Policy Act and that the LCRP must be halted for this reason alone. *See Citizens Awareness Network,* 39 F.3d at 292-93. While it is true that the NRC has not prepared either document for the LCRP, the NRC will prepare the appropriate document for the decommissioning plan. In addition, PGE prepared an environmental review ("ER") of the LCRP, which found that the impacts of the LCRP were within the EIS issued in connection with the operation of Trojan and the GEIS issued by the NRC in connection with decommissioning in general. The NRC Staff reviewed this ER and found it to be accurate and acceptable. The NRC review of the ER is adequate for purposes of NEPA compliance at this point. *See Friends of the River v. FERC,* 720 F.2d 93, 106-08 (D.C. Cir. 1983).

90% affected by the program at Yankee. PGE argues that the Trojan program therefore does not violate the Commission's pre-1993 decommissioning rules.

The Commission finds this question a close one. Removal of the four Trojan steam generators and the pressurizer undoubtedly has to be characterized as a "major structural change," and these components do contain some residual radioactivity. On the other hand, PGE is correct that the radioactivity involved in the LCRP is only a miniscule part (1%) of Trojan's total (nonfuel) radioactivity. In this sense it could be concluded that the Trojan LCRP is not a "major" segment of the decommisioning process to which the Commission's decommissioning regulations should be strictly and literally applied.

The Commission need not resolve this question definitively, however, because there are several additional reasons why the Commission should not interfere with the LCRP. PGE entered upon the program in reliance upon the NRC's assurance, given prior to the *Citizens Awareness Network* decision, that it complied with the Commission's regulations. In contrast to the component removal program at the Yankee Nuclear Power Station that led to the *Citizens Awareness Network* litigation, no parties requested an NRC hearing on the Trojan LCRP. While PGE continued its implementation, DWOC and the other petitioners participated in a state-law process for review of the LCRP and made no effort, until September 25, to seek any relief from the NRC. PGE in the meantime incurred substantial costs and now faces the prospect of losing favorable contracts, incurring additional costs, and idling its trained work force, should the program be summarily halted.

In addition, the *Citizens Awareness Network* court itself did not direct the halt of preliminary removal and transport operations already under way. Here, PGE reports that the program to remove and transport off site the Trojan steam generators and pressurizer is about 70% complete and, if not stopped by the Commission, will be finished by late October or early November 1995. Because the LCRP remains in compliance with all NRC safety requirements, the Commission believes that fairness and the public interest will best be served by not taking any action to interrupt this program on the eve of its completion. *See Heckler v. Chaney,* 470 U.S. 821, 831-32 (1985); *Union of Concerned Scientists v. NRC,* 711 F.2d 370, 383 (D.C. Cir. 1983).

Any further significant decommissioning activities beyond the LCRP must await completion of the NRC approval process for the Trojan decommissioning plan. This restores effect to the Commission's original interpretation of its decommissioning rules, as required by *Citizens Awareness Network,* and the Commission expects PGE to comply with that interpretation. When (and if) the NRC Staff is prepared to issue an order approving the Trojan decommissioning plan, the Commission intends to follow its pre-1993 practice of giving notice of an opportunity for an adjudicatory hearing on the plan. The Commission intends to order an expedited hearing process.

The Commission believes that, with 99% of Trojan's nonfuel radioactive contamination still in place, halting further major dismantling at Trojan pending final decommissioning plan approval gives ample effect to the concern of the *Citizens Awareness Network* court that the "decommissioning plan approval process" be followed before "the actual decommissioning activities are already completed[]" 59 F.3d at 292.

IV. SUMMARY

In summary, the Commission will not require PGE to halt its LCRP, which is slated to be completed within the next few weeks. However, the Commission expects PGE to adhere to current NRC decommissioning rules and to take no further decommissioning actions involving major dismantling at Trojan until final NRC approval of the Trojan decommissioning plan. The Commission directs PGE to inform the Commission promptly, within no more than 14 calendar days, of the steps it is taking to come into compliance with the reinstated rule interpretation announced in this Decision.

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of October 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONER:

Shirley Ann Jackson, Chairman[1]

In the Matter of **Docket No. 50-029**

YANKEE ATOMIC ELECTRIC COMPANY
(Yankee Nuclear Power Station) **October 12, 1995**

On remand from the First Circuit Court of Appeals, the Commission holds that the Court's decision (*Citizens Awareness Network v. NRC,* 59 F.3d 284 (1st Cir. 1995)), reinstating the NRC's pre-1993 decommissioning policy, requires issuance of a notice of opportunity for an adjudicatory hearing on the Yankee NPS decommissioning plan. The Commission directs the Licensee to inform it promptly of the steps it will take to come into compliance with the reinstated rule. The Commission notes that NRC regulations prohibit Yankee Atomic from conducting further major dismantling or decommissioning activities until after completion of the hearing process.

REGULATIONS: DECOMMISSIONING

The NRC has defined "major dismantling" under the 1988 regulations as "major structural changes to radioactive components of the facility or other major changes . . . ." *See* 53 Fed. Reg. 24,018, 24,025 (1988) ("Statement of Considerations," 1988 decommissioning rule).

[1] This Decision was made by Chairman Jackson under delegated authority, as authorized by NRC Reorganization Plan No. 1 of 1980, after consultation with Commissioner Rogers. Commissioner Rogers has stated his agreement with this Decision.

REGULATIONS: DECOMMISSIONING

Under the Commission's pre-1993 interpretation of its 1988 decommissioning regulations, a nuclear power plant licensee may not conduct major decommissioning activities prior to final NRC approval of a decommissioning plan.

REGULATIONS: DECOMMISSIONING

Prior to 1993, the Commission had consistently interpreted its 1988 regulations on decommissioning as requiring an adjudicatory hearing prior to the NRC's final approval of a licensee's decommissioning plan.

REGULATIONS: DECOMMISSIONING

A licensee's argument that the NRC's provision of an adjudicatory hearing on a previously approved decommissioning plan may result in financial hardship to the licensee due to decommissioning delays, does not excuse the Commission from providing a meaningful remedy to effectuate a Court of Appeals decision.

REGULATIONS: DECOMMISSIONING

Where a Court of Appeals has recognized in its decision that a licensee has virtually completed major decommissioning of a nuclear power plant, but that a continued removal of radioactive material will continue to pose safety and health questions, the NRC considers itself duty bound to take the only action available to it that gives meaning to the Court's decision — provide an adjudicatory hearing on the licensee's decommissioning plan in accordance with the Commission's pre-1993 interpretation of its regulations.

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the Commission on a remand from the United States Court of Appeals for the First Circuit. *See Citizens Awareness Network v. NRC*, 59 F.3d 284 (1st Cir. 1995). The Commission issued a *Federal Register* notice soliciting public comments on how it should implement the remand order. *See* 60 Fed. Reg. 46,317 (Sept. 6, 1995). The Citizens Awareness Network ("CAN") has filed comments asking for a hearing on the decommissioning plan for the Yankee Nuclear Power Station ("Yankee NPS"), which is owned and operated by the Yankee Atomic Electric Company ("YAEC"). However,

that decommissioning plan has already been approved by the NRC Staff — albeit without an adjudicatory hearing. In its comments, YAEC argues that the Commission should not hold such a hearing.

In light of the First Circuit's decision, the Commission has decided that it must reinstate its pre-1993 interpretation of its decommissioning regulations. *See generally* 60 Fed. Reg. 46,317 (Sept. 6, 1995). Pursuant to this interpretation, and for the reasons stated below, the Commission will issue a Notice of Opportunity for an adjudicatory hearing on the Yankee NPS decommissioning plan. The Commission intends to order an expedited hearing process. In the meantime, in accordance with the pre-1993 interpretation, the Commission expects YAEC not to conduct any further "major" dismantling or decommissioning activities until final approval of its plan after completion of the hearing process.[2] *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 73 n.5 (1991); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 61 n.7 (1992).

II. BACKGROUND

Briefly, on several occasions from late 1992 through early 1994, CAN asked the NRC to offer an opportunity for an administrative hearing regarding decommissioning activities being conducted by YAEC at the Yankee NPS. These activities were known as the Component Removal Project or "CRP."

The Commission denied each of CAN's requests, based upon a new interpretation of its decommissioning regulations, issued on January 14, 1993, and CAN sought review of the last denial before the First Circuit. On July 20, 1995, the First Circuit issued a decision that held that the Commission had improperly changed its interpretation of its decommissioning regulations. *Citizens Awareness Network,* 59 F.3d at 292. The First Circuit remanded the case to the Commission after finding illegal the Commission's 1993 shift in policy and its failure (1) to hold a hearing on the CRP activities and (2) to issue either an Environmental Assessment ("EA") or an Environmental Impact Statement ("EIS") on the CRP. *Citizens Awareness Network,* 59 F.3d at 291-92, 292-93, 294-95.

In response to the First Circuit's decision, the Commission issued a *Federal Register* notice (1) advising the parties and the general public that it did not intend to seek further review of the *Citizens Awareness Network* decision; (2)

[2] As explained in the statement of considerations accompanying the NRC's 1988 decommissioning rule, "major dismantling" means "major structural changes to radioactive components of the facility or other major changes . . . ." 53 Fed. Reg. 24,018, 24,025 (1988).

advising the public that it understood the decision to require a return to the interpretation of NRC decommissioning regulations that were in effect prior to January 14, 1993; and (3) asking for public comments on whether the Commission should order Yankee Atomic to cease ongoing decommissioning activities pending any required hearings, and any other matters connected with this issue.

III. PUBLIC COMMENTS

The Commission has received numerous comments from both members of the public and industry organizations, including CAN and YAEC, the two parties to the *Citizens Awareness Network* lawsuit. In its comments, CAN argues that the NRC should hold formal adjudicatory hearings on the Yankee decommissioning plan based upon the language in the First Circuit decision and on its own generalized concerns about the alleged hazards associated with decommissioning.

YAEC, on the other hand, argues that the First Circuit's requirement of a hearing on remand is moot, because the CRP has been completed, and that the First Circuit's NEPA remand is moot because the NRC Staff issued an EA when it approved the Yankee NPS decommissioning plan, which included a review of the activities conducted under the CRP.[3] Moreover, YAEC points out that the NRC Staff has already approved its decommissioning plan, *see* 60 Fed. Reg. 9870 (Feb. 22, 1995), and argues that nothing in the First Circuit's decision invalidates that approval. Finally, YAEC argues that "no useful safety or environmental purpose would be served" by halting decommissioning pending a hearing and that such a halt would "greatly increase the costs to the ratepayer."

IV. ANALYSIS

The question before the Commission on remand is not whether YAEC's current decommissioning activities are safe or environmentally benign but whether they are legal. Under the Commission's pre-1993 interpretation of its

[3] The First Circuit issued the *Citizens Awareness* decision on July 20, 1995, exactly 4 months after the day that YAEC now informs us the "last scheduled CRP activity initiated during the last phase of the CRP" was completed. *See* YAEC "Response to Request for Additional Information" (Sept. 25, 1995) (filed in this docket). But YAEC never claimed before the First Circuit that its March completion of the CRP rendered CAN's grievance moot or informed the Court of the CRP's completion. Therefore, YAEC is ill-positioned to claim mootness now, *after* the First Circuit has issued its decision and with additional decommissioning work remaining to be done. *See* 59 F.3d at 293 n.8.

The Commission agrees with YAEC, however, that the claimed lack of a NEPA review has been rendered moot by the subsequent preparation of the EA associated with the NRC Staff's review of the Yankee decommissioning plan. But CAN may still raise NEPA issues in any hearing request it files.

regulations, now reinstated, YAEC may not conduct "major" decommissioning activities prior to final NRC approval of a decommissioning plan. And under the Commission's consistent pre-1993 practice, final decommissioning plan approval came only after an opportunity for an adjudicatory hearing. In this case, the NRC approval of YAEC's plan was not preceded by an adjudicatory hearing — a fact that CAN stressed at the "informal public hearing" conducted on August 16, 1994, at Greenfield, Massachusetts. *See generally* Transcript of August 16, 1994. Thus, the NRC's approval of the Yankee NPS decommissioning plan cannot be accorded further legal effect, pending a hearing opportunity.

We now turn to YAEC's principal arguments why the Commission should not hold hearings on the decommissioning plan. First, YAEC maintains that "[t]his matter could be remedied if the NRC were to publish a full explanation of the policy change . . . ." Yankee Atomic Comments (Sept. 15, 1995) at 2-3. However, that option is unworkable. The First Circuit not only found the new rule interpretation unexplained, but also "seemingly irrational" and incapable of cure without a full hearing or rulemaking proceeding. *See* 59 F.3d at 291-92. Whether or not the First Circuit was correct in its view, its decision is the law that the Commission must follow on remand in this case. Therefore, the Commission could not simply reinstate the 1993 policy, certainly not any time soon, and certainly not fast enough to avoid a decision whether to halt YAEC's current decommissioning activities at Yankee NPS.[4] In fact, it is quite possible that the Commission's currently pending proposed rule change on decommissioning will be ready for issuance before a rulemaking on the old policy could be perfected. Thus, the Commission declines YAEC's invitation to attempt to comply with the First Circuit decision by codifying through rulemaking the now-invalidated 1993 policy.

In addition, YAEC argues that the Rancho Seco decommissioning proceeding (the only proceeding in which a hearing was actually initiated) constitutes merely a "precedent of one" for the proposition that decommissioning plan approval requires a prior hearing. YAEC argues that its decommissioning plan can be distinguished from the only other plans that were subject to the previous opportunities for a hearing, namely the Ft. St. Vrain and Shoreham plans, because unlike those plans the Yankee plan does not require the NRC to grant any amendments to the Yankee NPS license. *See* section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a) (requiring hearings on license amendments).

These arguments are unpersuasive. First, YAEC essentially concedes that its case is indistinguishable from Rancho Seco, where the Commission did not allow major dismantling prior to a hearing on the proposed decommissioning plan. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating

[4] The Commission ordinarily is not free to issue a new rule months from now and give it *nunc pro tunc* or retroactive effect. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208-09 (1993).

