

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED  
USNRC

August 24, 2001 (10:37AM)

Before Administrative Judges:  
Thomas S. Moore, Chairman  
Charles N. Kelber  
Peter S. Lam

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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In the Matter of	)	
	)	
DUKE COGEMA STONE & WEBSTER	)	Docket No. 070-03098-ML
	)	
(Savannah River Mixed Oxide Fuel	)	ASLBP No. 01-790-01-ML
Fabrication Facility)	)	
_____	)	August 21, 2001

**Duke Cogema Stone & Webster's Answer to  
Georgians Against Nuclear Energy's  
Motion to Dismiss Licensing Proceeding or,  
in the Alternative, Hold it in Abeyance**

**I. INTRODUCTION AND PROCEDURAL HISTORY**

Duke Cogema Stone & Webster ("DCS") hereby files its Answer to "Georgians Against Nuclear Energy's ("GANE") Motion to Dismiss Licensing Proceeding or, in the Alternative, Hold it in Abeyance" ("Motion to Dismiss").

DCS has submitted a Construction Authorization Request ("CAR") to the Nuclear Regulatory Commission ("NRC") for a proposed Mixed Oxide Fuel Fabrication Facility ("MOX Facility") to be located on the Department of Energy's ("DOE") Savannah River Site ("SRS") in South Carolina.<sup>1</sup> On April 18, 2001, the NRC published in the Federal Register a "Notice of Acceptance for Docketing of the Application, and Notice of Opportunity for a Hearing, on an Application for Authority to Construct a Mixed Oxide

Fuel Fabrication Facility” (“April 18 Notice”).<sup>2</sup> The April 18 Notice establishes a bifurcated process in which an opportunity for hearing will first be provided on the CAR and Environmental Report (“ER”). The application for a special nuclear material (“SNM”) possession and use license (which DCS plans to file in the summer of 2002) will be the subject of a separate notice of opportunity for hearing at a later date.<sup>3</sup> Pursuant to the April 18 Notice, GANE, along with two other organizations<sup>4</sup> and two individuals<sup>5</sup> (“Requestors”) requested a hearing on the MOX Facility CAR. The Requestors have had an opportunity to amend their petitions for standing, and have also filed proposed contentions.<sup>6</sup> The Atomic Safety and Licensing Board (“Board”) is not scheduled to rule on the requests for hearing until October 2001.<sup>7</sup>

GANE filed its Motion to Dismiss on “August 13-14, 2001,”<sup>8</sup> listing four procedural concerns with the NRC review and hearing process, and requesting that the proceeding on the MOX Facility CAR be dismissed, or, in the alternative, held in abeyance pending the resolution of these concerns. In support of its Motion to Dismiss, GANE claims:

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<sup>1</sup> Letter from Robert H. Idhe to William F. Kane (Feb. 28, 2001).

<sup>2</sup> 66 *Fed. Reg.* 19,994.

<sup>3</sup> *Id.* at 19,995.

<sup>4</sup> The other organizations that have requested a hearing on the MOX Facility CAR are the Blue Ridge Environmental Defense League and Environmentalists, Inc.

<sup>5</sup> The individuals who have requested a hearing on the MOX Facility CAR are Donald J. Moniak and Edna Foster.

<sup>6</sup> Ms. Foster has made no attempt to amend her request for a hearing, nor has she filed contentions.

<sup>7</sup> Thus GANE is seeking substantive action by the Board on DCS’ CAR even before it has been determined whether GANE meets the requisite standards for admission as a party to this hearing, or indeed whether there will be a hearing.

<sup>8</sup> GANE’s certificate of service indicates that the Motion to Dismiss was served on “August 13-14, 2001.” The motion was served via e-mail on August 13 at 10:47 p.m., without attachments. The certificate of service indicates that the motion was given to Federal Express on August 14. Accordingly, DCS did not receive the attachments to the Motion to Dismiss until August 15, 2001, upon receipt of the paper copy via Federal Express.

- (1) the NRC Staff improperly docketed DCS' CAR separately from the MOX Facility operating license application<sup>9</sup>;
- (2) "the current litigation schedule violates NEPA"<sup>10</sup>;
- (3) "the hearing file is substantially incomplete"<sup>11</sup>; and
- (4) the planned Memorandum of Understanding ("MOU") between the NRC and the DOE may "affect the standards for safe operation of the MOX Facility."<sup>12</sup>

As demonstrated below, the bifurcated review and hearing process established by the NRC is consistent with applicable laws and regulations, and GANE's procedural concerns have no merit. Therefore, GANE's Motion to Dismiss should be denied.

