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**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

OFFICE OF SECURITY  
RULEMAKING AND  
ADJUDICATION STAFF

**COMMISSIONERS:**

**Richard A. Meserve, Chairman  
Greta J. Dicus  
Nils J. Diaz  
Edward McGaffigan, Jr.  
Jeffrey S. Merrifield**

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In The Matter Of: )  
 )  
FANSTEEL, INC., )  
Muskogee, Oklahoma )  
\_\_\_\_\_)

Docket No. 40-7580-MLA  
ASLBP No. 00-772-01-MLA  
  
Re: Request to Amend  
License No. SMB-911

**FANSTEEL, INC.'S APPEAL FROM THE PRESIDING  
OFFICER'S DECISION TO GRANT A HEARING**

January 13, 2000

PDR A DOCK

DS03

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In The Matter Of:	)	Docket No. 40-7580-MLA
	)	ASLBP No. 00-772-01-MLA
<b>FANSTEEL, INC.,</b>	)	
Muskogee, Oklahoma	)	Re: Request to Amend
	)	License No. SMB-911

**FANSTEEL, INC.'S APPEAL FROM THE PRESIDING  
OFFICER'S DECISION TO GRANT A HEARING**

Pursuant to 10 C.F.R. § 2.1205(o) (1999), Fansteel, Inc. ("Fansteel") appeals from the Presiding Officer's Memorandum and Order Granting the Request for Hearing, dated December 29, 1999 ("Order"). The Order granted the State of Oklahoma's Request for Hearing ("Request"), filed by the Attorney General of Oklahoma, on Fansteel's request to amend its source material license for the construction of a low-level radioactive waste containment cell at Fansteel's facility in Muskogee, Oklahoma ("Fansteel Site" or "Site"), and for the decommissioning of that part of the Site

for restricted release pursuant to 10 C.F.R. § 20.1403.<sup>1</sup>

The Presiding Officer erred in holding that Oklahoma's Request satisfied the injury-in-fact and redressability elements of standing. In addition, the Presiding Officer erred when he ruled that Oklahoma set forth areas of concern germane to the proceeding, with regard to application of Section 20.1403 to the Site and compliance with requirements therein. Accordingly, Fansteel respectfully requests that the United States Nuclear Regulatory Commission ("NRC") reverse the decision of the Presiding Officer and terminate this proceeding.

### **BACKGROUND**

Fansteel holds Source Material License No. SMB-911, issued pursuant to 10 C.F.R. Part 40, which authorizes it to possess natural uranium and natural thorium containing materials remaining from its former rare metals extraction operations. Presently, there are about 9,600 tons of work-in-progress or "WIP" process residues and about 85,000 tons of calcium fluoride residues at the Fansteel Site, which contain about 93% of the total radioactivity at the Site. (The remaining radioactivity is associated with soils at the Site.) The license authorizes Fansteel to process the WIP and calcium fluoride process residues into commercial products.

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<sup>1</sup> Fansteel does not seek a stay of this proceeding based upon representations of the Presiding Officer during a telephonic scheduling conference held on January 12, 2000 wherein the Presiding Officer informed the parties of his intention to enter an order that would hold in abeyance any hearing pending completion of the NRC's environmental review.

Starting in January 1993, Fansteel began a comprehensive site characterization program directed toward identifying areas of radiological and chemical contamination and developing sufficient information about the Site to evaluate remedial alternatives. The results of this study are reported in the Radiation Survey and Remediation Assessment - Northwest Property (July, 1993) and Remediation Assessment, Fansteel, Inc. - Muskogee, Oklahoma (December, 1993).

Fansteel evaluated various remedial alternatives and determined that on-site processing of residues into commercial products, collection and treatment of contaminated groundwater, and on-site containment of radiologically contaminated soils and soil-like materials was the most appropriate alternative. See Feasibility Study, Fansteel, Inc. - Muskogee, Oklahoma (1994). This approach would enable Fansteel to clean-up 90% of the Site to unrestricted release, whereas off-site disposal of soils above unrestricted release levels would exceed Fansteel's ability to pay, thereby resulting in a lesser cleanup. The Feasibility Study also provided the technical basis for Fansteel's first Decommissioning Plan ("DP") that was submitted to the NRC in June 1994 in support of its license amendment request. See Eastern Property Area Decommissioning Plan, Fansteel, Inc. - Muskogee, Oklahoma (June, 1994).<sup>2</sup> That DP outlined a decommissioning program relying on on-site containment of contaminated soils in an engineered containment cell.

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<sup>2</sup> In a separate decommissioning program, Fansteel decommissioned a 35-acre tract at the Site, referred to as the Northwest Property, which the NRC released for unrestricted use. The balance of the Site is referred to as the Eastern Property.

In April 1999, at NRC's request, Fansteel agreed to split its DP into two separate plans – an Unrestricted Release Decommissioning Plan (“URDP”) addressing the portion of the Site that would be decommissioned for unrestricted release pursuant to NRC Site Decommissioning Management Plan (“SDMP”) criteria, and a Restricted Release Decommissioning Plan (“RRDP”) for the containment cell, which would be decommissioned for restricted release in accordance with 10 C.F.R. § 20.1403. *See* April 16, 1999 NRC Memorandum, a copy of which is attached hereto as Exhibit 1.

On June 16, 1999, Fansteel submitted the URDP. NRC provided the opportunity for a hearing, but none was requested. NRC prepared an Environmental Assessment and issued a Finding of No Significant Impact. The NRC then approved the URDP and amended Fansteel's license accordingly.

On August 13, 1999, Fansteel submitted the RRDP to the NRC. *See* Decommissioning Plan - Containment Cell Portion, Fansteel, Inc. - Muskogee, Oklahoma (August 1999). Along with the RRDP, Fansteel submitted updated versions of the Remedial Design Report, Treatability Study and ALARA analysis.<sup>3</sup> The RRDP features an on-grade containment system comprised of a monolith of cement-stabilized, radiologically-contaminated soils and a gently sloping durable cover system designed to

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<sup>3</sup> *See* Remedial Design Report - Stabilization and Solidification of Above-Action Level Soil and Construction of Containment Cell, Fansteel, Inc. - Muskogee, Oklahoma (August, 1999); Treatability Study Report for Stabilization and Solidification of Above-Action Level Soil, Fansteel, Inc. - Muskogee, Oklahoma (August, 1999); ALARA Analysis, Section 2.1.2.7 of the RRDP, Fansteel, Inc. - Muskogee, Oklahoma (August, 1999).

passively divert water, retard radon emanation, reduce radiation exposures and withstand natural phenomena of credible magnitude for at least 1,000 years. The RRDP also describes institutional controls and a financial assurance program for monitoring and maintenance, which were developed with input from a series of public meetings held by a Site Specific Advisory Board composed of representatives from the surrounding community.

The NRC published a Notice of Consideration of Amendment Request For Construction of a Containment Cell at Fansteel Facility in Muskogee, Oklahoma and Opportunity for Hearing. *See* 64 Fed. Reg. 49823 (Sept. 14, 1999). In response, on October 14, 1999, the Oklahoma Attorney General filed the Request for Hearing, pursuant to 10 C.F.R. § 2.1205. Fansteel filed its Answer in Opposition to the Request ("Answer") on October 29, 1999, and the NRC Staff filed its response ("NRC Staff Response") on November 5, 1999.

The NRC has not yet conducted a technical and environmental review of the proposed containment cell under 10 C.F.R. Part 51. By letter dated December 14, 1999, the NRC informed Fansteel that the NRC Staff expects to prepare an Environmental Impact Statement ("EIS").<sup>4</sup> A copy of the letter is attached hereto as Exhibit 2.

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<sup>4</sup> NRC's intention to prepare an EIS was not raised below because the letter was issued after Fansteel filed its Answer.