Station), CLI-93-12, 37 NRC 355 (1993). Second, the Commission did not offer the Shoreham and Ft. St. Vrain plans for public hearing on the basis of any amendments they might have involved. Rather, those plans (like Rancho Seco's) were offered for hearing for the purpose of approving the licensee's overall plan for decommissioning. Approval of any amendments (or changes to the plant's technical specifications) was incidental to the approval of the process and goals contained in each plan. Third, YAEC's facts are incorrect: the Shoreham decommissioning plan, like the Yankee NPS plan, did not involve the issuance of any license amendments.

Finally, YAEC points out that the First Circuit did not address the Yankee NPS decommissioning plan, as such, in *Citizens Awareness Network* because that issue was not before the Court. Moreover, argues YAEC, the NRC has already approved the Yankee decommissioning plan, which places it beyond review now. But the Commission cannot accept the rather formalistic response to *Citizens Awareness Network* that YAEC urges because, with the completion of the CRP, YAEC's position would result in no remedy at all for CAN on remand and would require the Commission to ignore the First Circuit's clearly expressed view that CAN should receive a hearing opportunity prior to further major dismantling at Yankee NPS. *See Citizens Awareness Network,* 59 F.3d at 292 ("Why offer the public an opportunity to be heard on the decommissioning plan if the actual decommissioning activities are already completed?").

The First Circuit was fully aware that the CRP was virtually complete, but nonetheless expected the Commission to offer CAN some relief on remand:

> We recognize that this holding comes too late to prevent much of the CRP activity. There remains, however, a significant amount of radioactive material and structures at the Yankee NPS site, the removal of which will continue to affect CAN members. This continued removal will undoubtedly continue to pose health, safety, and environmental questions, thereby requiring NRC oversight and NEPA compliance.

59 F.3d at 293 n.8. The Commission can only understand this statement to mean that CAN remained entitled to whatever process it was still possible for the Commission to offer. While it is true that YAEC's activities until now have proceeded according to the NRC's own view of its regulations, that view has now been struck down by the First Circuit. The Commission considers itself duty bound to take the only action available to it that gives meaning to the Court's decision: provide an adjudicatory hearing on YAEC's decommissioning plan in accordance with the pre-1993 interpretation of our regulations.

Understandably, YAEC expresses some frustration that it may suffer financially if hearings on its decommissioning plan result in decommissioning delays.[5]

[5] Other commenters, including the states of Massachusetts, Vermont, and Rhode Island, have expressed similar cost-based concerns.

Much of what YAEC alleges seems tied to a speculative fear that South Carolina authorities may again close the Barnwell waste disposal facility. Nonetheless, because of the Commission's court-directed change of course and YAEC's claim of financial hardship, the Commission in its hearing notice will direct an expedited hearing process in this case.

The long and short of this situation is that the Commission and YAEC *lost* this lawsuit in the First Circuit. Possible delay and financial impacts flowing from that defeat cannot excuse the Commission from providing CAN a meaningful remedy to effectuate the court's decision.

V. CONCLUSION

In summary, the Commission holds that *Citizens Awareness Network*'s reinstatement of the pre-1993 decommissioning policy requires issuance of a notice of opportunity for an adjudicatory hearing on the Yankee NPS decommissioning plan. Until that plan gains approval after the completion of the hearing, NRC regulations do not allow YAEC to conduct further "major" decommissioning activities at the Yankee NPS facility. The Commission directs YAEC to inform it promptly, but within no more than 14 calendar days, of the steps it is taking to come into compliance with the reinstated rule interpretation announced in this Decision.

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of October 1995.

Atomic Safety and Licensing Boards Issuances

LICENSING BOARDS

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Richard F. Cole
Dr. Charles N. Kelber

In the Matter of **Docket No. 50-440-OLA-3**
(ASLBP No. 90-605-02-OLA)

CLEVELAND ELECTRIC ILLUMINATING COMPANY, *et al.*
(Perry Nuclear Power Plant, Unit 1)

October 4, 1995

The Licensing Board grants the Intervenors' motion for summary disposition in this proceeding involving a license amendment to remove from the facility technical specifications the schedule for the withdrawal of reactor vessel material surveillance specimens.

STATUTORY CONSTRUCTION: GENERAL RULES

Because Appendix H of Part 50 is legislative in character, the rules of interpretation applicable to statutes are equally germane to determining that regulation's meaning. 1A Sutherland, *Statutory Construction* § 31.06 (5th ed. 1992).

STATUTORY CONSTRUCTION: GENERAL RULES

Where the meaning of a regulation is clear and obvious, the regulatory language is conclusive and we may not disregard the letter of the regulation. We must enforce the regulation as written.

STATUTORY CONSTRUCTION: GENERAL RULES

We may not read unwarranted meanings into an unambiguous regulation even to support a supposedly desirable policy that is not effectuated by the regulation as written. *See* 2A Sutherland, *Statutory Construction* § 46.01 (5th ed. 1992).

STATUTORY CONSTRUCTION: GENERAL RULES

To discern regulatory meaning, we are not free to go outside the express terms of an unambiguous regulation to extrinsic aids such as regulatory history. Aids to interpretation only can be used to resolve ambiguity in an equivocal regulation, never to create it in a unambiguous one.

MEMORANDUM AND ORDER
(Ruling on Motions for Summary Disposition)

In CLI-93-21, 38 NRC 87 (1993), the Commission reversed and remanded our ruling in LBP-92-4, 35 NRC 114 (1992), that Ohio Citizens for Responsible Energy (OCRE) and Susan L. Hiatt, lacked standing to intervene in this operating license amendment proceeding. Thereafter, we admitted the Intervenors' sole proffered contention. As admitted, that contention states:

> The portion of Amendment 45 to License No. NPF-58 which removed the reactor vessel material specimen withdrawal schedule from the plant Technical Specifications to the Updated Safety Analysis Report violates Section 189a of the Atomic Energy Act (42 USC 2239a) in that it deprives members of the public of the right to notice and opportunity for a hearing on any changes to the withdrawal schedule.

We then invited the Intervenors to file a motion for summary disposition on their contention and the Applicants to file a cross-motion for summary disposition. Those motions are now before us. The NRC Staff opposes the Intervenors' motion and supports the Applicants' cross-motion. For the reasons set forth below, we grant the Intervenors' motion for summary disposition and deny the Applicants' cross-motion for summary disposition.

A. Our earlier ruling on standing in LBP-92-4 set forth the regulatory background underlying this license amendment proceeding and we need not repeat that history here. It suffices to note that section 182a of the Atomic Energy Act (AEA), 42 U.S.C. § 2232(a), requires that an application for a nuclear power plant operating license include technical specifications for the facility. It further provides that the technical specifications become part of the operating license. The Commission's regulation, 10 C.F.R. § 50.36, implements the statutory directive and generally describe the types of items that must be included in the technical specifications.

In 1987 the Commission initiated a program designed to encourage licensees to improve voluntarily the technical specifications of their facilities. As part of that program, the Staff issued Generic Letter 91-01 (Jan. 4, 1991) providing guidance on the preparation of a license amendment to remove from the technical specifications the schedule for the withdrawal of reactor vessel material surveillance specimens. Specifically, the letter explains the function of the surveillance capsule withdrawal schedule and its relationship to other surveillance requirements designed to prevent reactor vessel embrittlement. It then states that it is duplicative to retain regulatory control over the schedule through the license amendment process because the Commission's regulations in 10 C.F.R. Part 50, Appendix H, § II.B.3 already require that a licensee obtain NRC approval for any changes to the withdrawal schedule. Finally, the generic letter provides that a licensee must commit to maintain the specimen withdrawal schedule in the updated safety analysis report.

The Intervenors' contention challenges the procedural consequences of removing the material surveillance specimen withdrawal schedule from the Applicants' technical specifications. They assert that such action deprives them of notice and an opportunity for hearing on future schedule changes in violation of the hearing provisions of section 189a of the Atomic Energy Act. In its summary disposition motion, the Intervenors state that their contention raises this single legal issue and that there are no factual matters in dispute.

Initially, the Intervenors assert that the withdrawal schedule traditionally has been part of the facility technical specifications and that, because of the hearing requirements of section 189a, technical specifications could be changed only after notice and an opportunity for hearing on the proposed change. Next, the Intervenors state that the amendment removing the withdrawal schedule from the technical specifications permits the Applicants to change the schedule without any notice or public participation even though 10 C.F.R. Part 50, Appendix H, § II.B.3 of the Commission's regulations requires the NRC to review and approve the changes to the withdrawal schedule. Thus, according to the Intervenors, the only effect of the amendment is to remove the public from the process in violation of section 189a.

In support of their argument, the Intervenors rely upon *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1451 (D.C. Cir. 1984), for the proposition that section 189a requires hearings on material licensing issues and *Sholly v. NRC*, 651 F.2d 780, 791 (D.C. Cir. 1980), for the proposition that an action granting a licensee the authority to do something it otherwise could not have done under existing authority is a license amendment within the scope of section 189a. The Intervenors then argue that the agency action at issue

> violates the Atomic Energy Act in that changes to the reactor vessel material specimen withdrawal schedule, which the NRC's regulations make material by requiring prior approval by the NRC, will be de facto license amendments, but will not be formally labeled as license amendments and noticed as such in the Federal Register with opportunity for a hearing. . . .
>
> . . . .
>
> Changes to the reactor vessel material specimen withdrawal schedule, with approval by the NRC, will give Licensees the authority to operate in ways in which they otherwise could not. Thus, they are de facto license amendments, and the public must have notice and opportunity to request a hearing. Anything less is in violation of the Atomic Energy Act.[1]

In opposing the Intervenors' summary disposition motion, the Applicants and the Staff agree that the Intervenors' contention raises a single legal issue and that there are no factual matters in dispute. Both parties also take the same position regarding the substance of the Intervenors' motion.

The Applicants and the Staff first argue that neither section 182a nor 10 C.F.R. § 50.36 requires that the withdrawal schedule be included in the facility technical specifications. Specifically, they assert that the statute and regulations give the agency broad discretion in determining what information should be included in technical specifications. Additionally, they assert that applicable agency precedents provide that information such as the withdrawal schedule, which is unrelated to conditions or limitations required to obviate an abnormal situation or an event giving rise to an immediate threat to public health and safety, should not be placed in the technical specifications. And, because the withdrawal schedule is not required by statute or regulation to be included in the facility technical specifications, the Applicants and the Staff maintain that there is no basis for requiring it to remain there even if it traditionally has been included in the technical specifications in the past.

Next, the Applicants and the Staff argue that the removal of the withdrawal schedule from the technical specifications, with the consequence that future changes to the schedule are without notice and an opportunity for a hearing, does not violate the hearing provisions of the Atomic Energy Act. For their part, the Applicants assert that section 189a requires a hearing only as to issues that are material to the agency's license issuance or amendment decision. They

[1] Motion for Summary Disposition (Feb. 7, 1994) at 4-5 [hereinafter Intervenors' Motion].

argue that here the withdrawal schedule is not material to the agency's license issuance decision so it can be removed without running afoul of section 189a. In support of their argument, the Applicants do not independently seek to establish the immateriality of the withdrawal schedule to the license issuance decision. Rather, the Applicants rely solely upon the Staff's assertion contained in the Staff's answer to the Intervenors' motion that the withdrawal schedule is not material to the Staff's license issuance decision. Finally, the Applicants argue that, because the withdrawal schedule is not material to the license issuance decision, the schedule properly can be removed from the technical specifications and future changes in the schedule will not be de facto license amendments that are outside the Applicants' licensing authority.

Similarly, the Staff does not directly challenge the legal proposition asserted by the Intervenors that agency action granting a licensee permission to operate in ways in which it otherwise could not, is a licensing action within the meaning of AEA section 189a and that a change in the withdrawal schedule is such an action. Rather, the Staff argues that the removal of the withdrawal schedule from the facility technical specifications does not violate the hearing provisions of section 189a because all changes in the withdrawal schedule do not require prior agency approval and therefore such changes are not material to the agency's license issuance decision. Contrary to the Intervenors' argument that the withdrawal schedule is material to the agency's license issuance decision because the Commission's regulations require NRC approval of changes to the withdrawal schedule, the Staff asserts that the Intervenors have misinterpreted 10 C.F.R. Part 50, Appendix H, § II.B.3, and that the regulation is ambiguous. According to the Staff, the regulatory history of Appendix H, which it presents through a Staff affidavit and a Staff memorandum to the Commission, SECY-83-80 (Feb. 25, 1983), shows that the Commission intended to incorporate the applicable American Society for Testing and Materials (ASTM) Code into the regulation. Further, the Staff asserts the regulatory history establishes that changes to a withdrawal schedule that conform to the ASTM Code need not be submitted to, and approved by, the agency. Rather, the argument continues, only changes to the schedule that do not conform to the applicable ASME Code, and hence the regulation, "would likely require prior Commission approval in the form of a license amendment."[2] Thus, the Staff argues that the withdrawal schedule can be removed from the technical specification without violence to section 189a.

B. We need not belabor the arguments of the Applicants and the Staff that the removal of the withdrawal schedule from the facility technical specifications does not violate section 182a of the Atomic Energy Act or 10 C.F.R. § 50.36. The Intervenors concede this point and readily admit that removal of the

[2] NRC Staff Response to Intervenors' Motion for Summary Disposition (Mar. 7, 1994) at 27 [hereinafter NRC Staff Response].

withdrawal schedule from the technical specifications does not violate any legal strictures.

The Intervenors do not agree, however, with the Staff's additional assertion that this admission is fatal to their motion for summary disposition. According to the Staff, the fundamental issue here is whether the withdrawal schedule is required by law or regulation to be included in the facility technical specifications. If not, the Staff claims there can be no basis for requiring the withdrawal schedule to remain in the technical specifications and the Intervenors' summary judgment motion should be denied. The Intervenors, on the other hand, argue that the focus of their contention is not on whether the withdrawal schedule remains in the technical specifications and that the "Intervenors are not insisting that the schedule be included in the Technical Specifications."[3] Rather, the Intervenors assert that their contention deals with the loss of hearing rights on future changes to the withdrawal schedule in violation of AEA section 189a as a consequence of the challenged license amendment.