## **II. THE PROCEEDING REGARDING THE MOX FACILITY CAR MEETS APPLICABLE PROCEDURAL REQUIREMENTS**

### **A. The NRC's Separate Docketing of the CAR Was Appropriate**

The NRC's docketing of the CAR, ER and quality assurance ("QA") plan marks the initial phase of a two-part process. In this first phase, NRC will consider whether the design bases of the MOX Facility's principal structures, systems, and components ("SSCs"), together with its QA program, provide reasonable assurance of protection against natural phenomena and the consequences of potential accidents.<sup>13</sup> Additionally, to comply with NEPA, the NRC Staff must conclude that based on environmental considerations, "the action called for is the issuance of the proposed license."<sup>14</sup> If these findings are made, construction of the MOX Facility may commence. The second phase

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<sup>9</sup> Motion to Dismiss at 13-14.

<sup>10</sup> *Id.* at 19.

<sup>11</sup> *Id.* at 23.

<sup>12</sup> *Id.* at 25.

<sup>13</sup> 10 CFR § 70.23(b).

<sup>14</sup> 10 CFR § 70.23(a)(7).

of NRC's review will begin when DCS submits the balance of the information required by 10 CFR § 70.23 for its license to possess and use SNM at the MOX Facility.

Claiming that neither the AEA nor NRC regulations authorizes the process established by the NRC in this case, GANE argues that the NRC's decision to docket the CAR separately and to publish a notice of opportunity for hearing on the CAR was "fundamentally defective."<sup>15</sup> GANE's position is incorrect.

First, GANE has identified no specific provision of the AEA that prohibits the two-step process established by the NRC, and no such prohibition exists. Because the AEA does not require the submittal and NRC review of a license application (or any other information) prior to commencement of construction of a plutonium fuel fabrication facility, the NRC is free to establish a two-step process in its regulations.<sup>16</sup> Indeed, Section 161(b) of the AEA,<sup>17</sup> grants the NRC broad authority to:

establish by rule, regulation, or order, such standards...to govern the possession and use of special nuclear material...as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property....

The Commission is free to establish its own procedural process, so long as that process complies with Section 57 of the AEA (which requires a license to possess or use SNM, but not to construct a facility).<sup>18</sup>

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<sup>15</sup> Motion to Dismiss at 13.

<sup>16</sup> See generally, *State of Ohio v. NRC*, 868 F.2d 810, 813 (6<sup>th</sup> Cir. 1989) ("the NRC is delegated primary authority in regulating the safety of nuclear plants through licensing and other procedures. In fact,...[the AEA] creates 'a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objections.'") quoting *Siegel v. Atomic Energy Commission*, 400 F.2d 778, 783 (D.C. Cir. 1968).

<sup>17</sup> 42 USC § 2201.

<sup>18</sup> 42 USC § 2077.

Second, GANE's interpretation of the governing regulations is overly formalistic and illogical, and would establish a procedural requirement that would serve no useful purpose. GANE points in particular to the language of 10 CFR § 70.22(f), which states that:

[e]ach application for a license to possess and use special nuclear material in a plutonium ... fuel fabrication plant shall contain, in addition to the other information required by this section, [information regarding] the design bases of the principal structures, systems, and components of the plant.

From this language, GANE argues that DCS was required to submit its entire application for an SNM possession and use license at the same time that it submitted the CAR.<sup>19</sup>

However, GANE does not dispute the scope of the findings that must be made by the NRC before construction of the MOX Facility may commence. Pursuant to 10 CFR § 70.23(b):

The Commission will approve construction of the principal structures, systems, and components ... on the basis of information filed pursuant to § 70.22(f) when the Commission has determined that the design bases of the principal structures, systems, and components, and the quality assurance program provide reasonable assurance of protection and natural phenomena and the consequences of potential accidents.

There is no requirement in the regulations that the NRC review any other information (other than the environmental information called for by 10 CFR § 70.23(a)(7)), or make

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<sup>19</sup> GANE also refers to the language of 10 CFR § 70.21(f), which states that "an application for a license to possess and use special nuclear material for ... fuel fabrication ... shall be filed at least 9 months prior to commencement of construction of the plant or facility in which the activity will be conducted, and shall be accompanied by an Environmental Report ..." Motion to Dismiss at 5. The purpose of this section, as the regulatory history makes clear, was to provide for "Commission *environmental* review prior to commencement of construction ..." See Final Rule, Prohibition of Site Preparation and Related Activities, 37 Fed. Reg. 5745-46 (Mar. 21, 1972). Since DCS submitted its ER well in advance of the anticipated date of commencement of construction, it has fully complied with 10 CFR § 70.21(f). See also, Letter from Andrew Persinko to Peter S.