In the December 29, 1999 Order, the Presiding Officer granted Oklahoma's request for a Subpart L informal hearing on the source material license amendment proposed in Fansteel's RRDP. The Presiding Officer erroneously held that the State established its standing and identified several areas of concern germane to the subject of the proceeding.

### **ARGUMENT**

#### **I. THE PRESIDING OFFICER ERRONEOUSLY DETERMINED THAT OKLAHOMA HAS STANDING TO REQUEST A HEARING.**

##### **A. Legal Requirements for Standing**

When a request for an informal hearing is filed by a person other than the applicant, in connection with the amendment of a materials license under 10 C.F.R. Part 2, Subpart L, the Presiding Officer must determine, among other things, that requestors such as the State of Oklahoma meet judicial standards for standing. See 10 C.F.R. § 2.1205(h). It is well established that requirements for standing are applied to requests for hearing in informal Commission proceedings held under Subpart L, such as the one at issue. See, e.g., *Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CL1-99-12, 49 N.R.C. 347, 1999 NRC LEXIS 53, at \*\*5-6 (Apr. 26, 1999); *Chemetron Corp.* (Bert Avenue, Harvard Avenue, McGean - Rohco Sites-Newburgh Heights and Cuyahoga Heights, Ohio), LBP-94-20, 40 N.R.C. 17, 18 (1994).

To establish standing, the requestor must show that it meets the following

“irreducible constitutional minimum” requirements: (1) the requestor will suffer an “injury in fact” which is “concrete and particularized and . . . actual or imminent, not conjectural or hypothetical”; (2) there is a causal connection between the alleged injury and the action complained of; and (3) the injury will be redressed by a favorable decision. *See Bennett v. Spear*, 520 U.S. 154, 167-168 (1997); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 N.R.C. 149, 154, *aff’d*, CLI-98-20, 48 N.R.C. 183 (1998). In the case where a state like Oklahoma is the requestor, the NRC has recognized that “standing should not be automatic.” *International Uranium (USA) Corp.* (Receipt of Material from Tonawanda, New York), LBP-98-21, 48 N.R.C. 137, 145 (1998).

**B. The Request Fails to Demonstrate that Approving the RRDP Will Cause Injury-in-Fact to Oklahoma’s Interest.**

In the Request, Oklahoma alleges five different injuries. *See Request at 17-22.* The Presiding Officer held in cursory fashion that Oklahoma asserted injuries to streams, air and property at or near the Fansteel Site from alleged discharges, which are sufficient to establish an injury-in-fact. Order at 8. This ruling is erroneous.

Oklahoma has failed to meet the legal standard for injury-in-fact. In each case, the alleged injury is either too speculative (*i.e.*, involving potential future harms arising from extremely low probability events), too generalized to be particular and concrete, or both. Moreover, there are several instances where the description of the injury uses information about the proposed action that is either taken from the RRDP and

its supporting documents and distorted, or is attributed to these sources but is just plain wrong. The alleged injuries are:

(i) The containment cell “will harm the citizens, air, land, waters, wildlife and natural resources of Oklahoma, as well as the health, safety, and welfare of Oklahoma’s citizens who live, work, travel, and recreate near the Fansteel facility, and who rely upon the Arkansas River for consumption, irrigation or livestock uses.” Request at 17.

Oklahoma bases this general claim of injury on the mere presence of radioactivity at the Fansteel Site and unfounded assumptions and speculation that the containment cell will fail, allowing this radioactivity to be released into the environment. This alleged injury is neither “concrete and particularized” nor “actual and imminent”; instead, it is “conjectural or hypothetical.”

Oklahoma correctly stated that the containment cell will contain 25,500 cubic yards of decommissioning wastes (Request at 17), but does not indicate how much radioactivity or the concentration of activity that will be placed in the cell. Fansteel estimates that the cement stabilized soil monolith will contain uranium and thorium at a concentration of only 82.9 pCi/g. *See* Fansteel, Inc. License SMB-911. This is much less than the 0.05 wt. % threshold for source material (*see* 10 C.F.R. §§ 40.4, 40.13 (1999)), and is less than other wastes containing naturally occurring radioactive materials (*e.g.*, oil and gas drilling wastes) whose disposal in Oklahoma is presently unregulated. *See* Exhibits 1 and 2 attached to Answer.

Oklahoma alleged that the cell will be placed over test boring locations and monitoring wells, providing a virtual “super highway” for contaminants to reach

groundwater. Request at 18. This is more hyperbole than fact. The borings and monitoring wells either have been or will be sealed in accordance with accepted industry practice and Oklahoma's regulatory requirements<sup>5</sup> thereby precluding a preferential pathway to groundwater.

In a conclusory statement that is too general to constitute injury-in-fact, Oklahoma characterized Fansteel's proposed long-term maintenance budget as "inadequate." Request at 18. Oklahoma does not explain why the maintenance budget is inadequate, especially in light of the robust cell design. Furthermore, it is wrong. Fansteel's decommissioning funding plan cost estimating table presented in the RRDP (Exhibit 9 attached to Request) provides annual costs for activities such as groundwater monitoring, fence repair, and cell cover repair.

Oklahoma further alleged that the RRDP wholly fails to account for migration of the Arkansas River into the Fansteel facility and the catastrophic failure of the disposal cell under these circumstances. Request at 18-19. This is yet another example of pure conjecture. Oklahoma does not identify a mechanism by which the Arkansas River could migrate into the containment cell, nor does it explain how that could cause "catastrophic failure" of the cell, or what the resulting harm would be.

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<sup>5</sup> Oklahoma seems to be challenging the adequacy of its own regulations. Oklahoma Water Resources Board Rule 35-11-2(a) provides closure requirements for wells and borings that ensure that they are sealed in a manner that actually reduces the permeability of the in-place materials, thereby eliminating the likelihood of groundwater contamination. See Okla. Admin. Code § 785:35-11-2(a) (1999).

**(ii) “The inadequate long-term maintenance and monitoring budget proposed by Fansteel in the RRDP will amplify and accelerate releases of radioactive contaminants into the air of Oklahoma.” Request at 19.**

Oklahoma alleged injury-in-fact because, *inter alia*, the containment cell cap is designed only to reduce air emissions of radioactive contaminants (Request at 19), and the financial assurance for long-term monitoring does not include adequate or realistic funding for maintenance and repair of the containment cell cap (*id.* at 20). These allegations suffer from a fatal lack of specificity. Oklahoma does not indicate any level of radioactive emissions from the cell, and it does not allege that radioactive emissions would exceed regulatory limits. Further, Oklahoma does not describe how these unquantified air emissions would result in any radiological exposures.

**(iii) The placement of radioactive waste in proximity to the Arkansas River will lessen the recreational value of the river causing tourism to decrease and a corresponding decrease in revenues. Request at 20.**

Oklahoma alleged that because of the “[n]earby wildlife refuges, such as the Webbers Falls Unit of the McClellan - Kerr Wildlife Refuge and the Cherokee Gruber Wildlife Refuge” the area is an important tourism asset and is frequented by its citizens for recreational purposes, and that approval of the RRDP will lessen tourism and the associated revenues. *Id.* These allegations are too generalized and speculative. First, Oklahoma does not specify where these refuges are in relation to the Fansteel site or their distance from it. Oklahoma also does not specify the current level of tourism and recreational use of the area around the Site, nor the current level of revenue generated from these activities. Furthermore, Oklahoma does not indicate how approval of the RRDP would reduce tourism and recreation in the area to cause the alleged harm.