Contrary to the Staff's assertion, the Intervenors' concession, i.e., that the removal of the withdrawal schedule does not violate the Commission's regulations, is not fatal to their motion. Similarly, the issue whether the withdrawal schedule is required by law or regulation to be included in technical specifications is not the fundamental question before us. Rather, the only issue before us is the one presented by the Intervenors' contention. That contention focuses exclusively on the asserted violation of AEA section 189a hearing rights caused by future changes in the withdrawal schedule without notice and an opportunity for hearing due to the removal of the schedule from the facility technical specifications. As the Commission stated in reversing our earlier ruling that the Intervenors' lacked standing, "[w]ith the license amendment in effect, future changes to the withdrawal schedule no longer require notice and an opportunity for a hearing under section 189a."[4] Thus, the fundamental issue before us is whether the lack of notice and opportunity for hearing on future changes to the withdrawal schedule violates the Intervenors' section 189a hearing rights. And, the parties' approach to this AEA section 189a hearing rights issue[5] has further narrowed the question to whether a change in the withdrawal schedule is a material license issuance decision.

The Intervenors' argument in support of this question is premised on the legal proposition announced in *Union of Concerned Scientists v. NRC,* 735 F.2d at 1451, that section 189a requires a hearing on issues material to the agency's licensing issuance decision. From this premise, the Intervenors argue that, because 10 C.F.R. Part 50, Appendix H, § II.B.3 requires revisions in

[3] Intervenors' Motion at 6.
[4] CLI-93-21, 38 NRC at 93.
[5] *See supra* pp. 140-41.

the withdrawal schedule to be approved by the NRC prior to implementation, changes in the schedule are material licensing decision issues and, as such, can only be made in conformance with section 189a after notice and an opportunity for hearing. The linchpin of the Intervenors' argument, therefore, is their assertion that the Commission's regulations require prior agency approval of any changes to the withdrawal schedule.

In opposing the Intervenors' position, the arguments of both the Applicants and the Staff accept the Intervenors' premise that material licensing issues trigger section 189a hearing rights. They both argue, however, that future changes to the withdrawal schedule are not material licensing issues. The Staff reaches this conclusion by arguing that the Intervenors have misinterpreted the Commission's regulations and that Appendix H does not require that all revisions to the withdrawal schedule be submitted to the agency for approval before implementation. The Applicant reaches this same conclusion by relying exclusively on the Staff's assertion that revisions in the schedule are not material. Thus, the crux of the Staff's opposition, and, in turn, the Applicant's opposition to the Intervenor's argument, is the Staff's interpretation of the Commission's regulations. Accordingly, resolution of the Intervenors' summary disposition motion rests upon the proper interpretation of Appendix H, § II.B.3. If the Intervenors' interpretation is correct, then their summary disposition motion must be granted and the Applicants' cross-motion must be denied. Contrarily, if the Staff's interpretation is correct, then the Intervenors' motion must be denied and the Applicants' cross-motion must be granted.

C. The starting point for analyzing any regulation is the language and structure of the regulation itself,[6] here Appendix H of Part 50 titled "Reactor Vessel Material Surveillance Program Requirements." Because Appendix H is legislative in character, the rules of interpretation applicable to statutes are equally germane to determining that regulation's meaning.[7] Therefore, in construing any part or section of Appendix H, § II.B.3, that portion of the regulation may not be considered in isolation but must be considered in reference to the entire regulation so as to produce a harmonious whole.[8] In doing so, we first turn to the text of the Commission's regulation.

Section I, of Appendix H, labeled "Introduction," begins by stating that the purpose of the material surveillance program is to monitor changes in the fracture toughness properties of ferritic materials in the beltline region of reactor vessels resulting from neutron irradiation and the thermal environment. It next indicates

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[6] *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288, *review declined,* CLI-88-11, 28 NRC 603 (1988). *See Pennsylvania Welfare Department v. Davenport,* 495 U.S. 552, 557-58 (1990).

[7] 1A Sutherland, *Statutory Construction* § 31.06 (5th ed. 1992).

[8] 2A *id.* § 46.05.

that fracture toughness test data from the material specimens in surveillance capsules periodically withdrawn from the reactor are to be used as described in Appendix G of Part 50. That Appendix specifies, inter alia, the fracture toughness requirements for reactor vessels. The introduction for Appendix H concludes by stating that editions E 185-73, -79, and -82 of the ASTM Code "Standard Practice for Conducting Surveillance Tests for Light-Water Cooled Nuclear Power Reactor Vessels" referenced in Appendix H have been approved for incorporation by reference by the Director of the *Federal Register* and that notice of any changes to the material incorporated by reference will be published in the *Federal Register.*

Section II of the regulations, titled "Surveillance Program Criteria," first provides in paragraph A, that no surveillance program is required for reactor vessels for which it can be conservatively demonstrated that peak neutron fluence at the end of the design life of the vessel will not exceed 10^{17} n/cm^2. For reactor vessels that cannot meet this requirement, paragraph B provides that they must have their beltline materials monitored in accordance with Appendix H.

Subparagraph B.1 then states:

> That part of the surveillance program conducted prior to the first capsule withdrawal must meet the requirements of the edition of ASTM E 185 that is current on the issue date of the ASTM Code to which the reactor vessel was purchased. Later editions of ASTM E 185 may be used, but including only those editions through 1982. For each capsule withdrawal after July 26, 1983, the test procedures and reporting requirements must meet the requirements of ASTM E 185-82 to the extent practical for the configuration of the specimens in the capsule. For each capsule withdrawal prior to July 26, 1983 either the 1973, the 1979, or the 1982 edition of ASTM E 185 may be used.

Subparagraph B.2 then details the various requirements for the placement and attachment of surveillance capsules in the reactor vessel followed by Subparagraph B.3, which states:

> *[a] proposed withdrawal schedule must be submitted with a technical justification as specified in § 50.4. The proposed schedule must be approved prior to implementation* [emphasis supplied].

Finally, paragraph C of section II addresses the requirements for integrated surveillance programs for multiple reactors. The last part of Appendix H, section III, titled "Report of Test Results," sets forth the various reporting requirements for the surveillance program.

In support of their argument that changes to the withdrawal schedule are material licensing issues, the Intervenors argue simply that "the plain language of Appendix H requires licensee submittal of the schedule and prior NRC approval

of the schedule before implementation."[9] The Staff, on the other hand, argues that the language of section II.B.3 is ambiguous and that the meaning of the provision must be found in its regulatory history. Specifically, the Staff asserts that the regulation "does not explicitly address changes to an approved schedule, nor does it indicate that prior approval is required for any change to an approved schedule, no matter how insignificant."[10] As previously mentioned, the Staff claims that the regulatory history of Appendix H indicates that only changes in the withdrawal schedule that do not conform to the applicable ASTM Code need to be approved by the agency prior to implementation.

Contrary to the Staff's argument, however, its claim that Appendix H is ambiguous cannot be squared with the plain meaning of the regulation. On its face, section II.B.3 clearly and unambiguously states that "[a] proposed withdrawal schedule must be submitted" to the agency and "[t]he proposed schedule must be approved prior to implementation." This language cannot reasonably be understood to mean anything other than what it plainly says, i.e., the NRC must approve proposed schedules before they are implemented.[11] As the Supreme Court has stated

> in interpreting a statute a court should always turn first to one, cardinal cannon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."[12]

Thus, where, as here, the meaning of the regulation is clear and obvious, the regulatory language is conclusive and we may not disregard the letter of the regulation. Rather, we must enforce the regulation as written. Similarly, we may not read unwarranted meanings into an unambiguous regulation even to support a supposedly desirable policy that is not effectuated by the regulation as written.[13] Further, to discern regulatory meaning, we are not free to go outside the express terms of an unambiguous regulation to extrinsic aids such as regulatory history. Aids to interpretation only can be used to resolve ambiguity in an equivocal regulation, never to create it in an unambiguous one.

In this instance, however, the Staff would disregard the plain meaning of the regulation to invent an ambiguity where none exists. It does this in a transparent

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[9] Intervenors' Answer to NRC Staff Response to Intervenors' Motion for Summary Disposition and Licensees' Cross Motion for Summary Disposition (Apr. 5, 1994) at 4.

[10] NRC Staff Response at 19-20.

[11] *Cf. San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1310 (D.C. Cir. 1984), *vacated in part and reh'g en banc granted on other issues*, 760 F.2d 1320 (1985); *aff'd en banc*, 789 F.2d 26, *cert. denied*, 479 U.S. 923 (1986).

[12] *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981); (citations omitted)). *See Reves v. Ernst & Young*, 122 L. Ed. 2d 525, 535 (1993); *United States v. Clark*, 454 U.S. 555, 560 (1982); *Howe v. Smith*, 452 U.S. 473, 483 (1981).

[13] *See* 2A *Sutherland, supra*, § 46.01.

attempt to avoid the consequences of the plain meaning rule, thereby permitting it to delve into regulatory history in an attempt to support an argument that section II.B.3 of Appendix H only requires agency approval of proposed withdrawal schedules that differ from the schedules contained in the incorporated ASTM Code. According to the Staff, the regulation is ambiguous because it does not explicitly address changes, including insignificant changes, to an already approved schedule. To make the regulation conform to its ambiguity argument, however, the Staff necessarily reads a word into section II.B.3 that is not there. It seeks, in effect, to insert the word "initial" before the term "proposed withdrawal schedule" in the first sentence of the regulation to convey the meaning that there only can be one withdrawal schedule for a reactor vessel and that any change or revision to that one schedule, or even a new subsequent schedule, is an amendment to the single, original schedule. Only by this unwarranted insertion of a word into the regulation can it rationally be argued that the regulation is ambiguous.

But neither any imagined word nor any ambiguity is in the regulation. When the words of section II.B.3 are given their ordinary meaning, the regulation speaks to the very circumstances the Staff recites. In simple and straightforward language, the regulation states that a proposed withdrawal schedule must be submitted to the Staff and approved before implementation. By definition, a schedule that is "proposed" is one that is offered "for consideration, discussion, acceptance, or adoption."[14] Thus, under its literal terms, a new schedule or any change to an already implemented schedule, significant or otherwise, must be considered a "proposed" schedule and, as such, must be submitted to the agency and approved prior to implementation. This is what the plain words of the regulation say and this is what it means. Accordingly, section II.B.3 is unambiguous and there is no need to consult the regulatory history of the provision to discern its meaning as the Staff argues.

Nonetheless, assuming arguendo that the language of this regulation is ambiguous so that we may turn to the regulatory history of the provision to aid in its interpretation, we still do not find the Staff's argument persuasive. As originally promulgated, Appendix H specified the number of capsules and the specific withdrawal schedules to be followed.[15] It also provided that "[p]roposed withdrawal schedules that differ from those specified in paragraphs a. through f. shall be submitted, with a technical justification therefor, to the Commission for approval. The proposed schedule shall not be implemented without prior Commission approval."[16] In 1983, the Commission amended the regulation

[14] *Webster's Third New International Dictionary* 1819 (1971).
[15] *See* 10 C.F.R. Part 50, Appendix H, § II.C.3.a-f (1974).
[16] *Id.* at 3.g.

essentially to its current form.[17] Specifically, it deleted the withdrawal schedules from the original version and in their place incorporated by reference in section II.B the various editions of the ASTM E 185 Code, including Table 1 of each of those editions that contains a withdrawal schedule.[18] At the same time, the Commission changed the provision dealing with agency approval of *nonconforming* schedules to state that "[a] proposed withdrawal schedule must be submitted with a technical justification therefore to the Director, Office of Nuclear Reactor Regulation, for approval. The proposed schedule must be approved prior to implementation."[19] Subsequently, in 1986 the latter provision was again amended to its current form when the Commission, by referencing 10 C.F.R. § 50.4, sought to standardize document submission requirements throughout the agency's regulations.

The Staff is correct that the 1983 amendment of Appendix H incorporated by reference the various editions of the E 185 ASTM Code (including Table 1 of those editions) into the regulation. The introduction to Appendix H and the agency response to certain public comments on the proposed rule that are part of the rulemaking record[20] make that clear. There is absolutely no regulatory history, however, to support the remainder of the Staff's argument that Appendix H, § II.B.3 means that only those changes in a proposed withdrawal schedule that do not conform to the applicable ASTM Code E 185 Table 1 need to be approved by the agency before implementation.[21] The Commission's 1983 deletion of specific withdrawal schedules from the original regulation and its incorporation by reference of various ASTM Code withdrawal schedules — a substitution of qualitatively similar but quantitatively different schedules — does not advance the Staff's argument. The Staff's argument overlooks the fact that along with this change the Commission deleted the provision that specifically limited any requirement for prior agency approval of schedules only to those that differed from the schedules set forth in the regulation and substituted a new comprehensive requirement that the agency approve *all* proposed schedules

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[17] *See* 10 C.F.R. Part 50, Appendix H (1984).

[18] *See* Proposed Rule, 45 Fed. Reg. 75,536, 75,537 (1980) (noting deletion of withdrawal schedules from regulation "because the requirements for withdrawal schedules contained in the 1979 edition of ASTM E 185 provide satisfactory criteria for scheduling surveillance information gathering").

[19] 10 C.F.R. Part 50, Appendix H, § II.B.3 (1984).

[20] *See* NRC Staff Response at 23 & n.32.