any other findings (other than its environmental findings) before authorizing construction. To construe the regulations to require the submittal of information beyond the scope of the findings to be made by the NRC in approving construction would therefore serve no useful purpose.<sup>20</sup>

GANE also refers to the regulatory history of 10 CFR Part 70 to support its position. In particular, GANE states that the purpose of the 1971 amendments to Part 70 specifically applicable to plutonium fuel fabrication facilities was to “provide for Commission review of the site and design bases . . . prior to the beginning of plant construction” and to “strengthen” rather than weaken the NRC’s safety review process.<sup>21</sup>

Prior to the 1971 changes to the regulations, plutonium fuel fabrication facility license applicants were only required to obtain approval to possess and use special nuclear material; they could begin construction on their own initiative without any prior NRC safety review. Thus, the 1971 regulatory changes clearly did “strengthen” the review process for plutonium facilities, by adding the requirement for a separate construction authorization.<sup>22</sup> The bifurcated procedure adopted in the MOX Facility proceeding, however, fully meets the objective of that rule change by requiring the review and approval of the design basis information and QA plan prior to construction.

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Hastings (Jan. 17, 2001) (stating that DCS’ submittal of the CAR and ER complies with the 9 month requirement of 10 CFR § 70.21(f)).

<sup>20</sup> GANE’s interpretation of the regulations would produce nonsensical consequences. Under GANE’s interpretation, DCS would be required at the pre-construction stage to submit concurrently: (1) a complete license application under 10 CFR § 70.22; and (2) a CAR under 10 CFR § 70.22(f). However, the information required by Section 70.22(f) is more general and less detailed than the information required in a complete license application. It would make no sense for an applicant to submit the information for a CAR under Section 70.22(f), if the applicant at the same time were required to submit more detailed and complete information on the same topics in its license application.

<sup>21</sup> Motion to Dismiss at 16.

<sup>22</sup> See Final Rule, Special Nuclear Material, Plutonium Processing and Fuel Fabrication Plants, 26 *Fed. Reg.* 17,573 (Sept. 2, 1971).

However, the 1971 rule change clearly does not require the NRC to review and approve the full license application prior to commencement of construction (*see* 10 CFR § 70.23(b)), and there is no rational basis for believing that the Commission intended to require an applicant to submit information at the pre-construction stage that is not relevant to the NRC's decision on construction authorization.

GANE also repeatedly states that the "NRC Staff" has improperly decided to allow DCS to file the CAR prior to submittal of the full license application. The Commission has clearly acknowledged the acceptability of this procedure in both the April 18 Notice (which specifically recognizes that DCS intends to submit a full license application at a later date),<sup>23</sup> and in its referral order (CLI-01-13) (which discusses DCS' submittal of the CAR and the scope of the hearing, should a hearing request be granted).

Accordingly, GANE's argument that the CAR was improperly docketed separately from the full license application is incorrect.<sup>24</sup>

**B. The Current Litigation Schedule Complies With NEPA**

GANE next alleges that the EIS cannot be completed, and that the NRC will have failed to take the "hard look" at environmental impacts required by NEPA, if the NRC Staff does not first issue its Safety Evaluation Report ("SER") relating to operation of the MOX Facility. GANE seems to presume that the environmental review to be performed by the Staff in issuing the EIS will not or can not address the impacts of MOX Facility operation.

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<sup>23</sup> 66 *Fed. Reg.* at 19,095.

<sup>24</sup> GANE also states that the two-step review process will allow the NRC Staff to "cut off environmental review before the second phase is complete" and that the NRC "intends to" cease all environmental review after issuance of the EIS. Motion to Dismiss at 14. In fact, NRC regulations *require* completion of the environmental review before construction of the facility may begin. *See* 10 CFR § 70.23(a)(7). Furthermore, under 10 CFR § 51.92, the NRC will be required

On the contrary, DCS' ER (Section 5.2) provides information on the impacts of MOX Facility operation, and the NRC's Scoping Summary Report clearly indicates that the EIS will address such impacts.<sup>25</sup> Furthermore, the assertion that NEPA will be violated if the Staff does not complete its safety review of MOX Facility operations and issue its SER for operations before the EIS is completed is inconsistent with several other NRC regulations that contemplate just such a procedure.