**(iv) The restricted portion of the Fansteel Site will be barred from all future use. Request at 21.**

Oklahoma alleged that approval of the RRDP will result in removal of 6-12 acres of the Fansteel Site from all future use and that the mere presence of the containment cell will reduce the market value of surrounding property and will lower *ad valorem* tax revenues for Oklahoma. *Id.* These allegations do not meet the legal standard for injury-in-fact because they are lacking in specificity and are hypothetical and conjectural. Oklahoma does not explain how the appraised value and property taxes would be lessened, especially when approximately 56 acres of the site will be decommissioned for unrestricted release (in addition to the 35 acres already released for unrestricted use). This alleged injury is entirely too general and too hypothetical to constitute injury in fact.

**(v) Releases of radioactivity from the disposal cell will require remediation requiring the use of heavy vehicles that will injure the roads and possibly force the shutdown or relocation of roads near the Fansteel Site. Request at 22.**

Oklahoma alleged injury-in-fact to its roads and thoroughfares because “inevitable” releases from the containment cell will require “major remediation,” involving the use of heavy equipment and trucks on those roads and thoroughfares.<sup>6</sup> *Id.* This allegation lacks the necessary specificity to be injury-in-fact.

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<sup>6</sup> Oklahoma is apparently unconcerned about the heavy equipment and trucks loaded with contaminated soils that would travel its roads if the RRDP was rejected and the entire Fansteel Site was decommissioned for unrestricted release.

Oklahoma does not indicate what type of releases will inevitably occur or why such releases would require major remediation involving use of heavy equipment. Oklahoma does not allege that the use of heavy equipment and trucks on the affected roads and thoroughfares would be contrary to applicable law, or that weight limits on affected roads and thoroughfares would be exceeded in the event of major remediation. Accordingly, Oklahoma fails to state a concrete injury-in-fact to its roads from the use of heavy equipment as a result of unspecified releases from the proposed disposal cell.

In summary, the Presiding Officer erred in finding that Oklahoma will suffer injury-in-fact. Each of the alleged injuries is entirely too general and too hypothetical to meet the legal standard for injury-in-fact. Oklahoma either merely alleges that releases of radioactivity will occur from the containment cell or postulates incredible scenarios by which releases would occur. In either case, Oklahoma fails to identify how much radioactivity would be released, how it would be transported away from the site, how it could harm any of Oklahoma's interests or to what degree its interests would be harmed over maintaining the *status quo* or remediating the Fansteel Site for unrestricted release. Such general assertions of off-site releases or economic injury must be supported by factual statements. See *Babcock & Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 N.R.C. 72, 94 (1993); see also *Shieldalloy*, 1999 NRC LEXIS 53, at \*12 (substantiating evidence required for factual assertions regarding standing). In each case, the specific factual support is missing and the allegations fail to demonstrate a

concrete, palpable, distinct and particularized injury-in-fact requisite for standing.<sup>7</sup> Thus, Oklahoma did not meet the requirements for injury-in-fact and the Presiding Officer erred in finding that it did.

**C. The Request Fails to Demonstrate that Oklahoma's Alleged Injuries Can be Redressed in This Proceeding.**

The Presiding Officer's Order finds, without legally sufficient support, that Oklahoma's "alleged injuries to its interests, the harm to the citizens, and the potential injury to the environment at or near the Muskogee site, are all redressible by a Board decision favorable to the State's position such as the denial of the request for restricted release decommissioning." Order at 8. To the contrary, Oklahoma cannot show, as it must, that it is likely that its alleged injuries would be redressed by the denial of Fansteel's license amendment. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Westinghouse Electric Corp. (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants)*, CLI-94-7, 39 N.R.C. 322, 332 (1994). Redressability is an essential requirement of standing, for when "none of the relief sought by the

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<sup>7</sup> Oklahoma may not compensate for its failure to establish injury-in-fact by attempting to rely on a presumption of injury based on geographic proximity. *See* Request at 14-16. This presumption may be applied in non-power reactor cases where the proposed action involves a significant source of radioactivity producing an obvious potential for off-site consequences. *See Georgia Institute of Technology (Georgia Tech Research Reactor)*, CLI-95-12, 42 N.R.C. 111, 116 (1995). Here, Oklahoma has not demonstrated that the cell will be a "significant source" of radioactivity, where it provides absolutely no information on the radiological content of the cell. Further, Oklahoma attempts to circumvent the requirement that there be an "obvious" potential for off-site harm by alleging harm in the vicinity of the Site without pointing to specific citizens or describing a mechanism of injury, factors the NRC has found important to show injury-in-fact.

respondent would likely remedy its alleged injury in fact, we must conclude that respondent lacks standing.” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S. Ct. 1003, 1020 (1998).

If the relief requested is granted, and the alleged injury remains or will not be alleviated, then the requestor has not established redressability. *See Wyoming v. Lujan*, 969 F.2d 877, 882 (10th Cir. 1992). Here, if the NRC were to grant Oklahoma’s requested relief, namely rejection of Fansteel’s RRDP (Request at 24-25), the injury would remain. Without approval of the RRDP, Fansteel’s only other decommissioning option would involve decommissioning for unrestricted release pursuant to 10 C.F.R. § 20.1402. However, as a practical matter, Fansteel has limited financial resources and cannot afford to dispose of contaminated soils off-site. *See Answer at 5, 29.*<sup>8</sup> Moreover, any such reallocation of these limited resources would seriously jeopardize Fansteel’s ability to continue residue reclamation and decontaminate the balance of the site for unrestricted release. Therefore, if Oklahoma’s requested relief is granted and the license amendment is denied, then the Fansteel Site would remain in its current state, with radionuclides located on-site. With radionuclides on-site, the potential for harm due to the possible release of radioactive materials continues, and the alleged injury remains.

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<sup>8</sup> Notably, the NRC has recognized in adopting its license termination criteria that “there appears to be a strong indication that removing and transporting soil to waste burial facilities to achieve exposure levels at the site at or below a 0.25 mSv/y (25 mrem/y) unrestricted dose criterion is generally not cost-effective.” Radiological Criteria for License Termination, 62 Fed. Reg. 39058, 39065 (1997) (final rule).

Thus, it is “merely speculative that the injury will be redressed by a favorable decision.”  
*Lujan*, 560 U.S. at 561.

In sum, the Presiding Officer improperly held that Oklahoma has standing to request a hearing. The Request fails to establish an injury-in-fact and that any alleged harms can be redressed by a decision in Oklahoma’s favor. Thus, the Request should be denied.

**II. THE PRESIDING OFFICER ERRONEOUSLY DETERMINED THAT OKLAHOMA IDENTIFIED AREAS OF CONCERN THAT ARE GERMANE TO THE PROCEEDING.**

In addition to the Presiding Officer’s erroneous rulings with respect to standing, the decision to grant Oklahoma’s Request should be reversed because the Presiding Officer erred in finding that the State identified areas of concern germane to Fansteel’s proposed license amendment under 10 C.F.R. § 20.1403, which provides for decommissioning for restricted release. The State’s areas of concern erroneously decided by the Presiding Officer, and discussed *seriatim infra*, relate to:

- the alleged inapplicability of Section 20.1403 to the Fansteel Site;
- Fansteel’s alleged non-compliance with Section 20.1403(a), pertaining to ALARA analyses; Section 20.1403(e), which concerns radioactivity if institutional controls are no longer in effect; legally enforceable institutional controls required by Section 20.1403(b); and financial assurance requirements mandated by Section 20.1403(c); and
- a challenge to the design and sufficiency of Fansteel’s proposed containment cell.

**A. Legal Requirements for Areas of Concern That Are Germane**

In addition to satisfying standing requirements, Oklahoma and other entities requesting a Subpart L informal hearing must describe in detail, “[t]he requestor’s areas of concern about the licensing activity that is the subject matter of the proceeding.” 10 C.F.R. § 2.1205(e)(3). In ruling on hearing requests, the Presiding Officer must determine, *inter alia*, that “the specified areas of concern are germane to the subject matter of the proceeding.” 10 C.F.R. § 2.1205(h). When making such a determination, the Presiding Officer may only look to information supplied in the requestor’s hearing petition. *See Chemetron*, 40 N.R.C. at 19.