[21] In support of its argument dealing with the regulatory history of Appendix H, the Staff partially relies upon an affidavit of several staff members. *See, e.g.,* NRC Staff Response at 20 ("[s]ome of the regulatory history for Appendix H is provided in the attached affidavit"). To the extent that the affidavit contains more than a recitation of primary sources of regulatory history, i.e., final rules, proposed rules, statements of considerations, and matters in the rulemaking record, it is not a legitimate source of regulatory history. Only contemporaneous regulatory history can reflect the intent of the Commission that promulgated the regulation. *See, e.g., Resolution Trust Corp. v. Cityfed Financial Corp.,* 57 F.3d 1231, 1242 (3rd Cir. 1995). Subsequent revisionist history is not valid regulatory history. *See Sullivan v. Finkelstein,* 496 U.S. 617, 632 (1990) ("Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously. . . .") (Scalia, J., concurring in part).

prior to implementation.[22] The amendment of this provision imparts a meaning to Appendix H, § II.B.3 exactly the opposite of the meaning the Staff asserts. Indeed, only if the 1983 amendment of the nonconforming schedule provision had retained the gist of its original form would the Staff argument have any plausibility. Thus, even if we accept for the sake of argument that section II.B.3 is ambiguous so that we may turn to the regulatory history to aid in its construction, the Staff's interpretation finds no support there. In sum, the text of section II.B.3 of Appendix H, even when read in conjunction with the selected portions of regulatory history relied upon by the Staff, simply cannot be read reasonably to mean that only those proposed withdrawal schedules that do not conform to the applicable ASTM Code need be approved by the agency prior to implementation. Moreover, as should be obvious, the Commission's policy on improving facility technical specifications cannot alter the plain language or meaning of Appendix H.[23]

D. For the foregoing reasons, the Intervenors' motion for summary disposition is *granted.* Correspondingly, the Applicants' cross-motion for summary disposition is *denied.* Our grant of the Intervenors' motion, however, does not invalidate the license amendment at issue or require that the withdrawal schedule be returned to the technical specifications. The Intervenors are not insisting that the withdrawal schedule be included in the facility technical specifications. Rather, the Intervenors' contention only challenges the consequences of the amendment that would deprive them of notice and an opportunity for hearing on any future changes to the withdrawal schedule. Because Appendix H, § II.B.3 currently requires that a proposed withdrawal schedule be approved

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[22] *See* 48 Fed. Reg. 24,008, 24,008 (1983) (where in statement of considerations accompanying final rule the Commission notes that it changed the reporting requirement in part III of the regulation from a proposed 90 days of capsule withdrawal to one year from that time "because capsule withdrawal schedules [already] must be approved by the Director, Office of Nuclear Reactor Regulation, as provided in paragraph II.B.3. of Appendix H").

[23] Additionally, we note that the Staff's interpretation before us of Appendix H, § II.B.3 conflicts with its interpretation of that same provision in Generic Letter 91-01. The letter to all NRC reactor license holders accompanying the generic letter states that "Section II.B.3 of Appendix H to 10 CFR Part 50 requires the submittal to, and approval by, the NRC of a proposed withdrawal schedule for material specimens before implementation. Hence, the placement of this schedule in the [technical specifications] duplicates the controls on changes to this schedule that have been established by Appendix H." Letter to all Holders of Operating Licenses or Construction Permits for Nuclear Power Reactors from James G. Partlow, Associate Director for Projects, Office of Nuclear Reactor Regulation (Jan. 4, 1991). In like vein, the generic letter itself states that "[t]he removal from the [technical specifications] of the schedule for the withdrawal of reactor vessel material surveillance specimens will not result in any loss of regulatory control because changes to this schedule are controlled by the requirements of Appendix H to 10 CFR Part 50." Generic Letter 91-01 (Jan. 4, 1991) at 2. *See also* CLI-93-21, 38 NRC at 89 (where the Commission characterizes the generic letter as indicating that "the Commission's regulations under 10 CFR Part 50, Appendix H, § II.B.3, already mandate prior NRC approval of any changes to the withdrawal schedule"). In its response to the Intervenors' summary disposition motion, the Staff euphemistically describes in a footnote its earlier conflicting interpretation of Appendix H, § II.B.3 by stating that "[i]n hindsight, it appears that [Generic Letter] 91-01 does not express the Staff's views on this matter with precision." NRC Staff Response at 27 n.33. The Staff also indicates that it is developing clarification for the statements in the generic letter and considering whether a rulemaking is necessary. No such clarification or rulemaking has occurred to date. Needless to say, it appears that the Staff's interpretation of Appendix H, § II.B.3 in the generic letter is correct.

by the agency prior to implementation, any such requested change is a request for a material licensing action that triggers section 189a hearing rights.[24] Thus, as long as this regulatory provision remains in its current form, the grant of the Intervenors' motion requires that the agency treat any future proposed withdrawal schedule as a license amendment and provide notice and an opportunity for a hearing in accordance with section 189a of the Atomic Energy Act.

With our resolution of these motions for summary disposition, there are no further matters for decision in the proceeding and the proceeding is *terminated.* In accordance with 10 C.F.R. § 2.786(b)(1), Commission review of this Memorandum and Order may be sought by filing a petition for review within 15 days after service of this Memorandum and Order. Requirements regarding the length and content of a petition for review and the timing, length, and content of an answer to such a petition are set forth in 10 C.F.R. § 2.786(b)(2)-(3).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Thomas S. Moore
ADMINISTRATIVE JUDGE

Richard F. Cole
ADMINISTRATIVE JUDGE

Charles N. Kelber
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 4, 1995

[24] *See Union of Concerned Scientists v. NRC,* 735 F.2d at 1451. *See generally Citizens Awareness Network v. NRC,* 59 F.3d 284, 294 (1st Cir. 1995).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Dr. Jerry R. Kline
G. Paul Bollwerk, III

Thomas D. Murphy, Alternate Board Member

In the Matter of

Docket No. 40-8027-EA
(ASLBP No. 94-684-01-EA)
(Source Material License
No. SUB-1010)

SEQUOYAH FUELS CORPORATION
and GENERAL ATOMICS
(Gore, Oklahoma Site Decontamination
and Decommissioning Funding)

October 26, 1995

MEMORANDUM AND ORDER
(Approval of Settlement Agreement)

Pending before the Board is a proposed Settlement Agreement (hereinafter Agreement) submitted by the Nuclear Regulatory Commission (Staff) and Sequoyah Fuels Corporation (SFC).[1] Native Americans for a Clean Environment and the Cherokee Nation (Intervenors) filed objections to the Agreement, and replies to the objections have been submitted by the Staff and SFC.[2] The Board

[1] Joint Motion for Approval of Settlement Agreement (Aug. 24, 1995).

[2] Intervenors' Response to Joint Motion (Sept. 8, 1995); NRC Staff Reply to Intervenors' Response (Sept. 22, 1995); SFC's Reply to Intervenors' Response (Sept. 15, 1995). In the interest of completeness, the Board grants, and considers herein, the Intervenors' Motion for Leave to Reply to SFE and NRC Staff (Sept. 25, 1995) and SFC's Motion for Leave to Respond to Intervenors' Motion (Sept. 29, 1995).

received objections to the Agreement submitted by the Tulsa District Corps of Engineers to the NRC Staff.[3] SFC, Intervenors, and the Staff filed comments on the Corps of Engineers' concerns. The Staff's counsel has also forwarded a letter from the Office of the Attorney General of Oklahoma requesting additional time to review the Agreement.[4]

BACKGROUND

This proceeding involves an NRC October 15, 1993 Order to SFC and its parent corporation, General Atomics (GA), concerning fulfilling a regulatory obligation for ensuring decommissioning funding of SFC's licensed facilities located at Gore, Oklahoma. The Agreement, appended hereto, proposes to release SFC from liability under the Order and the pending litigation in exchange for SFC's agreement pledging all its net assets and revenues to the decommissioning completion.

Intervenors' objections are based on four assertions: first, that due to a provision in the Agreement that SFC's obligations thereunder are "subject to the rights of senior lien-holders," the Board should authorize discovery concerning the particulars of such liens to prevent creditors from plundering SFC's assets. Intervenors, in particular, allege that a lien involving a note to the Kerr-McGee Corporation (Kerr-McGee) does not appear to be the sole responsibility, if any, of SFC (Intervenors' Response to Joint Motion at 4-8); second, the Agreement does not protect from SFC creditors' funds from two accounts (decommissioning reserve and escrow) that have been previously set aside for decommissioning (*id.* at 8-14); third, that a review of the "reasonableness" of SFC's business contractual arrangements with an organization, ConverDyn, needs to be undertaken (*id.* at 14-15); and fourth, since the Agreement, based on SFC's commitments thereunder, rescinds the October 15, 1993 NRC Order against it, the NRC should not permit SFC to be exempt from future assessments for decommissioning in the event SFC resumes business operations. Nor should any successors in title to SFC's property be absolved from liability for decommissioning funding (*id.* at 14-16).

The Corps of Engineers, Tulsa District, complains that the Agreement limits financial commitments by SFC and GA for decommissioning costs and would foreclose future action on enforcement of such costs in the event of a failure to fully fund remediation of federally owned areas adjacent to the SFC facility. These areas presumably are under the jurisdiction of the Corps of Engineers. On behalf of the Department of Wildlife Conservation, the Oklahoma Attorney

[3] Letter, Sanford to NRC Counsel (Sept. 11, 1995).
[4] Letter, Hale to NRC Counsel (Sept. 29, 1995).

General's Office expresses a concern that the Agreement may permit creditors to divert SFC resources and its letter hints of SFC's financial difficulty and a possible bankruptcy plan.

DISCUSSION

The Agreement defines SFC's net assets as the company's gross assets, subject to SFC's obligations to ConverDyn and the rights of senior lien-holders; net revenues are defined as SFC's gross revenues after paying necessary expenses subject again to SFC's obligations to ConverDyn and the rights of senior lien-holders. *See* Agreement, *Definitions,* ¶¶ 1.d and 1.e. The Staff and SFC stipulate that SFC cannot provide funds for decommissioning in excess of its net assets and net revenues, as those terms are defined, and cannot obtain financial assurances for decommissioning beyond pledging its net assets and revenues. *See* Agreement at 1 (p. 160, *infra*). Intervenors' first question concerning the possible plundering of SFC's revenue and assets by creditors raises the issue as to what SFC can commit for decommissioning costs after it pledges all its possessions in terms of assets or revenues. Intervenors concentrate on a lien on SFC's property supporting a Kerr-McGee promissory note which is also an obligation of two other subsidiaries of GA. *See* Intervenors' Reply to SFC and NRC Staff at 2-6. In Intervenors' view, GA might influence SFC to pay the indebtedness to Kerr-McGee alone thus diverting funds required for decommissioning for an obligation partially owed by GA's other subsidiaries. *Id.* at 3.

Intervenors do not present arguments of substance here. Whatever the legal status of creditors' claims against SFC, they are unaffected by the terms of the Agreement proposed. Such claims, if any, can only be resolved by action between the claimant and SFC. The NRC is neither impacted by nor involved in the resolution of other parties' legal disputations. And the same conclusion holds for the arguments advanced concerning the SFC debt to Kerr-McGee.[5] It is immaterial to the consideration of the Agreement before us. The legal rights and duties related to this obligation exist regardless of the action contemplated by the proposed Agreement and have no relevance to whether the Agreement should be ratified. The NRC is not left helpless in the event of any deception on the part of SFC. As the Staff points out, any transfer of SFC assets and revenues to claimants who had no legal entitlement to them would subject SFC to "an enforcement action (by the NRC) . . . for violating the Settlement Agreement."

[5] Although not relied on for this opinion, it should be noted that SFC has submitted a letter reflecting Kerr-McGee's intention not to seek legal action against the SFC until after the pending Settlement Agreement is approved and implemented and decommissioning completed. SFC's Motion for Leave to Respond to Intervenors' Motion, Attachment 1.

Under the Agreement, SFC must commit all of its net assets and revenues to the completion of decommissioning. *See* Staff Reply to Intervenors' Response at 4-5. It is also noted that SFC is obligated to provide the Staff with copies of annual audited financial statements as well as make financial records available for Staff inspection. Agreement at 5 (p. 164, *infra*).

The reasoning underlying the Board's conclusions concerning Intervenors' first objection, *supra,* also negates any validity to the second — that concerning the protection of two decommissioning accounts from the claims of creditors. Both the Staff and SFC point out that the Intervenors misconstrue the nature of these accounts and that neither is affected in any manner by the Settlement Agreement. Suffice it to state that these accounts are required to be established pursuant to SFC's license and NRC regulations, and neither is impacted by the Agreement. The net assets and revenues of SFC are to be utilized for decommissioning expenses under the Agreement and, if any funds considered in either or both reserve accounts are secured for decommissioning, such allocations are not changed by the pending Agreement. The Agreement is not intended to, nor does it, permit any financial allocations or obligations for decommissioning previously committed by SFC to be obviated by the terms therein. The Agreement and SFC and Staff statements concerning this matter make it evident that any monies committed or obligated for such purposes would simply become part of the net assets and revenues that, after the payment of reasonable and necessary expenses, are pledged by the Licensee to decommissioning. *See* NRC Staff's Reply to Intervenors' Response at 5-7; SFC's Reply to Intervenors' Renewed Opposition at 4-9.

In regard to Intervenors' third argument, that the "reasonableness" of SFC's arrangements with ConverDyn be reviewed, we fail to understand how the Board can undertake an analysis of the merits of SFC's business transactions or what objective such scrutiny would serve. Intervenors offer no suggestion as to the criteria the Board should utilize in any evaluation of SFC's contractual arrangement with ConverDyn. In the Agreement, SFC commits itself to "diligently pursue" its contractual rights with ConverDyn until decommissioning has been satisfactorily completed. And it should be noted that the Staff retains enforcement authority to compel SFC's compliance with the Agreement. *See* Agreement at 4 and 6 (pp. 163 and 164-65, *infra*).

Finally, Intervenors' contentions raise the specter of the Agreement failing to obligate SFC for decommissioning expenses, if the Corporation pursues other profitable business activities, and that successors in title to SFC's property would be absolved from decommissioning indebtedness. Intervenors' first argument has no foundation since it is clear, as the Staff points out, that the Agreement reaches SFC's present and future assets and revenues from all sources and, with regard to the second, no provision of the Agreement immunizes any successors in title

from decommissioning expenses. *See* Staff Reply to Intervenors' Response at 8-9.

As indicated, *supra,* the Tulsa District Corps of Engineers in correspondence to the Staff has submitted objections to the proposed Agreement. Although the letter purports to reflect the participation of the Corps as a partner in "any Settlement Agreements," the Tulsa District is not a party in this proceeding. Consequently, the allegations contained in this correspondence cannot be considered in the evaluation of the Agreement. It does appear that a misunderstanding may exist on the part of the District Office concerning the provisions of the Agreement, since, despite allegations to the contrary, the Agreement does provide for financial commitments on the part of SFC and does not exempt General Atomics from the NRC October 25, 1993 Order. With respect to the letter addressed to NRC Counsel from the Oklahoma State Attorney General's Office, the correspondence indicates, on behalf of the State's Department of Wildlife Conservation, concern over certain terms of the Agreement and requests additional time to consider its effect on State interests. Similar to the opinion expressed above, the State of Oklahoma is not a party to the proceeding herein and, consequently, the Board lacks jurisdiction to review the concerns raised in the State's communication.