For example, Subpart A of 10 CFR Part 52 establishes a procedure for the issuance of "early site permits" for nuclear power plants. Under 10 CFR § 52.15(a), an early site permit application may be filed "notwithstanding the fact that an application for a construction permit or a combined license has not been filed ...." Under 10 CFR § 52.18, an early site permit may be issued after the Commission has prepared an EIS addressing "the environmental effects of construction and operation of" the reactor. The Part 52 regulations thus explicitly contemplate conduct of the NRC's environmental review, and issuance of an EIS covering the full impacts of reactor construction and operation, before the applicant has even filed its construction permit application or combined license. Therefore, no SER on either the construction or operating aspects of the facility is a prerequisite to the issuance of the EIS covering the full environmental impacts of the facility.

Similarly, 10 CFR § 50.10(e)(i) allows the Staff to permit certain early site work to be undertaken at a proposed reactor site (often referred to as a "Limited Work Authorization") after an EIS on a construction permit application is issued. Typically,

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to supplement its EIS if "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."

<sup>25</sup> See "Environmental Impact Statement Scoping Process, Scoping Summary Report" (August 2001) ("Scoping Summary Report"), Attachment A, section 4.3.

Limited Work Authorizations have been issued before the Staff's SER on the construction permit application has been issued. Otherwise, there would likely be no need to seek the Limited Work Authorization in the first place, since issuance of a favorable SER on construction would permit full construction to commence.

Finally, GANE cites *Citizens for Safe Power v. NRC*, 524 F.2d 1291 (D.C. Cir. 1975) and *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003 (1973) in support of its position. Neither decision supports GANE's position or even appears to be on point.<sup>26</sup> Thus, GANE's assertions on the need for an SER on MOX Facility operations as a prerequisite to the issuance of an EIS should be rejected.

**C. There Is No Basis to Suspend These Proceedings Pending Issuance or "Completion" of the Hearing File**

GANE next alleges that "the hearing file is substantially incomplete [because] the majority of the DCS license application," the Final EIS, and the SERs for construction and operation are not available. This claim is premature and contrary to the NRC's rules.

Pursuant to 10 CFR § 2.1231(a), the hearing file will be created and made available "within (30) days of the presiding officer's entry of an order granting a request for a hearing." Since the Licensing Board has not yet granted a hearing, there is no requirement as yet to even establish a hearing file. Furthermore, for purposes of any

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<sup>26</sup> The brief statement quoted from *Citizens for Safe Power* (that AEA requirements cannot "be viewed separate and apart from NEPA considerations") was taken out of context by GANE. It was made in response to an argument by the petitioners in that case that, in essence, a finding that an applicant has met applicable Atomic Energy Commission ("AEC") safety and environmental regulations is not sufficient, in and of itself, for the AEC to make the requisite "reasonable assurance" and "inimicality" findings – findings which the petitioners believed should be made "independent of" the AEC regulations. See *Citizens for Safe Power*, 524 F.2d at 1293-1301; see, in particular, 524 F.2d at 1298-1299. Neither that case, nor the *Maine Yankee* Appeal Board decision which was reviewed in *Citizens for Safe Power*, stands for the proposition that a sufficient EIS cannot be prepared in the absence of a full Staff safety review of operations.

hearing on the CAR, the hearing file need not, and will not, include either the full license application or the SER on operations.

GANE also alleges that “the NRC Staff’s proposed schedule unlawfully contemplates that litigation will go forward before the completion of the hearing file.”<sup>27</sup> This allegation is incorrect in several significant respects. First, the schedule has been established by the *Commission* (in CLI-01-13), and not by the NRC Staff. The Commission has specifically directed the Board to rule on standing and the admissibility of contentions and to begin the discovery process before the hearing file is even *issued*.<sup>28</sup> It has also specified that the contentions:

must be based on information (or the lack thereof) contained in either the Applicants’ CAR or its environmental report. In filing contentions, petitioners must evaluate the applicant’s submittals, and not simply wait for the Staff to issue its SER or EIS before formulating contentions.<sup>29</sup>

Further, the Commission has made it clear that the actual evidentiary hearing will not go forward until the EIS and the SER on the CAR are available. According to CLI-01-13, formal written presentations regarding the contentions will occur 90 days after the NRC Staff issues the EIS and the SER, and any oral presentation will take place 135 days after the NRC Staff issues the EIS and the SER. Thus the relief requested by GANE directly contravenes the Commission’s referral order.

To hold this proceeding in abeyance at this stage until the EIS and the SER are added to the hearing file would also contravene the NRC regulations governing intervention, which require Requestors to “file contentions based on the applicant’s

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<sup>27</sup> Motion to Dismiss at 13.

<sup>28</sup> CLI-01-13, slip op. at 8-9.