When raising areas of concern, the Commission insists on “detailed descriptions of the petitioner’s positions on issues going to both standing and the merits.” *Shieldalloy*, 1999 NRC LEXIS 53, at \*6; *see also Sequoyah Fuels Corp.*, LBP-94-39, 40 N.R.C. 314, 316 (1994) (citing Section 2.1205 requirement of detailed description). “In Subpart L proceedings, a statement of concern must provide enough specificity to afford the Presiding Officer the ability to link the concern with the subject matter of the proceeding in order to make a decision to admit the statement for litigation.” *Sequoyah Fuels*, 40 N.R.C. at 316.

**B. The First Alleged Area of Concern, Regarding the Applicability of 10 C.F.R. § 20.1403 to the Site, Fails to Present a Litigable Question and Impermissibly Attacks the Regulation.**

The Commission should reverse the Presiding Officer’s determination that Oklahoma’s first alleged area of concern is germane to this proceeding. Order at 10.

This alleged area of concern challenges whether the NRC intended 10 C.F.R. § 20.1403 to apply to facilities like the Fansteel Site, which contain long-lived radionuclides such as uranium and thorium. The Presiding Officer's determination was in error on the following grounds: (i) there is no litigable issue because both the plain language and NRC interpretations of Section 20.1403 make clear that the regulation applies to the Fansteel Site; and (ii) Oklahoma's challenge to this NRC regulation is barred in Subpart L hearings.

**1. The First Area of Concern Raises No Issue for a Hearing Because 10 C.F.R. § 20.1403 Applies to the Fansteel Site.**

Oklahoma argues that when the NRC promulgated Section 20.1403, it only intended restricted release for facilities containing relatively short-lived radionuclides that will decay to unrestricted dose levels within a finite period. Request at 27-28. Under Oklahoma's interpretation, the Fansteel Site is not eligible for restricted release because the radioactive contaminants present there, uranium and thorium, will remain hazardous for billions of years. *Id.* at 27. However, the State's position is wrong as a matter of law and, thus, fails to provide a basis for a hearing. *See Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), LBP-99-46, 1999 WL 1267277, at \*7 (Dec. 16, 1999).

Oklahoma's contention is entirely inconsistent with the plain language of 10 C.F.R. § 20.1403, which does not limit its application to sites contaminated with short-lived nuclides. Moreover, it is clear that 10 C.F.R. Part 20, Subpart E, Radiological Criteria for License Termination (which includes 10 C.F.R. § 20.1403) applies to the

decommissioning of facilities licensed under Part 40. *See* 10 C.F.R. § 20.1401(a). The Fansteel Facility is licensed under 10 C.F.R. Part 40, Domestic Licensing of Source Material. This part applies to licensing activities involving “source material,” which is defined as uranium or thorium or any combination thereof. *See* 10 C.F.R. §§ 40.1, 40.4. By specifically making 10 C.F.R. Part 20, Subpart E applicable to source material licenses, its applicability to uranium and thorium is clear. Accordingly, Section 20.1403 applies to the Fansteel Site by the terms of the regulations, and there is no issue to litigate.

In a case that is directly on point, the NRC Presiding Officer held in *Sequoyah Fuels* that Section 20.1403 is not limited by the types of radioactive contaminants under consideration. *See Sequoyah Fuels*, 1999 WL 1267277, at \*7. In *Sequoyah Fuels*, the State raised the identical area of concern as in this case. The court in *Sequoyah Fuels* held that Oklahoma was incorrect as a matter of law in asserting that restricted decommissioning was not appropriate for the site, which, analogous to the Fansteel Site, has soil contaminated with low levels of uranium and thorium. Accordingly, the court found that Oklahoma’s area of concern did not present a litigable question. *Id.*; *see also Babcock & Wilcox Co. (Pa. Nuclear Services Operations, Parks Township, Pa.)*, LBP-94-12, 39 N.R.C. 215, 217-18 (1994) (presiding officer did not accept issue for hearing where there was no regulatory basis upon which issue could be litigated). In its response to Oklahoma’s Request in this proceeding, the NRC Staff concurred that Section 20.1403 is not limited to sites contaminated with short-lived nuclides. *See* NRC Staff Response at 9-10.

In addition to the express language of the regulation and decisional law, NRC's Statement of Considerations, in connection with its 10 C.F.R. Part 20 rulemaking, evidences the NRC's intention that Section 20.1403 apply to sites contaminated with long-lived nuclides like uranium and thorium. When issuing the final regulations, the NRC responded to public comments by noting that the rule would apply to a variety of sites, including "a limited number of cases, in particular those involving large quantities of uranium and thorium contamination, [where] the presence of long-lived nuclides at decommissioned sites will continue the potential for radiation exposure beyond the 100-year period." Radiological Criteria for License Termination, 62 Fed. Reg. 39058, 39070 (1997) (emphasis added).<sup>9</sup>

Further, when proposing the decommissioning regulations, the NRC specifically anticipated that the regulations would apply to sites with long-lived radionuclides. The NRC noted that it was "aware of sites, such as sites with significant volumes of thorium contamination, that will require extensively [sic] remedial efforts to achieve the proposed requirements for restricted . . . release." Radiological Criteria for License Termination, 59 Fed. Reg. 43200, 43209 (1994).

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<sup>9</sup> Oklahoma attempts to support its erroneous position by citing to language contained in the Statement of Considerations that is read in isolation and taken out of context. See Request at 27-28, 28 n.15 (citing 62 Fed. Reg. 39058, 39069). The passage relied upon provides an example of a site containing short-lived radionuclides to illustrate the rule's application. Neither the regulation nor the rulemaking record restrict application of Section 20.1403 to sites with short-lived radionuclides.

Moreover, in the NRC's Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Nuclear Facilities, NUREG-1496 ("GEIS"), NRC specifically evaluated the restricted release decommissioning of a reference rare metals extraction plant (comparable to the Fansteel Site), including a scenario where uranium and thorium contaminated soils and slag are stabilized and disposed onsite. GEIS at Appendix C, pp. 2-6 to 2-7, 7-11 to 7-13, 7-36 to 7-40.

As further evidence of the NRC's clear intent to apply Section 20.1403 to the Site, as discussed *supra*, the NRC Staff directed Fansteel to split its Decommissioning Plans into two separate plans, in order to "grandfather" the URDP pursuant to Section 20.1401 and to apply Section 20.1403 to the RRDP. If Section 20.1403 did not apply to the RRDP, the Staff would have invoked Section 20.1401 for both plans.

Thus, it is clear that the NRC intended for restricted release to apply to facilities with long-lived radionuclides such as uranium and thorium; as such, the Presiding Officer erred in finding that the State's concern is germane to the proceeding.

**2. Oklahoma is Barred from Challenging 10 C.F.R. § 20.1403 in an Informal Subpart L Hearing.**

The Presiding Officer erred by characterizing Oklahoma's first area of concern as raising "a garden variety issue of regulatory interpretation." Order at 10. To the contrary, the State's claim directly challenges the scope of applicability of 10 C.F.R. § 20.1403 to the Facility. Request at 27. Unless specifically authorized by the

Commission, parties to informal hearings under Subpart L may not challenge NRC regulations. See 10 C.F.R. § 2.1239(a); *Curators of the Univ. of Missouri*, CLI-95-1, 41 N.R.C. 71, 125 n.70, *aff'd*, CLI-95-8, 41 N.R.C. 386 (1995). Because Oklahoma's challenge is proscribed by 10 C.F.R. § 2.1239(a), the challenge cannot be an issue addressed in an informal hearing. Thus, the Presiding Officer incorrectly ruled that this area of concern could form the basis for a hearing.