In light of the foregoing, and all of the circumstances of this proceeding, the Board finds no basis for disapproving the proposed Agreement. A settlement of contested proceedings has long been encouraged by the Commission. *See* 10 C.F.R. §§2.759, 2.1241. In guidance to boards on licensing proceedings, the Commission's policy statement encourages boards to conduct settlement conferences for the purpose of resolving contentions by negotiation. *Statement of Policy on Conduct of Licensing Proceedings,* CLI-81-8, 13 NRC 452, 456 (1981).

In evaluating agreements on enforcement orders, the Staff's position for settlement, under the Commission's prescriptions of 10 C.F.R. §2.203, is required to be provided "due weight" by the Board but if required in the "public interest," an adjudication of the issues involved therein may be ordered. The premise underlying the terms of the Agreement appears to be that the agency will receive from SFC all that the NRC would be entitled to receive in the absence of an agreement and a decision issued in NRC's favor. Even in the event of the financial failure of the organization producing a bankruptcy filing as intimated by the State of Oklahoma correspondence, *supra,* the Staff would be in no worse position than a bankruptcy filing during or after a decision in the present litigation. The result would be the same since the agency would receive from the licensee all that a Bankruptcy Court Judge would allow under existing bankruptcy laws. It should be noted that the possibility of bankruptcy filings are always weighed in the development of settlement agreements and we have

no reason to suspect its impact — or lack thereof — has not been evaluated here.[6]

In summary, the avoidance of protracted and needless litigation is in the public interest and an objective of settlement negotiations.[7] The appropriateness of the Agreement submitted for our approval should be viewed in the light of the allegations made by the Staff in the October 15, 1993 Order that forms the foundation of this proceeding. The fundamental charge of that order is that the funding plan SFC proposes for decommissioning its facility at Gore, Oklahoma, is not adequate to meet the Commission's regulations and that GA, as an active parent organization, is responsible for providing for any deficiencies therein. Although settlement negotiations are currently being undertaken with GA,[8] there is no waiving of the agency's claims against GA expressed or implied by the terms of the Agreement before us. Accordingly, since the charges against GA still exist and SFC pledges to furnish all of its assets and revenues that it would have to provide if a judgment were to issue against it in the proceeding, we cannot conclude that there is an issue herein that requires an adjudication in the public interest.

Pursuant to the Commission's regulations (10 C.F.R. § 2.203), and upon consideration of the Joint Motion for Approval of the Settlement Agreement, we find that settlement of this matter as to Sequoyah Fuels Corporation's participation as a party, as proposed by the parties to the Settlement Agreement should be approved. Accordingly, upon consent of the parties to the Settlement Agreement, and giving due weight to the views of other parties to this proceeding, the Settlement Agreement is hereby approved and incorporated into this Order, pursuant to section 63 and subsections (b), (i), and (o) of section 161 of the Atomic Energy Act, as amended, 42 U.S.C. §§ 2093, 2201(b), 2201(i), and 2201(o), and is subject to the enforcement provisions of the Commission's regulations and Chapter 18 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2271, *et seq.* Sequoyah Fuels Corporation is hereby dismissed as a party to this proceeding.

In accordance with 10 C.F.R. §§ 2.760 and 2.786, this Order constitutes the final action of the Commission 40 days after the date of issuance, unless any party petitions for Commission review or the Commission takes review of the decision *sua sponte.* Commission review of this Order may be sought by filing a petition for review within fifteen (15) days after service of this Decision. Any other party to the proceeding may, within 10 days after service

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[6] It should not be expected that environmental protection of the public health and safety can be vitiated by bankruptcy proceedings. *See Midlantic Bank v. New Jersey Department of Environmental Protection,* 474 U.S. 494 (1986).

[7] The Staff indicates that settlement negotiations and deliberations have consumed a 6-month period of time. *See* NRC Staff Reply to Intervenors' Response to Joint Motion for Approval of Agreement at 1.

[8] *See* Board Order Extending Discovery Stay (Oct. 13, 1995).

of a petition for review, file an answer supporting or opposing Commission review. Requirements regarding the length and content of a petition for review or an answer to such petition are specified in 10 C.F.R. § 2.786(b)(2)-(3).

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD[9]

James P. Gleason, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 26, 1995

Separate Statement by Bollwerk, J.

Because I have concerns about certain aspects of the proposed settlement agreement between Sequoyah Fuels Corporation (SFC) and the NRC staff, I am not prepared at present to make the requisite "public interest" finding pursuant to 10 C.F.R. § 2.203. Specifically, I would ask for additional clarification from SFC and the staff regarding several matters.

I. STAFF ENFORCEMENT AUTHORITY UNDER THE AGREEMENT

Paragraph 7 of the agreement states that "[n]othing in this Agreement shall limit the NRC Staff's ability to take appropriate enforcement action to enforce SFC's compliance with this Agreement . . . ." In responding to concerns expressed by intervenors Native Americans for a Clean Environment (NACE) and the Cherokee Nation regarding the improper dissipation of SFC assets and

[9] Copies of this Order are being sent this date to counsel for Sequoyah Fuels Corporation, General Atomics, and Intervenors NACE and the Cherokee Nation by facsimile transmisssion and to Staff counsel by E-mail transmission through the agency's wide area network system.

revenues,[1] both SFC and the staff suggest that this provision gives the staff the necessary authority to rectify any problems in this regard. *See* SFC's Reply to Intervenors' Opposition to Settlement Agreement (Sept. 15, 1995) at 6-7 [SFC Reply]; NRC Staff's Reply to Intervenors' Response to Joint Motion for Approval of Settlement Agreement (Sept. 22, 1995) at 4-5 [Staff Reply]. According to the staff, this clause provides ample protection because it allows the staff to "bring an enforcement action against SFC seeking sanctions for violating the Settlement Agreement if SFC did not seek the return of such funds to be added to its pool of assets or revenues." Staff Reply at 5.

The October 1993 enforcement order at issue in this proceeding makes it apparent that an essential staff concern is the possibility that SFC revenues and assets will ultimately be insufficient fully to cover the costs of decommissioning SFC's Gore, Oklahoma facility. *See* 58 Fed. Reg. 55,087, 55,089 (1993). Consequently, a central component of the public interest assessment of the SFC/staff settlement agreement now before the Board must be the degree to which the agreement ensures that the already limited assets and revenues of SFC will be protected from inappropriate dissipation so as to be available for decommissioning. And if, as the staff's own description suggests, staff enforcement authority does not reach beyond requiring SFC to ask for the improperly disbursed funds back, a legitimate question seemingly exists about the degree to which the proposed agreement serves the public interest function of properly maintaining the pool of decommissioning funds.[2]

Undoubtedly, this potential problem of improper disbursement and recapture of SFC funds would be of considerably less concern if the agency has the authority to maintain an action to recover improperly disbursed funds from the party receiving those funds. Whether this authority exists is, at best, problematic. Therefore, before approving the agreement, I would explore with the parties the question of the agency's authority in this regard. And, if it turns out that the agency's enforcement arsenal does not include this authority, the sufficiency of the staff's oversight efforts relative to the reasonableness of SFC expenditures and disbursements likely should be the subject of further scrutiny as well.[3]

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[1] Although none of the parties have raised or addressed the point, as a procedural matter there is a question whether the concerns about the settlement agreement expressed by NACE and the Cherokee Nation in response to the joint motion for approval of the settlement agreement should be considered as, and assessed under the standards governing the admissibility of, late-filed contentions. *See* 10 C.F.R. § 2.714(a)(1).

[2] In considering the sufficiency of the protection afforded by the proposed agreement, the constraints on SFC's assets and revenues suggests that any staff enforcement action against SFC for improperly disbursing assets is not likely to produce more decommissioning funds.

[3] Paragraph 5 of the proposed agreement provides that the staff will have the right to receive SFC annual audited financial statements and to have reasonable access to SFC financial records and books for audit purposes. The staff has declared that it did not seek further measures relating to oversight of SFC expenditures, such as prior staff approval, because of a concern about intrusion into the management of the daily affairs of SFC. *See* Staff Reply

(Continued)

II. BANKRUPTCY AND NOTICE TO THE STAFF

In responding to intervenor concerns about the dissipation of assets to repay the claims of SFC creditors, SFC indicates that it has few secured creditors. The largest appears to be the Kerr-McGee Corporation, which holds a $10.6 million note giving Kerr-McGee a lien on SFC's property, plant, and equipment. *See* SFC Reply at 3-4. While SFC seemingly is in default on this note because it has not made any principal or interest payments since August 1993, Kerr-McGee apparently will not make any attempt to foreclose on or otherwise enforce the note until decommissioning is completed.[4]

The degree to which SFC's response puts these intervenor concerns to rest is tempered by a recent submission from the State of Oklahoma that SFC may be considering bankruptcy. The Board has not provided the parties with an opportunity to respond to the State's suggestion, leaving me unable fully to assess its validity.[5] On its face, however, it raises the specter that, because the agency seeking decommissioning funds in a bankruptcy proceeding may well be only an unsecured creditor, *see Dollar Savings Association v. Eisen* (*In re METCOA, Inc., fdba The Pesses Co.*), Case No. B83-00415, Adv. No. B85-0092, slip op. at 17-18 (Bankr. N.D. Ohio Nov. 18, 1986), some SFC assets will fall beyond the agency's reach for dedication to funding decommissioning activities.

Current agency regulations require that a source materials licensee like SFC need only inform the staff of a bankruptcy after it has occurred. *See* 10 C.F.R. § 40.41(f). Prior to approving this agreement, however, I would seek information from SFC and the staff regarding the likelihood of bankruptcy. At the same time, I would explore with the staff the question of whether, if the agreement provided for reasonable prior notice from SFC of its intent to file for bankruptcy, the staff

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at 5 n.2. If the agency has no authority to recapture improperly disbursed funds, then the question of whether the staff oversight mechanisms included in the agreement are adequate seemingly is an issue that merits further exploration.

[4] As part of an additional reply filing, SFC supplied a letter from a senior Kerr-McGee official stating that Kerr-McGee has no plans to initiate collection on the $10.6 million note until decommissioning is completed. *See* SFC's Reply to Intervenors' Renewed Opposition (Sept. 29, 1995) at 3-4. Kerr-McGee's action in this regard is not particularly surprising, given that foreclosure on the note likely would bring the SFC property back into Kerr-McGee's hands, along with the accompanying responsibility for clean-up of contamination on the property.

[5] This submission is in a September 29, 1995 letter from the Attorney General of Oklahoma to staff counsel, a copy of which was provided to the Board by staff counsel by letter dated October 5, 1995.

The State of Oklahoma is not a party to this proceeding. Nonetheless, under the agency's rule governing interested governmental entities, it readily could become a participant in this case. *See* 10 C.F.R. § 2.715(c). Moreover, the recognized limitation that the State must "take the proceeding as it finds it," *see Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-600, 12 NRC 3, 8 (1980), likely would not preclude the State from commenting on the proposed settlement. Particularly in the context of the Board's "public interest" determination regarding the pending settlement proposal, giving the State's concerns minimal recognition by affording the other parties an opportunity to address them does not seem untoward.

would be able to take any action prior to bankruptcy that would provide it with a preferential claim to secure SFC assets for the purpose of decommissioning.

III. GLOBAL SETTLEMENT

General Atomics (GA), the other object of the October 1993 enforcement order, and the staff currently are engaged in negotiations in an attempt to settle the staff's claims that GA is jointly and severally liable for decommissioning funding for the Gore facility. Based on the information now before me, I am unable to conclude that action now to approve a separate settlement between SFC and the staff — as opposed to waiting to give "global" consideration to all settlements encompassing GA, SFC, and the staff — is in the public interest.

Putting aside any jurisdictional questions about the extent and nature of GA control over SFC, there is a clear linkage between GA and SFC by reason of their parent-subsidiary relationship and the involvement of GA and its subsidiaries, including SFC, in the ConverDyn partnership agreements under which a substantial portion of any SFC revenue purportedly is to be generated. In light of these inter-relationships, it would seem that the Board's best opportunity fully to understand and assess the implications of any staff settlement with either GA or SFC would come when the Board has before it staff settlements with both parties that would resolve this case in toto.[6]

Because of this concern, before approving this settlement agreement I would request additional briefing by the parties on the question of why delaying a Board ruling on the SFC/staff agreement until the conclusion of the ongoing settlement negotiations between GA and the staff is inconsistent with the public interest in ensuring that the settlements reached in this proceeding provide adequate funding for decommissioning SFC's Gore facility.

[6] Also in this regard, in contrast to the stated conclusion in the staff's October 1993 order that the ConverDyn agreements were inadequate to fulfill the decommissioning funding requirements of 10 C.F.R. §§ 40.36, 40.42, in the absence of funding commitments from GA, *see* 58 Fed. Reg. 55,091-92, it is not now apparent whether the SFC/staff agreement is consistent with these regulatory requirements. The agreement does not provide any specific decommissioning funding figure for which SFC is liable, whether through the ConverDyn agreements or otherwise, and GA's contribution to decommissioning funding, if any, is still indeterminate because of the pendency of settlement negotiations. By decoupling the settlement agreements of GA and SFC, the Board has not abandoned its prerogative, in assessing whether the public interest will be served by any GA settlement, to consider whether the decommissioning funds generated under the SFC settlement agreement and the GA settlement agreement, in combination, will cover the total costs of decommissioning the Gore facility and the ramifications of any funding shortfall.