<sup>29</sup> *Id.* at 7, n.2.

environmental report” on issues arising under NEPA.<sup>30</sup> Requestors will later be afforded an opportunity to “amend those contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto.”<sup>31</sup>

GANE relies upon an unpublished Presiding Officer’s decision in *Hydro Resources*.<sup>32</sup> In that case, the Presiding Officer held the proceeding (including its determinations on requests for hearing) in abeyance pending completion of the NRC Staff’s review and approval (or denial) of the license application and its update of the hearing file.

The NRC regulations explicitly contemplate that the Presiding Officer will rule on pending requests for hearing before the hearing file is made available. In particular, 10 CFR § 2.1231(a) states:

Within thirty (30) days of the presiding officer’s entry of an order granting a request for hearing, the NRC staff shall file in the docket ... and make available to ... any party to the proceeding a hearing file.

(Emphasis added).

Furthermore, DCS believes that the most common practice in Subpart L proceedings is for the Presiding Officer to rule on standing and areas of concern prior to receipt of the Staff’s SER or EIS, rather than to delay the proceeding entirely pending publication of those documents.<sup>33</sup> We believe that the same practice typically applies in

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<sup>30</sup> 10 CFR § 2.714(b)(2)(iii); *see also* CLI-01-13, slip op. at 7 n.2.

<sup>31</sup> 10 CFR § 2.714(b)(2)(iii).

<sup>32</sup> *Hydro Resources, Inc.*, 1995 WL 569153 (Sept. 13, 1995).

<sup>33</sup> *See e.g., Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 NRC 9, 16 (2001) (ruling on standing and areas of concern prior to completion by NRC staff of the EIS and SER).

Subpart G proceedings.<sup>34</sup> Therefore, GANE's request that the proceeding be held in abeyance pending receipt of the SERs and EIS should be denied.

**D. The Planned MOU Will Not Affect the Applicable Standards in This Case**

Finally, GANE alleges that "because the NRC Staff has yet to establish a[n] MOU with the DOE that would clarify respective NRC roles and responsibilities with respect to the operation of the MOX Facility, the standards governing facility operation remain unclear."<sup>35</sup> This allegation is incorrect because the roles of both agencies with respect to regulating the operation of the MOX Facility are clear. Pursuant to 42 USC § 5842, the NRC has "licensing and related regulatory authority" over the MOX Facility. As an NRC licensee, DCS' operation of the MOX Facility will be subject to all applicable NRC regulatory requirements.

The pending MOU is apparently intended to establish a general working agreement between the agencies, and to coordinate their roles with respect to information, personnel and physical security at the MOX Facility. The MOU is not required by law, and will in no way alter the NRC's regulatory authority. Thus, the pending MOU can have no impact on the "standards governing facility operation," and does not constitute a basis for a delay of this proceeding. Furthermore, to the extent that security matters to be addressed in the MOU may be relevant to the ultimate decision on the application for a

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<sup>34</sup> See e.g. *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998) citing the Statement of Consideration on the Contentions Rule, 10 CFR § 2.714 ("because the license application should include sufficient information to form a basis for contentions, we reject [the] suggestion[ ] that interventions not be required to set forth pertinent [contentions] until the Staff has published its [final EIS] and SER"); see also *Florida Power & Light Co.* (Turkey Point Nuclear Plant, Units 3 and 4), CLI-01-17, slip op. at 17-18 (July 19, 2001) (denying standing and rejecting petitioner's claim of "unwarranted 'difficulty' because the NRC Staff has not issued its SER and SEIS").

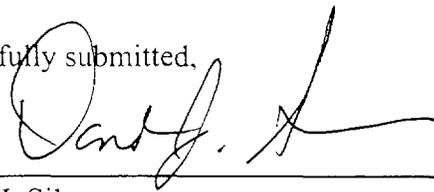
<sup>35</sup> Motion to Dismiss at 3.

possession and use license, they are clearly beyond the scope of the proceeding on the CAR,<sup>36</sup> and provide no basis for dismissing or delaying the CAR proceeding.

### III. CONCLUSION

For the foregoing reasons, Duke Cogema Stone & Webster requests that GANE's "Motion to Dismiss Licensing Proceeding or, in the Alternative, Hold it in Abeyance" be denied.

Respectfully submitted,



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Dated August 21, 2001

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<sup>36</sup> See CLI-01-13, slip op. at 6-7.

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:  
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	)	

**CERTIFICATE OF SERVICE**

I hereby certify that copies of "Duke Cogema Stone & Webster's Answer to Georgians Against Nuclear Energy's Motion to Dismiss Licensing Proceeding or, in the Alternative, Hold it in Abeyance" were served this day upon the persons listed below, by both e-mail and United States Postal Service, first class mail, with the exception of Environmentalists, Inc, which was served by overnight mail.

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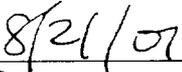
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