In conclusion, Oklahoma's first alleged area of concern regarding the applicability of 10 C.F.R. § 20.1403 to the Site is not germane, because there is no regulatory basis upon which to litigate the issue and Oklahoma is, in any event, precluded from doing so at the hearing. Thus, the Presiding Officer erred in ruling otherwise.

**C. The Second Alleged Area of Concern, Regarding the RRDP's Compliance with 10 C.F.R. § 20.1403(a), Raises Immaterial Claims and Lacks Sufficient Detail.**

The Presiding Officer's Order erroneously found that the State advanced an area of concern involving compliance with 10 C.F.R. § 20.1403(a) that is germane to this proceeding. Order at 10-11. The NRC regulation provides that a site will be considered acceptable for license termination under restricted conditions if the licensee can demonstrate that any further reductions in residual radioactivity that would be necessary to qualify for unrestricted use cannot be made because either: (a) such reductions would result in net public or environmental harm; or (b) the levels associated with restricted use are As Low As Reasonably Achievable ("ALARA"). See 10 C.F.R. § 20.1403(a).

Fansteel conducted an ALARA analysis consistent with NRC guidance which demonstrates that on-site containment of radiologically contaminated soils from the remainder of the Fansteel Site, as opposed to off-site disposal of such soils, is indeed ALARA as prescribed by 10 C.F.R. 20.1403(a). See Section 2.1.2.7 of Decommissioning Plan, Fansteel, Inc. - Muskogee, Oklahoma (August, 1999). Oklahoma alleges that Fansteel's ALARA analysis contains serious flaws that call its legitimacy into question. Contrary to the State's claims, Fansteel's analysis is fully consistent with NRC guidance and demonstrates compliance with 10 C.F.R. § 20.1403(a). As discussed in Fansteel's Answer (pp. 26-29), where Oklahoma's allegations are specific, they are immaterial; otherwise, they are too general and unsupported by factual statements for the Presiding Officer to determine that the State's arguments are germane to this proceeding. See *Shieldalloy*, 1999 NRC LEXIS 53, at \*6; *Sequoyah Fuels*, 40 N.R.C. at 316. Furthermore, because the analysis demonstrates compliance with the regulation, there is no issue to contest in this proceeding. See *Babcock & Wilcox*, 39 N.R.C. at 217-18.

**D. The Third Alleged Area of Concern, Regarding the RRDP's Compliance with 10 C.F.R. § 20.1403(e), Lacks Sufficient Detail with Respect to Modeling Errors.**

This Commission should reverse the Presiding Officer's determination concerning the germaneness of Oklahoma's third area of concern relating to Fansteel's compliance with 10 C.F.R. § 20.1403(e). The State's third area of concern is that Fansteel's RRDP fails to provide reasonable assurances that residual radioactivity at the Fansteel Facility has been reduced so that if institutional controls were no longer in effect

at the Fansteel Facility, the total effective dose equivalent (“TEDE”) from residual radioactivity distinguishable from background to the average member of the critical group would not exceed 100 mrem/year (or alternatively 500 mrem/year), as required by 10 C.F.R. § 20.1403(e). Request at 33. Oklahoma’s overly generalized criticism of the RRDP is based on its perceived “[e]rrors in the modeling performed by Fansteel, including the assumptions and input parameters used in such modeling [that] render the modeling in the Restricted Release Decommissioning Plan unsubstantiated.” *Id.* at 34.

The Presiding Officer erroneously found that the State identified errors in Fansteel’s modeling. Order at 11. Oklahoma failed to point to any particular model, assumption, or input parameter as being erroneous, nor did it otherwise explain why Fansteel’s modeling is unacceptable. The two-paragraph section of the State’s Request is devoid of any facts that could be proved at a hearing. This lack of specificity prevents the Presiding Officer from determining whether these general statements are germane to the subject matter of the proceeding.

The NRC requires “detailed descriptions” of Oklahoma’s position. See *Shieldalloy*, 1999 NRC LEXIS 53, at \*6. The lack of detail in the State’s Request is fatal to its third alleged area of concern. In the closely analogous *Sequoyah Fuels* matter, Oklahoma made similar conclusory, unsubstantiated claims about the applicant’s TEDE modeling. See 1999 WL 1267277, at \*9. The Presiding Officer in that case properly held that “Oklahoma’s failure to specify what particular aspects of the model fail to adhere to

EPA standards makes it impossible to determine whether the claims in this regard are germane.” *Id.*<sup>10</sup>

Just as the *Sequoyah Fuels* Presiding Officer found, this Commission should hold that Oklahoma’s third area of concern is not germane to the current proceeding.

**E. The Fourth Alleged Area of Concern, Regarding the RRDP’s Compliance with 10 C.F.R. § 20.1403(b), Fails to Present Litigable Questions with Respect to Long-Term Custodian and Institutional Controls.**

The Presiding Officer erroneously accepts as germane Oklahoma’s fourth area of concern relating to 10 C.F.R. § 20.1403. The Order admits the State’s contention that Fansteel’s RRDP does not comply with Section 20.1403 “because it fails to demonstrate legally enforceable institutional controls and long-term custodianship that provides assurance that the TEDE from residual radioactivity distinguishable from the background to the average member of the critical group will not exceed 25 mrem/year.” Order at 11. The Order applies the “durable institutional control” standards found in 10 C.F.R. § 20.1403(e), instead of the proper “legally-enforceable institutional control” requirements to which Fansteel is subject under Section 20.1403(b).<sup>11</sup> Thus, there is no

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<sup>10</sup> In addition, as discussed in Fansteel’s Answer, Fansteel demonstrated that doses from the containment cell are below 100 mrem/yr. without institutional controls and, thus, demonstrated compliance with Section 20.1403(e). Oklahoma has not identified any errors in the modeling performed by Fansteel that would change this conclusion.

<sup>11</sup> Oklahoma created needless confusion by blending and misconstruing the requirements of Sections 20.1403(b) and (e). See Request at 35. It is understandable that the Presiding Officer erred in applying the “durable institutional control” standard.

basis for a hearing because the State's claims and the Order do not identify an issue of compliance with applicable NRC regulations. *See Sequoyah Fuels*, 1999 WL 1267277, at \*7; *Babcock & Wilcox*, 39 N.R.C. at 217-18.

**1. Durable Institutional Controls and Related Custodial Requirements Do Not Apply to the Fansteel Site.**

Oklahoma asserts that Fansteel failed to "identify the long-term custodian of the Fansteel Facility" and "map out long-term custodial care at the Fansteel Facility." Request at 35. The Presiding Officer erroneously relied on the NRC Staff's concerns that Fansteel's RRDP does not identify a custodian or provide a contract with the custodian. *See Order at 11; NRC Staff Response at 13.*<sup>12</sup> This issue may not be litigated at a hearing, however, because the requirement of long-term custodians is invoked in connection with "durable institutional controls" set forth in Section 20.1403(e), which do not apply to Fansteel.

NRC regulations create two classes of restricted release, depending on the anticipated radiological dose in the event that the institutional controls fail. In one class are sites at which failure of the institutional controls could result in a maximum estimated dose in the range 25 mrem/yr to 100 mrem/yr. *See 10 C.F.R. § 20.1403(e)(1)*. In the other class are sites at which loss of institutional controls could result in doses that exceed 100 mrem/yr, but will not exceed 500 mrem/yr. *See 10 C.F.R. § 20.1403(e)(2)*. Only in

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<sup>12</sup> In his Order, the Presiding Officer quoted from selected portions of the NRC Staff Response concerning, *inter alia*, the enforceability of physical controls, but he did not put the remarks in context by including the Staff's discussion of custodians and custodial contracts. *See NRC Staff Response at 13.*

the latter class are “durable institutional controls” required. See 10 C.F.R. § 20.1403(e)(2)(ii); *Demonstrating Compliance with the Radiological Criteria for License Termination*, NRC Draft Regulatory Guide DG-4006 at 4.1.1.3 (Aug. 1998). Such controls could include legally enforceable deed restrictions and/or controls backed up by government control or ownership. See NRC Draft Regulatory Guide DG-4006 at 4.1.1.3; *Radiological Criteria for License Termination*, 62 Fed. Reg. 39058, 39070 (1997).