ATTACHMENT

SETTLEMENT AGREEMENT

THIS AGREEMENT is made by and between Sequoyah Fuels Corporation ("SFC") and the Staff of the United States Nuclear Regulatory Commission ("NRC" or "Commission"), to wit:

WHEREAS, on October 15, 1993 the Commission issued an order to SFC and General Atomics ("GA") (58 Fed. Reg. 55087 (Oct. 25, 1993)) (the "Order"), relating to the site decontamination and decommissioning funding for the facilities located in Gore, Oklahoma that are licensed under NRC License No. SUB-1010, Docket No. 40-8027 ("Sequoyah Facility"); and

WHEREAS, a hearing on the Order is now being held before an Atomic Safety and Licensing Board (the "Board") in Docket No. 40-8027-EA, and SFC and the NRC Staff are parties in such hearing; and

WHEREAS, the NRC Staff and SFC understand and acknowledge that, in meeting any obligations that SFC has under existing regulations or may have under future regulations, SFC cannot provide funds for decommissioning the Sequoyah Facility in excess of all of its "net assets" and "net revenues," as those terms are defined in this Agreement, and is unable to obtain and provide financial assurance for decommissioning beyond pledging all of its net assets and net revenues; and

WHEREAS, the NRC Staff and SFC understand and acknowledge that it is in the public interest to avoid the dissipation of their manpower and financial resources in litigation, particularly since it is in the public interest that SFC's resources be devoted to completion of decommissioning of the Sequoyah Facility; and

WHEREAS, both the NRC Staff and SFC have engaged in negotiation and compromise because they recognize that certain advantages and benefits may be obtained by each of them through settlement and compromise of the controverted matters now pending; and

WHEREAS, the NRC Staff and SFC believe that this Agreement is in the public interest.

NOW, THEREFORE, in consideration of the mutual promises made herein, SFC and the NRC Staff agree as follows:

1. *Definitions.* The following terms used in this Agreement are defined as follows:

   a. "Gross assets." SFC's gross assets include, but are not limited to, cash and cash equivalents on hand, accounts receivable, materials and supplies inventories, prepaid expenses, unbilled receivables,

property, plant and equipment, and any other known or future assets owned or acquired by SFC.

b. "Gross revenues." SFC's gross revenues include, but are not limited to, standby fees and additional standby fees received by SFC under the "Sequoyah Fuels Corporation Standby Agreement" (Nov. 19, 1992) with ConverDyn, revenues received by SFC under the "Sequoyah Fuels Corporation Conversion Services Agreement" (Nov. 19, 1992) with ConverDyn (these foregoing two agreements are hereafter collectively referred to as the "ConverDyn Arrangements"), revenues received by SFC under contracts for conversion services with entities listed in Schedule C of the foregoing agreement, revenues from the sale or salvage of plant, equipment, material or supplies, cash flow from financing activities, and any other known or future revenues derived by SFC from whatever source.

c. "Reasonable and necessary expenses." SFC's reasonable and necessary expenses include:

(1) reasonable and necessary expenses paid by SFC that are consistent with SFC's obligations under this Agreement and its business needs and sound judgment, exercising due care to preserve its assets and revenues for the completion of decommissioning; and

(2) salaries and benefits of SFC personnel and expenses for contractor personnel that are reasonable and commensurate with salaries and benefits of personnel performing similar functions for other companies engaged in activities of similar complexity in the nuclear industry; and

(3) payments for taxes, utilities, reasonable and necessary insurance expenses, reasonable and necessary professional services, license fees, inspection fees, and any other payments made to fulfill SFC's contractual obligations; and

(4) payments for conversion services provided by ConverDyn in satisfaction of SFC's current conversion contracts; and

(5) reasonable and necessary costs incurred in meeting SFC's ongoing decontamination and decommissioning obligations, in complying with regulatory requirements, and in complying with orders or otherwise fulfilling obligations imposed by competent federal, state, and local governmental authorities; and

(6) reasonable and necessary costs incurred in the sale or salvage of SFC's plant, equipment, materials and supplies; and

(7) costs paid for goods and services provided to SFC by GA and/or its parent companies, affiliates and subsidiaries ("Related Companies") that are rendered to SFC at rates consistent with those charged by GA, and/or Related Companies, to other customers for comparable services, and not in excess of rates otherwise available to SFC for performance of such services; and

(8) general and administrative expenses and overhead costs and expenses allocated to SFC by GA and/or Related Companies (not covered by the services charges referred to in section 1.c.(7) immediately above) that are allocated in accordance with established practices for allocating expenses among related privately held corporations, consistently applied, and consistent with generally accepted accounting principles; and

(9) payments of debts incurred by SFC including principal and interest payments to SFC's creditors, including, but not limited to, those made in accordance with the two revolving notes, for $4.5 million and $2.5 million, respectively, currently in place with GA (the two notes together are hereinafter referred to as the "Lines of Credit"). All such payments shall be made in accordance with the reasonable and ordinary terms and conditions of SFC's agreements with its creditors.

d. "Net assets." SFC's net assets are its gross assets, subject to its obligations to ConverDyn and subject to the rights of senior lien-holders.

e. "Net revenues." SFC's net revenues are its gross revenues that are available after SFC has paid its reasonable and necessary expenses, subject to its obligations to ConverDyn and subject to the rights of senior lien-holders.

2. SFC will carry out the funding plan described in the Preliminary Plan for Completion of Decommissioning submitted to the NRC on February 16, 1993, by devoting all of its net assets and net revenues to the completion of decommissioning of the Sequoyah Facility, in accordance with the requirements of the NRC, the Environmental Protection Agency, and any other state or federal agency with jurisdiction, until the NRC Staff determines that such decommissioning has been satisfactorily completed.

3. SFC specifically pledges by this Agreement to devote all of its net assets and net revenues to completion of decommissioning and pledges to diligently pursue and use its best efforts to preserve all of its contractual rights under the ConverDyn Arrangements, until the NRC Staff determines that such decommissioning has been satisfactorily completed.

4. In committing its net assets and net revenues to the completion of decommissioning, SFC's expenditure of funds to pay its reasonable and necessary expenses shall be consistent with its business needs and sound judgment within the following terms and conditions:

   a. SFC shall not enter into any agreement, or any amendment to an agreement, with GA and/or Related Companies which would require SFC to pay interest charges or fees in excess of those charges and fees normally charged by GA and/or such Related Companies for such loans to a similarly situated Related Company or to accept terms and/or pay interest charges or fees higher than those that would be available to SFC in a similar transaction negotiated at arms length with another lender; and

   b. acknowledging and understanding that GA has deposited sums of money in two cash collateral accounts held by GA at a financial institution so that SFC could obtain a letter of credit for purposes of compliance with Oklahoma's workmen's compensation requirements ($500,000) and a letter of credit for purposes of compliance with 10 CFR § 40.36 ($750,000), that GA's deposit of these sums of money reduces the funds available to SFC pursuant to the Lines of Credit currently being provided by GA to SFC, and that SFC is obligated to repay these sums of money and would do so under the terms of the Lines of Credit, nothing in this Agreement shall be construed to prohibit or limit: (1) the return to GA of its funds currently held in the cash collateral accounts which support SFC's letters of credit; (2) the substitution of SFC funds for the cash collateral accounts held by GA, if SFC has the funds available to do so; or (3) the repayment of funds to GA by SFC under the terms of its Lines of Credit and in fulfillment of its obligations, if SFC has the funds available to do so; and

   c. any sale or disposition of assets, as appropriate, reasonable and warranted in SFC's discretion, including the sale or transfer of assets to GA or Related Companies, shall be made at prices that assure that SFC receives payment at fair market value or salvage value upon the sale of such assets, such prices to be established either in good faith

arms length negotiations, exercising sound business judgment, or by obtaining an objective evaluation by an expert third party; and

d. SFC will exercise due care to preserve its entitlement to standby fees and additional standby fees by fulfilling its contractual obligations pursuant to the ConverDyn Arrangements.

5. Until the NRC Staff determines that the decommissioning of the Sequoyah Facility has been satisfactorily completed, SFC will provide the NRC Staff with copies of those annual audited financial statements in which SFC's financial information is consolidated. In addition, SFC will make its financial records and books available for audit by the NRC Staff at any reasonable time.

6. The NRC Staff and SFC agree that SFC's commitments in the Agreement represent a good faith effort to provide for the funding of the decommissioning of the Sequoyah Facility and to assure that its assets and revenues are effectively utilized to fulfill SFC's obligations and to complete decommissioning. Therefore, the NRC Staff hereby rescinds the Order insofar as it applies to SFC and accepts the terms of this Agreement in lieu of those provisions of the Order that are directed to SFC. Subject to the provisions of section 7 below, the NRC Staff also agrees to forbear from taking any enforcement or other action against SFC or its current of former officers, directors or employees (relating to their actions in their official capacities), (a) based upon any alleged requirement to provide funds for decommissioning the Sequoyah Facility or to provide financial assurance for decommissioning the Sequoyah Facility beyond the commitments of all of SFC's net assets and net revenues provided for in this Agreement, whether such requirement arises under any current NRC regulations or under any future regulation that might alter, redefine or clarify the currently applicable requirements, or (b) based upon the facts alleged in the Order and/or those reasonably known by the NRC that are related to the subject matter of the Order.

7. Nothing in this Agreement shall limit the NRC Staff's ability to take appropriate enforcement action to enforce SFC's compliance with this Agreement, or to take appropriate enforcement action based upon material information that is not currently available to or known by the NRC Staff or based upon evidence that any representation in this Agreement is incomplete or inaccurate in a material respect. The NRC Staff and SFC acknowledge that the terms and provisions of this Agreement, once approved by the Board, shall be incorporated by reference into an order issued by the Board, as the term "order" is used in subsections (b), (i) and (o) of section 161 of the Atomic Energy Act of 1954, as amended

(the "Act"), 42 U.S.C. § 2201, and shall be subject to enforcement pursuant to the Commission's regulations and Chapter 18 of the Act, 42 U.S.C. § 2271 *et seq.*

8. Nothing in this Agreement shall be construed to limit the NRC Staff's ability to continue to pursue litigation with GA regarding those provisions of the Order, and any related factual allegations in the Order, that are directed to GA.

9. The NRC Staff and SFC understand and acknowledge that this Agreement is the result of a compromise and shall not for any purpose be construed as an admission of the facts alleged or conclusions of law drawn in the Order, as an admission of the alleged joint and several responsibilities of SFC included in Section VII.A and other sections of the Order, or as an admission by SFC of any violation of 10 CFR § 40.36, 10 CFR § 40.42, or of any statute, regulation, license condition, or other regulatory requirement.

10. The NRC Staff and SFC agree that no inference adverse to either party shall be drawn based upon the parties having entered into this Agreement. They further agree that any factual findings or conclusions of law reached in any proceedings against GA relating to the Order shall not be binding on SFC, and SFC shall not be prejudiced by such findings or conclusions in any subsequent administrative or judicial proceedings involving SFC.

11. The NRC Staff and SFC agree to file a joint motion requesting that the Board approve this Settlement Agreement and dismiss SFC from the proceeding, pursuant to the Commission's regulations in 10 CFR § 2.203. Upon approval of this Settlement Agreement by the Board, without any substantive modification by the Board, the NRC Staff and SFC agree that they will not appeal the Board's approval or otherwise seek judicial review of such approval. If this Agreement is not approved by the Board, or if this Agreement is approved by the Board but is modified in any substantive manner by the Board, or if any body or court to which the Board's approval is appealed reverses such approval or affirms the approval but modifies the Agreement in any substantive manner, either the NRC Staff or SFC may void this Agreement by giving written notice to the other party within ninety (90) days of such action by the Board, body or court, unless such 90-day period is extended by written agreement of both parties. The NRC Staff and SFC agree that under such circumstances and upon request they will negotiate in good faith to resolve differences.

12. This Agreement shall become effective upon final action approving this Agreement by the Board.

IN WITNESS WHEREOF, the NRC Staff and SFC have caused this Settlement Agreement to be executed by their duly authorized representatives on this 18th day of August, 1995.

FOR SEQUOYAH FUELS CORPORATION:	FOR THE NUCLEAR REGULATORY COMMISSION
John H. Ellis President	Hugh L. Thompson, Jr. Deputy Executive Director for Nuclear Materials Safety, Safeguards and Operations Support

Directors' Decisions Under 10 CFR 2.206

DIRECTORS' DECISIONS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Carl J. Paperiello, Director

In the Matter of **Docket No. 40-8027**

SEQUOYAH FUELS CORPORATION
(Gore, Oklahoma Facility) **October 23, 1995**

The Director of the Office of Nuclear Materials Safety and Safeguards denies in part a petition dated March 11, 1995, filed with the Nuclear Regulatory Commission (NRC) by Native Americans for a Clean Environment (NACE), requesting that the NRC take action with respect to the Sequoyah Fuels Corporation (SFC) facility in Gore, Oklahoma. The petition requests that the NRC: (1) reverse the NRC Staff's decision to permit SFC to proceed with site characterization without submitting a final Site Characterization Plan (SCP) by issuing an Order or a Confirmatory Action Letter obliging SFC to submit a final SCP by a date certain; (2) obtain a copy of the Environmental Protection Agency's (EPA) title search or perform a title search of all property used in connection with the SFC license in order to clarify the identity and ownership of all property subject to NRC License No. SUB-1010; (3) issue an order forbidding SFC, Sequoyah Fuels International Corporation, Sequoyah Holding Corporation, or any other associated corporation that holds title to property under NRC License No. SUB-1010 from transferring any interest in any of its property before SFC applies for and receives a license amendment authorizing transfer; and (4) before issuing any such license amendment, find reasonable assurance that any entity acquiring an interest in the SFC property fully understands the nature of the liabilities and responsibilities it is undertaking for cleanup and long-term care of the site and that it has the financial capability to carry out those responsibilities.