Notably, the NRC Staff agreed that the durable control requirements of Section 20.1403(e)(2)(ii) do not apply to the Fansteel Site. “Oklahoma does not substantively assert that the TEDE could or will be more than 100 mrem per year or that 10 C.F.R. § 20.1403(e)(2) applies.” NRC Staff Response at 12. Oklahoma provides insufficient information to determine that durability of institutional controls is an area of concern germane to the challenged action. See *Sequoyah Fuels*, 40 N.R.C. at 316. Accordingly, concerns related to acceptance of custody may not be litigated because NRC regulations and guidance requiring durable controls do not apply to Fansteel.

Instead, Section 20.1403(b) requires Fansteel to only make provisions for “legally enforceable institutional controls,” which include proprietary institutional controls such as easements and restrictive covenants (deed restrictions). NRC Draft Regulatory Guide DG-4006 at 4.1.1.10; see also 62 Fed. Reg. at 39070. In its rulemaking for this regulation, the NRC determined that “institutional controls using relatively simple deed restrictions can provide reasonable assurance that the TEDE will be below the 0.25

mSv/y (25 mrem/y) dose criterion with restrictions in place.” 62 Fed. Reg. at 39070. In accordance with the regulations and guidance, Fansteel has proposed to impose deed restrictions to be enforced under Oklahoma law. See RRDP § 2.1.2.4, Exhibit A in Appendix B.<sup>13</sup>

Neither NRC regulations nor guidance require licensees to identify custodians in connection with 10 C.F.R. Part 20. Section 20.1403(c) requires that sufficient funds be set aside to enable an independent third-party, including a governmental custodian, to assume responsibility for control and maintenance of sites. That requirement may be satisfied by any of the four alternatives specified in the regulations, none of which require identification of a specific third party. Notably, Section 20.1403(c) refers to “an independent third party” and “a governmental custodian.” As a practical matter, potential custodians are unwilling to accept such a role before the NRC has approved a decommissioning plan and the duties and potential risks of becoming the custodian are more clearly defined.

In conclusion, Oklahoma’s allegations regarding Fansteel’s failure to identify a custodian do not contravene any NRC regulation or guidance and, therefore, do not rise to the level of germaneness and may not be raised at a Subpart L hearing.

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<sup>13</sup> Although durable institutional controls are not required by the regulations, Fansteel’s RRDP proposes arrangements for the transfer of the Site to a long-term government custodian. See RRDP §§ 2.1.2.4, 2.1.2.5, Appendix B. These and other controls were developed with input from a series of public meetings held by the Site Specific Advisory Board convened by Fansteel to provide advice on this issue.

**2. The Fansteel Site is Not Subject to Durable Controls Lasting for 1,000 Years.**

Oklahoma alleges that the RRDP fails “to adequately demonstrate legally enforceable institutional controls” because the proposed controls “cannot reasonably be expected to be effective in the near term, much less for 1,000 years or for the enormous lengths of time associated with the half-lives of the long-lived radioactive contaminants at the Fansteel Facility,” nor can they be considered “durable enough to provide an appropriate level of protection of public health and safety for the extreme amount of residual radioactivity Fansteel proposes to permanently placed at the Fansteel Facility.” Request at 34-35. These concerns do not raise any issue germane to this proceeding.

As discussed above, the Fansteel Site is not subject to “durable institutional control” requirements. In addition, as the NRC Staff Response recognized (p. 12), Section 20.1403(b) does not require the licensee to provide proof that its institutional controls will be effective for the 1,000 year period specified in 10 C.F.R. § 20.1403(d). In its Statement of Considerations, the NRC remarked:

Requiring absolute proof that such controls would endure over long periods of time would be difficult, and the Commission does not intend to require this of licensees. Rather, institutional controls should be established with the objective of lasting 1,000 years. . . . Having done this, the licensee would be expected to demonstrate that the institutional controls could reasonably be expected to be effective into the foreseeable future.”

62 Fed. Reg. at 39070.

In short, Oklahoma's concerns do not present an issue that can be litigated in this proceeding, because there is no requirement that Fansteel demonstrate that its institutional controls will be effective for 1,000 years and there is no requirement that it identify a custodian for the Site. The Presiding Officer erred when he found that Oklahoma's fourth area of concern is germane to the challenged action.

**F. The Fifth Alleged Area of Concern, Regarding the RRDP's Compliance with 10 C.F.R. § 20.1403(c), Raises Challenges to Cost Calculations That Are Not Germane.**

This Commission should reverse the Presiding Officer's admission of Oklahoma's fifth area of concern regarding Fansteel's alleged failure to comply with 10 C.F.R. § 20.1403(c) financial assurance requirements. Order at 12.<sup>14</sup> The Presiding Officer erred because the State's claims concerning incorrect long-term site control cost calculations should not be admitted because of numerous flaws, as discussed in Fansteel's Answer (pp. 33-37). Among other things, Oklahoma identifies items that (i) fail to present a litigable question because they are not required by NRC regulations or were

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<sup>14</sup> Oklahoma challenges Fansteel's calculation of the following costs, which are discussed within and in Fansteel's Answer: (1) repair of the disposal cell; (2) replacement of the disposal cell; (3) repair and replacement of the disposal cell cap; (4) short- and long-term testing, analysis and monitoring of disposal cell performance; (5) repair and replacement of groundwater monitoring systems; (6) future remediation, decontamination, decommissioning and additional cleanup in the event radiological criteria are not met and residual radioactivity poses a significant threat to public health and safety; (7) collection and remediation of leachate from the disposal cell; (8) engineered barrier replacement; (9) emergency planning and training; (10) site security; (11) funding for enforcement of institutional controls; (12) the costs of preventing the migration and flow of the Arkansas River into the disposal cell; and (13) unforeseen problems, acts of God and other force majeure events. NRC Staff Response at 14 (citing Request at 36-37).

addressed in the prior URDP proceeding; (ii) are impermissibly vague and speculative; (iii) lack a rational basis; and (iv) are duplicative.

**1. Alleged Costs That Cannot Be Litigated in This Proceeding**

Oklahoma alleged that Fansteel's cost calculations are deficient because they omit certain cost elements, but many of these "omitted" elements are not required by NRC regulations. The NRC Staff properly determined that the following expenses are not required under applicable regulations and, therefore, may not be litigated: replacement of the disposal cell (NRC Staff Response at 15-16); emergency planning and training for long-term custodianship (*id.* at 17); enforcement of institutional controls for restricted decommissioning (*id.*). See *Sequoyah Fuels*, 1999 WL 1267277, at \*7; *Babcock & Wilcox*, 39 N.R.C. at 217-18.