The Petitioner's request that SFC be ordered to submit a written final SCP by a date certain is denied. Petitioner's request that NRC perform a title search of property subject to NRC License No. SUB-1010 was satisfied by EPA's provision of a copy of the title search it had performed. Action on

Petitioner's request for an order forbidding the transfer of any interest in land subject to NRC License No. SUB-1010 before SFC applies for and receives a license amendment permitting such transfers is unnecessary because applicable regulations address Petitioner's concerns. Likewise, Petitioner's request that, before granting such a license amendment application, NRC ensure that potential purchasers of property be subject to NRC License No. SUB-1010 to be fully apprised of their obligations for site remediation and long-term care and that NRC ensure that such potential purchasers are financially qualified to do so, is unnecessary because applicable regulations address Petitioner's concerns.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

Native Americans for a Clean Environment (NACE) submitted to the Nuclear Regulatory Commission (NRC), a "Petition for an Order Requiring Sequoyah Fuels Corporation to File a Final Site Characterization Plan (SCP) and for an Order to Obtain a License Amendment" (Petition) dated March 11, 1995. NACE requested NRC to take action with respect to the Sequoyah Fuels Corporation (SFC or Licensee) pursuant to 10 C.F.R. § 2.206. The Petitioner requests that NRC:

(1) reverse the NRC Staff's decision to permit SFC to proceed with site characterization without submitting a final SCP, by issuing an Order or a Confirmatory Action Letter obliging SFC to submit a final SCP by a date certain;

(2) obtain a copy of the Environmental Protection Agency's (EPA) title search or perform a title search of all property used in connection with the SFC license, in order to clarify the identity and ownership of all property subject to NRC License No. SUB-1010;

(3) issue an order forbidding SFC, Sequoyah Fuels International Corporation, Sequoyah Holding Corporation, or any other associated corporation that holds title to property under NRC License No. SUB-1010 from transferring any interest in any of its property before SFC applies for and receives a license amendment authorizing transfer; and

(4) before issuing any such license amendment, find reasonable assurance that any entity acquiring an interest in the SFC property fully understands the nature of the liabilities and responsibilities it is undertaking for cleanup and long-term care of the site and that it has the financial capability to carry out those responsibilities.

The petition alleges the following bases for its requests:

(1) The NRC Staff illegally and improperly excused SFC from its obligation to submit a final SCP;
(2) SFC is presenting a "Trust Indenture" to several towns and the county of Sequoyah for the creation of an industrial park;
(3) Neither SFC's letter to Mr. Main (Secretary of Commerce, Oklahoma Department of Commerce), the Fact Sheet, nor the Trust Agreement, itself, refers to the fact that SFC has been ordered by NRC and EPA to characterize the extent of the contamination in the 1400 acres that surround the 85-acre processing area, the focus of site characterization and remediation efforts; nor do those documents refer to the other sources of potential contamination, consisting of groundwater migration from the admittedly contaminated processing area, effluent streams and ditches, and the Carlisle School (located on the land proposed for an industrial park, and used by SFC as a laboratory);
(4) The Trust Indenture depicts the 1400 acres of land subject to NRC License No. SUB-1010 as the candidate area for the industrial park; SFC has made conflicting representations regarding the size of the "facility" or "site" to NRC and in the Trust Indenture.

SFC responded to the petition by a letter dated March 29, 1995, and requests that the petition be denied in all respects.

By letter dated March 31, 1995, NACE supplemented its petition. NACE states that SFC is conducting site characterization by utilizing the EPA Facility Investigation Workplan (FIW), which was prepared for the EPA pursuant to requirements of the Resource Conservation and Recovery Act (RCRA). Petitioner asserts that by relying on the FIW to conduct site characterization, SFC has neither understood nor implemented NRC Staff criticisms of the draft SCP. Petitioner asserts that NRC should require SFC to submit a written final SCP because the FIW does not:

(1) Resolve NRC comments related to site hydrogeology and vertical and lateral contamination;
(2) Resolve NRC sample density concerns; or
(3) Provide for characterization of the DUF_4 processing, decorative pond, and parking lot areas.

By letter dated May 10, 1995, the Director, Office of Nuclear Material Safety and Safeguards acknowledged receipt of the petition, and informed the Petitioner that the petition would be evaluated under section 2.206 of the Commission's regulations.

I have completed my evaluation of the matters raised by the Petitioner and have determined that, for the reasons stated below, the petition is denied in part, was satisfied in part, and NRC regulations address the Petitioner's concerns related to the requests for issuance of orders related to transfer of property.

II. BACKGROUND

From 1970 until July 6, 1993, SFC operated a uranium conversion facility at a site located in Gore, Oklahoma, under the authority of NRC License No. SUB-1010, issued pursuant to 10 C.F.R. Part 40. The main process was the conversion of uranium oxide (yellowcake) to uranium hexafluoride. A second process, initiated in 1987, consisted of the conversion of depleted uranium hexafluoride to uranium tetrafluoride, the first step in producing depleted uranium metal.

After the discovery of contaminated soil surrounding structures used by SFC for its licensed activities, NRC Staff issued an order suspending SFC's authorization to operate its conversion facilities. *See* "Order Modifying License (Effective Immediately) and Demand for Information," EA 91-067 (Oct. 3, 1991). After studies by SFC, operational and organizational changes by SFC, extensive NRC inspections, and several public meetings, NRC, on April 16, 1992, lifted the order suspending the SFC license and authorized SFC to resume operation of its conversion facility.

In November 1992, SFC (and subsequently in writing) informed NRC that operation of its main process for the conversion of uranium oxide (yellowcake) to uranium hexafluoride was permanently terminated and that the second process, the conversion of depleted uranium hexafluoride to uranium tetrafluoride, would be terminated by July 1993. SFC formally notified NRC of its intentions to terminate all conversion processes and seek license termination in accordance with 10 C.F.R. § 40.42(e), in a letter dated February 16, 1993. In addition, a proposed plan to address decommissioning issues related to the SFC facility, entitled "Preliminary Plan for Completion of Decommissioning (PPCD)," was enclosed in its letter of February 16, 1993.

By letter dated March 23, 1993, NRC Staff notified SFC that its 10 C.F.R. § 40.42(e) notification had been accepted, and that activities at the site should be limited to those related to decommissioning. By letter dated July 7, 1993, SFC notified NRC Staff that SFC had ceased all operational licensed activities. Since that time, SFC has restricted its activities to disposal of contaminated material and planning for decommissioning.

On August 4, 1993, SFC and EPA Region VI signed an Administrative Order on Consent (AOC), establishing a schedule for compliance with section 3008(h) of the Solid Waste Disposal Act, as amended by the RCRA, as further amended by the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. § 6928(h). The AOC required SFC to perform a number of tasks aimed at monitoring site conditions, site characterization, corrective measures, and financial assurance. A key element of the AOC is the RCRA Facility Investigation (RFI) Workplan. The RFI Workplan data needs closely parallel those of an NRC SCP. For SFC's site, both the RFI Workplan and the SCP involve characterization of much of the same property. The major difference between the RFI Workplan and the

SCP rests only on the constituents that are analyzed (nonradioactive materials for EPA and radioactive materials for NRC).

Common to both plans is the characterization of the soil, bedrock, and groundwater underlying the site. SFC agreed to drill a series of wells to the next lower water-bearing strata to better define the geology underlying the site and to sample for contamination. These wells are in addition to the 100 wells previously installed by SFC at the site. Whether or not the deeper wells planned by SFC to address EPA concerns will also satisfy NRC concerns related to the vertical extent of radiological contamination will have to await the evaluation of sample analyses.

To avoid unnecessary duplicative regulatory actions, EPA and NRC drafted a site-specific Memorandum of Understanding (MOU). Under the terms of this MOU, EPA and NRC will exchange pertinent documents, keep each other informed of planned actions, and, to the extent possible, coordinate major characterization and remediation tasks on similar schedules. The MOU was signed by EPA on September 21, 1995, and by NRC on September 25, 1995.

SFC submitted to EPA a draft RFI Workplan in January 1994. EPA reviewed the draft RFI Workplan and provided SFC comments in a letter dated August 25, 1994. Based on the comments provided by EPA, SFC made changes to the draft RFI Workplan and a final Workplan was approved by EPA in December 1994. In accordance with the requirements of the AOC, SFC must submit a final RFI Report to EPA by December 1995.

SFC submitted a draft SCP to NRC in January 1994. Interested persons, including EPA, the United States Geological Survey (USGS), and NACE reviewed the draft SCP and provided comments to NRC. Consistent with the Staff's commitment to NACE, in a letter from J. H. Austin (NRC) to D. Curran (NACE), dated December 9, 1993, to keep NACE involved in the review process, the NACE comments were discussed with representatives of NACE, NRC, and SFC in a May 31, 1994 meeting.

NRC Staff performed an extensive review of the draft SCP and of all the comments regarding the draft SCP. Where appropriate, NRC Staff factored those comments into NRC Staff's comments, which were transmitted to SFC by letter dated November 3, 1994. The essence of NRC Staff's comments was that SFC must do substantially more sampling than proposed in the draft SCP. Additional sampling is necessary to reliably identify the types and extent of contamination on and around the SFC site. NRC Staff requested that SFC address the Staff's comments, or provide the basis for not making changes to the SCP.

In its November 1994 quarterly report to EPA, required by the AOC, SFC raised concerns related to possible duplication of SFC's decontamination and decommissioning efforts that could result in unnecessarily increased costs.

In January and February 1995, NRC Staff engaged in technical discussions with SFC regarding the November 3, 1994 comments of the Staff concerning

the draft SCP. The discussions covered a broad range of issues related to site characterization and scheduling.

By letter dated February 5, 1995, the Director, Division of Waste Management, Office of Nuclear Material Safety and Safeguards, confirmed NRC Staff's understanding of SFC's verbal commitment, by telephone in early February 1995, to use NRC Staff's comments of November 3, 1994, during site characterization and in SFC's preparation of its Site Characterization Report (SCR). Furthermore, NRC agreed with SFC that the schedule for the SCR should parallel that for the RFI Report, in order to minimize possible redundancy and associated costs, and to facilitate the effective utilization of SFC resources. Accordingly, NRC gave SFC a due date of January 15, 1996, for submission of a draft SCR. The Staff also reminded SFC that NRC may establish legally binding requirements, if necessary, to ensure timely and effective remediation of Site Decommissioning Management Plan (SDMP) sites. The SFC facility is an SDMP site. In its March 29, 1995 response to the petition, SFC again committed to address the NRC's comments on the SCP during conduct of the site characterization effort. SFC confirmed its understanding of the Staff's November 3, 1994 comments by a letter dated June 2, 1995, in which SFC again committed to incorporate those Staff comments into its SCR.

III. DISCUSSION

A. Petitioner Requests That NRC Staff Reverse Its Decision To Permit SFC To Proceed with Site Characterization Without Submitting a Revised SCP, by Issuing an Order or Confirmatory Action Letter Requiring SFC To Submit a Written Final SCP

Petitioner contends that by not requiring SFC to submit a written final SCP, NRC Staff illegally and improperly excused SFC from its obligations in violation of the:

(a) Timeliness in Decommissioning Rule;
(b) NRC's "Action Plan to Ensure Timely Cleanup of Site Decommissioning Management Plan Sites" (Action Plan), 57 Fed. Reg. 13,389 (Apr. 16, 1992);
(c) NRC's December 29, 1992 Demand for Information to SFC;
(d) MOU between NRC and EPA; and
(e) NRC's commitments to Petitioner in a letter dated December 9, 1993, that SFC would be required to demonstrate how it would sample all potentially contaminated areas as part of the SCP.

NRC Staff weighed the potential benefits, and the increased costs of and delays in decommissioning, of requesting SFC to revise its draft SCP in accordance with NRC Staff comments or to incorporate these revisions into the site

characterization process and to demonstrate that the NRC comments were accommodated in the proposed decommissioning plan. SFC understood the NRC comments and had already agreed to incorporate into the site characterization process and SCR. Therefore, NRC Staff concluded that the objectives of site characterization could be met, and data appropriate to support a proposed decommissioning alternative could be produced, if NRC Staff's comments were implemented during site characterization. NRC Staff's action was intended to avoid potentially costly delays in decommissioning and to prevent duplication of regulatory actions, based on work already under way as a part of the EPA-approved RFI Workplan.

Additionally, the Staff's action was consistent with agency efforts to streamline the Site Decommissioning Management Plan (SDMP) regulatory review process.[1] The SFC site is an SDMP site. This streamlining involves, among other things, discontinuance of NRC Staff review of SCPs and SCRs prior to the submittal of decommissioning plans. Site characterization information will be considered by NRC Staff in its review of decommissioning plans. NRC regulations do not require the submission of SCPs or SCRs, but do require site characterization data to be submitted with the decommissioning plan. *See* 10 C.F.R. § 40.42(f)(4)(i). Streamlining the SDMP process is consistent with NRC regulations.

Streamlining promotes a more coordinated and focused review of the licensee's characterization information and places greater emphasis on issues that affect the selection and implementation of a decommissioning approach.

Contrary to Petitioner's assertion, NRC Staff's action was consistent with the Timeliness in Decommissioning rule. Those amendments to NRC regulations establish specific time periods for submission of a decommissioning plan and completion of decommissioning, and were intended to reduce potential risk to public health and the environment at facilities after licensed activities have ceased. *See* "Timeliness in Decommissioning of Materials Facilities," 59 Fed. Reg. 36,026 (July 15, 1994). The Staff's February 5, 1995 letter allowed SFC to proceed with site characterization on the condition that SFC include in its SCR the Staff's November 3, 1994 comments regarding the draft SCP. The Staff determined that inclusion of those comments would produce adequate site characterization and would reduce delay. Although site characterization and the data derived during site characterization are necessary inputs to a decommissioning plan,[2] SCPs and SCRs are not expressly required by NRC regulations. The Staff did not release SFC from the "timeliness" rule or

[1] On May 19, 1995, the NRC Staff briefed the Commission on SDMP Policy and Program issues, including the Staff's implementation of streamlining.

[2] The licensee's decommissioning plan must include a description of the site, buildings, and outside areas affected by licensed activities. 10 C.F.R. § 40.42(f)(4)(i).

from the requirement to submit a decommissioning plan. *See* 10 C.F.R. § 40.42(f)(1). The Staff's action reduced potential delays in site characterization and decommissioning, and cannot be considered to have contributed to any delay in SFC's decommissioning the SFC site.

Contrary to being in violation of the NRC's Action Plan, NRC Staff's February 5, 1995 letter to SFC was consistent with the plan. The Action Plan was intended to encourage compliance with NRC timeliness in decommissioning regulations. The Action Plan is not itself a rule and contains no enforceable standards. The Action Plan refers to submittal of an SCP, but does not require NRC approval. The Action Plan encourages licensees to enter into early consultation with NRC Staff regarding site characterization and decommissioning issues. Such consultation is intended to address site-specific conditions to ensure that site characterization is appropriately planned and conducted, and of sufficient depth to support a selected decommissioning option. Consistent with the Action Plan, NRC Staff engaged in site-specific technical discussions with SFC regarding not only NRC's comments on the draft SCP, but also the comments of NACE, the USGS and EPA. *See* Section II, *supra.* The NRC Staff's February 5, 1995 letter to SFC was consistent with the Action Plan, and cannot be considered to have contributed to any delay in compliance with timeliness requirements for decommissioning, for the same reasons that the Staff's action was consistent with the Timeliness in Decommissioning Rule.