Further, the costs for leachate collection and remediation are not germane to this action. As described in the RRDP, the containment cell is designed to prevent the generation of radioactive leachate and there is no leachate collection system to operate. See *Decommissioning Plan, Fansteel, Inc. - Muskogee, Oklahoma* (August, 1999); *Remedial Design Report - Stabilization and Solidification of Above-Action Level Soil and Construction of Containment Cell, Fansteel, Inc. - Muskogee, Oklahoma* (August, 1999). However, as part of the residue processing facility, Fansteel has installed and is presently operating a groundwater collection and treatment system that intercepts groundwater from the proposed cell location and other areas. This system will also intercept any contaminated liquids that might come from the cell, in the extremely

unlikely chance that such liquids would ever be generated. This system is not part of the RRDP and is, hence, not germane to this proceeding. Fansteel will operate that system until groundwater quality meets applicable standards, which is not anticipated to occur until after the cell is closed

**2. Alleged Costs That Are Impermissibly Vague, Speculative and/or Not Rationally Related to the Challenged Action.**

The Presiding Officer contends that Fansteel's proposed financial assurance plan does not provide sufficient details. Order at 12. Ironically, it is the State's area of concern that is lacking details in many instances and is, thus, not germane to the proceeding at hand. *See Shieldalloy*, 1999 NRC LEXIS 53 at \*6; *Sequoyah Fuels*, 40 N.R.C. at 316. For instance, Oklahoma failed to explain why the amount that Fansteel has provided for cell repair is not realistic. In addition, the cost of engineered barrier replacement is not germane to the proceeding because the State provided no explanation as to what an "engineered barrier" is. Notably, the NRC Staff concluded that this alleged area of concern is not rationally related to the challenged action. *See* NRC Staff Response at 17.

Moreover, the migration of the Arkansas River into the containment cell is not a credible event and the costs for preventing an incredible event are not reasonably anticipated costs for which financial assurances must be provided. Therefore, this is not a germane issue for this proceeding. As for other highly speculative unforeseen problems, acts of God, and *force majeure* events, these are, by their very nature, not reasonably

anticipated events for which financial assurance must be provided. They are also too vague to be addressed in this proceeding. *See Sequoyah Fuels Corp.*, 40 N.R.C. at 316.

### **3. Duplicative Costs**

In some instances, Oklahoma improperly inflated its claims by duplicating costs. For instance, Oklahoma identified repair and replacement of the cell and the cap as separate items, when, in fact, they are a single item. Similarly, the State improperly identified future remediation, decontamination and decommissioning and additional cleanup as separate cost elements. In addition, short-term testing, analysis, and monitoring of cell performance, which includes groundwater monitoring, do not need to be included in the financial assurance calculation because such costs are already accounted for through the NRC's pre-termination requirements that the licensee provide funding for two years of disposal cell performance monitoring and any detected inadequacies be fixed.

In conclusion, the Presiding Officer erred in finding the cost calculations alleged by Oklahoma in its fifth area of concern are germane to the proceeding. The State's alleged concerns are deficient as a matter of law, too vague and speculative, lack a rational basis and are duplicative.

**G. The Sixth Alleged Area of Concern, Regarding the Design and Sufficiency of the Containment Cell Proposed in the RRDP, is Rendered Superfluous by the NRC Staff's Pending Environmental Review.**

The Presiding Officer erroneously accepted as germane Oklahoma's sixth and final area of concern regarding the adequacy of the design and location of the proposed containment cell. The Presiding Officer correctly recognized that the NRC Staff intended to analyze the issues raised by Oklahoma as part of a pending technical and environmental review, pursuant to 10 C.F.R. Part 51 (see Order at 13; NRC Staff Response at 18-19); however, the Presiding Officer failed to take into account that Oklahoma, as an interested State, will have multiple opportunities in the 10 C.F.R. Part 51 environmental review process to address its alleged concerns with respect to the adequacy of containment cell design and location.<sup>15</sup>

At the earliest stages of environmental review, the NRC Staff must publish a notice of intent to prepare an EIS, and Oklahoma must receive a copy. See 10 C.F.R. § 51.116(b). The Staff is required to invite Oklahoma to participate in the scoping process, which defines the scope of review for the EIS and eliminates peripheral issues. See 10 C.F.R. § 51.28(a)(4). In preparing the draft EIS, the Staff must cooperate with Oklahoma to avoid duplicative federal and state requirements. See 10 C.F.R. § 51.70(c). The draft EIS itself must consider Oklahoma's point of view and must provide analysis of any

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<sup>15</sup> As discussed above, by letter dated December 14, 1999, the NRC Staff informed Fansteel that an Environmental Report is required in connection with its amendment request for the RRDP. The NRC also indicated that as part of its environmental review, the NRC expects to prepare an EIS in accordance with 10 C.F.R. Part 51. See Exhibit 2.

significant problem or objection raised by Oklahoma. *See* 10 C.F.R. § 51.71(b). In addition, Oklahoma must receive a copy of both the published notice of draft EIS availability and the draft EIS itself. *See* 10 C.F.R. §§ 51.74(a)(4), 51.117(d). Oklahoma has opportunity to comment on any perceived problems or deficiencies in the draft EIS. *See* 10 C.F.R. §§ 51.73, 51.117(b). In addition, the NRC Staff must respond to all comments made and append all comments to the final EIS. *See* 10 C.F.R. § 51.91(a)(1), (2).

The 10 C.F.R. Part 51 environmental review ensures a high degree of participation and inclusion for states and state agencies. Thus, Oklahoma has no need to assert its alleged design concerns in both a Subpart L proceeding and environmental review. In light of this, Fansteel should be spared the unnecessary expense of a Subpart L hearing on this matter. The Presiding Officer failed to consider Oklahoma's substantial opportunities to raise its concerns in the environmental review process. Therefore, the sixth area of concern is inadmissible at a Subpart L hearing.<sup>16</sup>

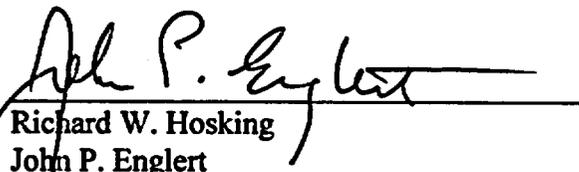
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<sup>16</sup> Moreover, as discussed in detail in Fansteel's Answer (pp. 37-41), Oklahoma's allegations are too vague, unsupported by factual statements demonstrating issues that can be litigated, or they are otherwise irrelevant to the proposed action.

## CONCLUSION

The Presiding Officer's grant of Oklahoma's request for a hearing was erroneous in that the State has not satisfied the requirements to be granted a hearing. Oklahoma has not demonstrated that it has standing, as it has not established that the proposed approval of the Restricted Release Decommissioning Plan would cause injury-in-fact to its purported interests or that a favorable decision would redress any alleged injury. Additionally, Oklahoma has not identified areas of concern germane to the challenged action. Accordingly, Fansteel Inc. respectfully requests that this Commission reverse the decision to grant a hearing or, in the alternative, limit the scope of the hearing to matters that are sufficiently detailed and that raise issues that may be litigated.

Respectfully submitted,

  
Richard W. Hosking  
John P. Englert  
William J. Labovitz  
Charles E. McChesney II

Kirkpatrick & Lockhart LLP  
Henry W. Oliver Building  
535 Smithfield Street  
Pittsburgh, PA 15222-2312  
(412) 355-8612  
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E-Mail: englerjp@kl.com

Counsel for Fansteel, Inc.

Dated: January 13, 2000



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

April 16, 1999

Stephen L. Jantzen

RECEIVED

APR 16 1999

ATTORNEY GENERAL'S  
OFFICE

MEMORANDUM TO:

Theodore S. Sherr, Chief  
Licensing and International  
Safeguards Branch  
Division of Fuel Cycle Safety  
and Safeguards, NMSS

THRU:

Charles Erneigh, Section Chief  
Licensing Section  
Licensing and International  
Safeguards Branch  
Division of Fuel Cycle Safety  
and Safeguards, NMSS

*M. Adams Jr.*  
4/16/99

FROM:

Michael E. Adjodha  
Licensing Section  
Licensing and International  
Safeguards Branch  
Division of Fuel Cycle Safety  
and Safeguards, NMSS

*M. Adjodha*

SUBJECT:

SUMMARY OF FANSTEEL MEETING

On April 13, 1999, representatives of Fansteel, Inc., met with the Division of Fuel Cycle Safety and Safeguards (FCSS) and the Division of Waste Management (DWM) staff at the Nuclear Regulatory Commission (NRC) headquarters in Rockville, Maryland. The individuals attending the meeting are listed on the attachment.

The purpose of the meeting was to discuss the deficiencies identified in the NRC's request for additional information (RAI) letter dated March 31, 1999, regarding Fansteel's plans for decommissioning their site.

Representatives of Fansteel sought guidance from the NRC staff on each of the questions raised in the RAI. The NRC staff provided necessary clarifications for Fansteel.

Through the course of the meeting, the following was agreed upon:

- separate decommissioning plans will be submitted for an SDMP plan and for a containment cell plan,
- Fansteel will respond to the RAI by late May or early June with the SDMP plan and a few weeks following with the containment cell plan,
- the Quality Assurance Project Plan (QAPP) needs to be summarized but need not be submitted for plan approval,
- the decommissioning plans will be revised to definitively state that there are no mixed wastes, and
- Fansteel will remove reference to MARSSIM in the SDMP plan, in conformance with NUREG-5849.

The follow-up action items were as follows:

- the NRC will provide an answer to Fansteel on whether or not their financial assurance funding plan needs to be split,
- Fansteel needs to incorporate the results of the 1993 Remedial Assessment into the decommissioning plan,
- Fansteel needs to have some procedures available of how decontaminated sites will not be re-contaminated, and
- Fansteel will need to submit to the NRC a letter requesting for an extension of time beyond the 30 days specified in the March 30, 1999, RAI.

John Hunter, Fansteel Plant Manager, stated that the containment cell is an essential part of their overall plan for decommissioning the site.

The duration of meeting was approximately two hours.

Docket        40-7580  
License        SMB-911

Attachment: As stated

cc:    Mr. John J. Hunter  
      Corporate Manager of Process Engineering  
      and Facilities Construction  
      Fansteel, Inc.  
      Number Ten Tantalum Place  
      Muskogee, OK 74403-9296

Meeting with  
Fansteel, Inc.,

Date: April 13, 1999

Place: O-16B6

Name	Organization	Phone Number
Michael E. Adjodha	NRC/NMSS/FCSS	301-415-8147
Mary Adams	NRC/NMSS/FCSS	301-415-7249
Stephen L. Jantzen	Oklahoma Atty. General	405-521-3921
Joseph Harrick	Earth Sciences Consultants	724-733-3000
M. Dave Tourdot	Earth Sciences Consultants	724-733-3000
Gerry Williams	Earth Sciences Consultants	724-733-3000
Keith Mahosky	Earth Sciences Consultants	724-733-3000
John J. Hunter	Fansteel, Inc.	918-687-6303
John Englert	Kirkpatrick & Lockhart	412-355-8331
Chuck Emeigh	NRC/NMSS/FCSS	301-415-7836
Larry Bell	NRC/NMSS/DWM	301-415-7302
Leslie Fields	NRC/NMSS/FCSS	301-415-6267
Ronald B. Uleck	NRC/NMSS/DWM	301-415-6722
John Hickey	NRC/NMSS/DWM	301-415-7234
Louis Carson	NRC/RIV/DNMS	817-860-8221
Garrett Smith	NRC/NMSS/FCSS	301-415-8118

Attachment



UNITED STATES  
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555-0001

December 14, 1999

Mr. John J. Hunter  
Corporate Manager of Process Engineering  
and Facilities Construction  
Fansteel, Inc.  
Number Ten Tantalum Place  
Muskogee, OK 74403-9296

**SUBJECT: REQUEST FOR AN ENVIRONMENTAL REPORT (TAC NO. L31216)**

Dear Mr. Hunter:

We are continuing to review your amendment request for construction of a containment cell at your Muskogee site and have determined that an Environmental Report (ER) is needed. An ER is required by 51.60 (b) (5); it must be prepared in accordance with 10 CFR 51.45 and submitted per 10 CFR 51.66. The ER should be provided within 90 days of the date of this letter. Please reference the above TAC No. in future correspondence related to this request.

As part of the environmental review, the Nuclear Regulatory Commission (NRC) expects to prepare an Environmental Impact Statement (EIS). The EIS will be consistent with 10 CFR Part 51, NRC Environmental Protection Regulations for Domestic Licensing and Related Regulatory Function, for Implementing the National Environmental Policy Act (NEPA; 1969, as amended). The ER should address all information necessary for NRC to prepare the EIS. This information is specified in 10 CFR Part 51, Appendix A to Subpart A: "Format for Presentation of Material in Environmental Impact Statements."

As we informed you in the telephone conversation held on November 17, 1999, the ER must include a discussion of alternatives to the proposed action. This discussion must include consideration of a no-action alternative. Guidance on discussion of no-action alternative's is enclosed and can be found at <http://ceq.eh.doe.gov/nepa/nepanet.htm>. Under new Advisory Council on Historic Preservation Regulations in 36 CFR 800.2 (promulgated in 64 FR 95, 27072-27087), NRC can authorize the licensee to initiate consultation with the State Historic Preservation Officer (SHPO) and Tribal Historic Preservation Officer(s) (THPO), and others as appropriate. NRC hereby grants this authorization to Fansteel. If you elect to perform these consultations, they should be documented in the ER.

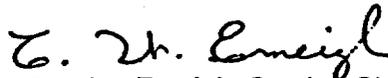
The staff has also noted that the proposed burial cell is located near the Arkansas River. The ER should include a thorough flood analysis, considering the risks of upstream dam failures and probable maximum flood levels at the site. Depending upon the design features needed to protect the site, the staff considers that the information needed will include data and analysis related to the dam failure, reservoir operation, and flood analysis.

Mr. John Hunter

-2-

We suggest that you meet with the NRC staff in early January to discuss your plans for and progress in preparation of the ER. This meeting will assure that the ER will address all necessary areas. Please contact Heather Astwood, the new Project Manager at (301) 415-5819 to arrange such a meeting. If you have any questions concerning this letter or the contents of an ER, please contact Ms. Astwood, at the telephone number listed above or send email to: *hma@nrc.gov*.

Sincerely,

  
Charles Emelgh, Section Chief  
Licensing Section  
Licensing and International  
Safeguards Branch  
Division of Fuel Cycle Safety  
and Safeguards, NMSS

Docket 40-7580  
License SMB-911

Enclosure: 46 FR 55, 18026-18038

cc w/encl: See next page

**Dr. Loren Mason**  
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Tulsa District  
U.S. Army Corps of Engineers  
P.O. Box 61  
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Waste Management Division  
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**Mr. Earlon Shirley**  
Radiation Management Section,  
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Vice President, General Counsel  
and Secretary  
Fansteel, Inc.  
Number One Tantalum Place  
North Chicago, IL 60064

DOCKETED  
USMRC

'00 JAN 18 P 4:03

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing "Fansteel, Inc.'s Appeal from the Presiding Officer's Decision to Grant a Hearing" have been served upon the persons listed below by certified U.S. mail, return receipt requested, this 13th day of January, 2000.

Chairman Richard A. Meserve  
U. S. Nuclear Regulatory Commission  
Washington, DC 20555  
*U.S. Certified Mail No. Z 234 733 960*

Commissioner Greta J. Dicus  
U. S. Nuclear Regulatory Commission  
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Commissioner Edward McGaffigan, Jr.  
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U.S. Nuclear Regulatory Commission  
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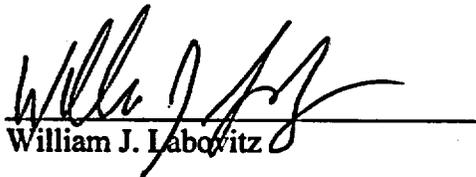
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**Administrative Judge Thomas S. Moore  
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William J. Labovitz