Petitioner does not explain, nor is it apparent how, the NRC Staff's February 5, 1995 letter contravened the December 29, 1992 Demand for Information (DFI) to SFC. As Petitioner notes, the February 13, 1993 Preliminary Plan for Decommissioning, submitted by SFC in response to the DFI, commits SFC to submission of an SCP to NRC and to implementation of the SCP by early 1994. The Staff in its February 5, 1995 letter did not delay the submission or implementation of the SCP. To the contrary, the Staff permitted SFC to proceed expeditiously with an SCP that NRC had reviewed and considers adequate, as long as the Staff's November 3, 1994 comments are incorporated, which SFC has undertaken to do.

Contrary to Petitioner's assertion, NRC Staff's action in its letter of February 5, 1995, did not violate the (then draft) MOU between NRC and EPA. The then draft MOU, as well as the final MOU, state that NRC will ensure that SFC develops and implements an SCP, which NRC Staff has done. Moreover, in the spirit of the EPA and NRC site-specific MOU, NRC and EPA have worked together to avoid unnecessary duplicative regulatory actions and their attendant costs. Specifically, after consultation with the EPA, NRC Staff agreed in its February 5, 1995 letter to SFC's request that the schedule for site characterization and submission of the SCR should parallel that of the EPA RFI Workplan. The development of the EPA MOU and NRC MOU was a major consideration in NRC Staff's action allowing SFC to proceed with site characterization and to

incorporate NRC Staff's comments in the SCR, rather than to require submission of yet another version of the SCP.

Contrary to the Petitioner's assertions, NRC Staff's action by its letter of February 5, 1995, did not violate NRC's commitments to Petitioner, made in a letter dated December 9, 1993, that SFC would be required to demonstrate how it would sample all potentially contaminated areas as part of the SCP. The December 9, 1993 letter also stated that NACE's concerns would be addressed during NRC Staff's review of the SCP.

NRC Staff met these commitments to NACE. NACE reviewed the SFC draft SCP and provided comments to NRC Staff. NACE's comments were discussed in a meeting on May 31, 1994, with representatives from NACE, NRC, and SFC. All applicable NACE comments were incorporated into NRC Staff's comments and transmitted to SFC by letter dated November 3, 1994. SFC verbally committed, by telephone in early February 1995, to use NRC Staff's comments of November 3, 1994, during site characterization and in SFC's preparation of its SCR. SFC confirmed its understanding of the Staff's November 3, 1994 comments by a letter dated June 2, 1995, in which SFC again committed to incorporate those Staff comments into its SCR. Accordingly, contrary to Petitioner's assertion, there is no basis to conclude that NACE's concerns will not in fact be addressed. Moreover, NRC remains committed to ensuring that SFC conduct a complete and accurate characterization of all radiological contamination on the SFC site and on property affected by SFC's licensed activities, through reviews of SFC's SCR and a subsequent decommissioning plan.

By letter dated March 31, 1995, NACE supplemented its petition. NACE states that SFC is conducting site characterization by utilizing the RCRA Facility Investigation Workplan. Petitioner asserts that by relying on the EPA Workplan to conduct site characterization, SFC has neither understood nor implemented NRC Staff criticisms of the draft SCP. Petitioner asserts that NRC should require SFC to submit a written final SCP because the EPA Workplan does not:

(1) Resolve NRC comments related to site hydrogeology and vertical and lateral contamination;
(2) Resolve NRC sample density concerns; or
(3) Provide for characterization of the DUF_4 processing, decorative pond, and parking lot areas.

As explained above, NRC Staff concluded after a series of discussions with SFC, that SFC does understand the Staff's November 3, 1994 comments regarding the draft SCP. Moreover, SFC has committed itself to incorporating those Staff comments during site characterization and in the SCR. In addition, NRC Staff concludes, after review of the EPA-approved RFI Workplan, that:

(a) The approved RFI Workplan adequately addresses NRC comments regarding questions of hydrogeology and the vertical and lateral extent of contamination;

(b) The RFI Workplan, draft SCP, and the SFC commitment to incorporate NRC Staff's comments on the draft SCP into site characterization activities will together ensure adequate sampling for site characterization; and

(c) The SCP provides for adequate characterization of the DUF_4 processing area (Unit 29), the decorative pond (Unit 26), and parking lot (Unit 31) (see Figure 2 of the SCP).

NRC Staff has neither violated nor excused SFC from complying with any NRC regulatory requirements, the MOU between NRC and EPA, any NRC Staff commitments to Petitioners, or the December 29, 1992 DFI to SFC. Petitioner has raised no health and safety concern arising from NRC Staff's action by letter of February 5, 1995, permitting SFC to address and implement the Staff's November 3, 1994 comments during site characterization and in the SCR. Additionally, the Staff's action was consistent with agency efforts to streamline the SDMP review process. Furthermore, to require submission of a written final SCP would unnecessarily delay decommissioning of the SFC site and unduly raise the costs of decommissioning. Finally, and most importantly, NACE comments on the draft SCP were incorporated into the final NRC comments on the draft SCP. The Licensee intends to conduct site characterization in accordance with these comments and must demonstrate this before the NRC approves the decommissioning plan.

In view of the above, there is no basis to require SFC to submit a written final SCP.

B. Petitioner Requests That NRC Obtain from EPA a Copy of Its Title Search or Perform a Title Search of All Property Used in Connection with the SFC License

By letter dated April 20, 1995, Mark W. Potts (EPA Region VI), provided to Lance Hughes, on behalf of NACE, a copy of a document entitled "Preliminary Property Search Document; Sequoyah Fuels Corporation; Gore, Oklahoma." The document is dated July 26, 1994, and was prepared by PRC Environmental Management, Inc., for EPA. The document identifies SFC as the sole owner of the 85-acre process area of the Sequoyah Fuels facility and the approximately 2100 acres of land surrounding the facility. A copy of this report has been placed in the SFC licensing docket and is available through either NRC's Public Document Room (PDR) at 2120 L St. NW, Washington, DC 20037, or the local PDR (LPDR) at the Stanley Tubbs Memorial Library, 101 E. Cherokee, Sallisaw, OK 21801.

Petitioner has identified no inconsistencies between the Trust Indenture and any representations to NRC regarding the size of the "facility" or "site." The land subject to NRC license SUB-1010 is principally the 85-acre site along with any adjacent lands that have been affected by licensed activities.[3] The copy of a "Trust Indenture" submitted by Petitioners neither describes the SFC facility or site, nor does it describe any lands subject to the Trust Indenture.[4] Article V merely identifies the Trust Estate as all property coming into the possession of the trustees pursuant to the Trust Indenture. The enclosure to a letter dated August 18, 1994, from John Ellis, President, SFC, to the Oklahoma Department of Commerce, both of which were attached to the petition, describes the proposed industrial park as a site of 1430 acres on the east bank of the Kerr-McClelland Waterway. Clearly the proposed industrial park surrounds or includes, in part, the SFC site, but is not identified by the Trust Indenture as all or part of the property subject to NRC License No. SUB-1010.

Petitioners have not raised a safety concern regarding the identity and ownership of lands subject to NRC License No. SUB-1010. Moreover, because EPA provided a copy of its title search, the Petitioner's request has been satisfied.

C. Petitioner Requests That, Before Permitting Transfer of Land Subject to License No. Sub-1010, NRC Find Reasonable Assurance That Any Entity Acquiring an Interest in the SFC Property Fully Understands the Nature of the Liabilities and Responsibilities It Is Undertaking for Cleanup and Long-Term Care of the Site and That It Has the Financial Capability To Carry Out Those Responsibilities

NRC regulations 10 C.F.R. § 40.42(c)(2) and 40.42(d), and License Condition No. 14 of NRC License No. SUB-1010, require that any real property subject to the License or affected by licensed activities must be remediated by SFC in accordance with an approved decommissioning plan, such that the property is suitable for release in accordance with NRC requirements. This means that SFC may not transfer or release, by sale or any other means, property subject to NRC License No. SUB-1010, or property affected by SFC's licensed activities, until SFC remediates such property and SFC demonstrates that the property meets NRC criteria for release.

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[3] Licensed activities do not include raffinate spreading because the treated raffinate is released for unrestricted use prior to spreading. However, if NRC determined that treated raffinate spreading significantly affected adjacent lands, then NRC would consider the need for additional characterization and remediation.

[4] SFC denies having contributed any corporate resources to drafting or developing the proposed Trust Indenture or in circulating it to local communities, but states that it has openly pursued development of an industrial park with local and state officials to replace jobs lost as a result of closing the SFC plant. SFC states that a local community group, SAFEST, has been working on the Trust Indenture with the Sequoyah County Commission. *See* Letter of John H. Ellis, President SFC, dated March 29, 1995, to James M. Taylor, Executive Director for Operations, NRC.

It is not apparent from the NACE petition, and no information has come to the attention of NRC Staff to indicate, that there has been a transfer of any real property subject to or affected by activities conducted pursuant to NRC License No. SUB-1010. It does appear that several local governmental authorities, including Sequoyah County and the cities of Gore, Vian, and Webbers Falls, have entered into an agreement to participate in the proposed Trust Indenture.

In its response to the petition, SFC committed to inform NRC of any proposal SFC receives for transfer of property adjacent to the industrial area, before SFC acts on any such proposal. SFC also states that at some future time, SFC may dispose of real property unaffected by licensed operations at the SFC facility, and would do so only after notifying NRC. In the case of affected areas, SFC states that it will dispose of such property that has been released by NRC, after SFC demonstrates that appropriate criteria have been met.

Before real property used in connection with or affected by activities conducted pursuant to NRC License No. SUB-1010 could be transferred to a person without authority to engage in NRC-licensed activities, that property must be decommissioned to meet the criteria for release for unrestricted use. *See* 10 C.F.R. §§ 40.4 and 40.42, and License SUB-1010, Condition 14. Since the proposed Trust Indenture would involve the transfer of land for the purposes of an industrial park, it appears that the potential transferees have no plan to engage in NRC-licensed activities. Thus, the decommissioning criteria for release of such property would be for unrestricted use.[5] If SFC were to decommission property used in connection with its licensed activities to meet NRC criteria for release for unrestricted use, the transferee would assume no obligation to remediate or to engage in long-term care of such property, and NRC would have no regulatory authority over the transfer of or the transferees of such property.

If property used in connection with activities conducted pursuant to NRC License No. SUB-1010 were transferred to a person who seeks authority to engage in NRC-licensed activities, including decommissioning activities such as remediation or long-term care, SFC would be required to obtain written permission from NRC prior to the transfer. *See* 10 C.F.R. § 40.46. At that time, it would be appropriate for NRC to ensure that the transferee is capable of meeting NRC requirements for decommissioning and all other applicable licensing requirements and the transferee must obtain an NRC license.

In view of the above, Petitioner's concerns about the potential transfer of property to the Trust and state, and potential transferees of such property, are adequately addressed by applicable regulations.

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[5] The Commission is currently evaluating proposed changes to the rules governing release criteria. *See* "Radiological Criteria for Decommissioning," 59 Fed. Reg. 43,200 (Aug. 22, 1994). SFC will have to comply with all NRC requirements for release to unlicensed individuals under any revised rules.

D. Petitioner Requests That NRC Staff Issue an Order Forbidding SFC, Sequoyah Fuels International Corporation, Sequoyah Holding Corporation, or Any Other Associated Corporation That Holds Title to Property Subject to NRC License No. SUB-1010, from Transferring Any Interest in Such Property Before SFC Applies for and Receives a License Amendment Authorizing Such a Transfer

As explained above, SFC owns the land subject to NRC License No. SUB-1010. Before SFC may transfer or release any property used in connection with, or affected by, its licensed activity to a person not authorized to engage in NRC-licensed activity, that property must be remediated in accordance with an approved decommissioning plan to meet NRC criteria for release for unrestricted use. *See* Section III.C, *supra.* There is no NRC requirement that a licensee obtain NRC permission to transfer property that has been remediated to meet NRC's criteria for release for unrestricted use.

If SFC were to transfer property subject to the license or affected by licensed activity to persons for the purpose of engaging in licensed activity, section 40.46 requires that SFC obtain written permission from NRC before transferring such property and the transferees must obtain an NRC license. Petitioners, however, have provided no evidence that such a transfer is contemplated or imminent.

Petitioners have raised no safety concern regarding a potential transfer of property used in connection with or affected by activities pursuant to NRC License No. SUB-1010, or potential transferees of such property. *See* Section III.C., *supra.* Moreover, since protection of the public health and safety, in the event of a transfer of such property to the proposed Trust Indenture, is already accomplished by NRC regulations, there is no justification to issue the requested order.

IV. CONCLUSION

The institution of proceedings pursuant to 10 C.F.R. § 2.202 is appropriate only where substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175-76 (1975); *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899 (1984). This is the standard I have applied to determine whether the action requested by Petitioner is warranted. For the reasons given above, Petitioner's request that SFC be ordered to submit a written final SCP by a date certain is denied. Petitioner's request that NRC perform a title search of property subject to NRC License No. SUB-1010 was satisfied. Action on Petitioner's request for an order forbidding the transfer of any interest in land subject to NRC License No. SUB-1010 before SFC applies for and receives a license amendment permitting such transfers is unnec-

essary because applicable regulations address Petitioner's concerns. Likewise, Petitioner's request that, before granting such a license amendment application, NRC ensure that potential purchasers of property be subject to NRC License No. SUB-1010 to fully be apprised of their obligations for site remediation and long-term care and that NRC ensure that such potential purchasers are financially qualified to do so, is unnecessary because applicable regulations address Petitioner's concerns.

As provided by 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review. The Decision will become the final action of the Commission 25 days after issuance, unless the Commission on its own motion institutes review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Carl J. Paperiello, Director
Office of Nuclear Material Safety
and Safeguards

Dated at Rockville, Maryland,
this 23d day of October 1995.