RAS 5665

January 26, 2003

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Presiding Officer

In the Matter of	)	Docket No. 70-143
Nuclear Fuel Services, Inc.	)	Special Nuclear Material
(Blended Low Enriched Uranium Project)	)	License No. SNM-124

KATHY HELMS-HUGHES' RESPONSE TO APPLICANT'S MOTION TO STRIKE PART OF HELMS-HUGHES RESPONSE TO NUCLEAR FUEL SERVICES, INC.'S JANUARY 16, 2003, MOTION TO DENY HELMS-HUGHES REQUEST FOR STANDING AND LEAVE TO INTERVENE

On January 16, 2003, Applicant Nuclear Fuel Services, Inc. ("Applicant" or "NFS") filed a motion to strike part of Kathy Helms-Hughes' January 6, 2003, response to Applicant's December 13, 2002, answer to her November 29, 2002, request for standing and leave to intervene.

Applicant claims the move to strike was because Helms-Hughes' response:

- Was "unjustifiably late and thus should be stricken";
- Attempted "to raise new areas of concern that she did not attempt to raise in her initial hearing request";
- Failed "to demonstrate standing because she fails to show a realistic threat of direct, concrete, and palpable injury that is fairly traceable to the proposed license amendment"; and
- Makes "only impermissibly vague and speculative claims, lacking in all detail, about potential harm arising from the amendment."

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SECY-02

In response, Helms-Hughes respectfully submits: "A petitioner need not establish that injury will inevitably result from the proposed action to show an injury in fact, but only that it may be injured in fact by the proposed action." Gulf States Utilities Co., et al. (Riverbend Station, Unit 1), LBP-94-3, 39 NRC 31, AFF'D, CLI-94-10, 40 NRC 43 (1994).

Helms-Hughes maintains that information submitted in her Jan. 6, 2003, Response is not "new," or "late"; rather, it seeks to elaborate on the original issues raised in Helms-Hughes' Nov. 29, 2002, Declaration and to "connect the dots" in a manner that even a third-grader could understand by providing "details" the Applicant claimed were lacking. Merely because NFS is resistant to respond to the issues raised in Helms-Hughes' Declaration and Response does not negate the fact that they are legitimate issues which this adjudicatory panel must have NFS address in an Environmental Impact Statement (EIS).

The Applicant states in its Jan. 16, 2003, answer, "Applicant's Motion to Strike Part of Kathy Helms-Hughes Response ..." (Sect. 1, Page 2, Paragraph 2), "The purpose of allowing replies to answers to hearing requests in NRC practice generally is to allow petitioners to respond to arguments in the answers that otherwise might have been difficult to anticipate in the requests."

Not being privy to the practices of this panel, Helms-Hughes respectfully submits that she would have included the additional information, and more, in her response had she known, as the Applicant does, the policies and procedure in these types of affairs. As previously stated, Helms-Hughes is not an attorney, nor does she have access to an attorney. But none of this negates the fact that Helms-Hughes must be given a place at the table in this public process.

Helms-Hughes must be heard given the fact that she lives less than 20 miles downwind of NFS, inside NFS's Region of Concern; she is in the flight path of air effluent dispersion (northeast), living on the same land her grandmother purchased in 1932 — land that her mother, aunts and uncles grew up on; land on which NFS has been depositing airborne uranium,

plutonium, americium and/or thorium since 1957, based on elementary science: gravity, wind velocity and wind direction. And now, as stated in the Environmental Assessment (EA,) (page 2-10, paragraph 1) those airborne emissions of uranium and thorium will increase four to five times current levels, creating further health risks for Helms-Hughes, her family and her community. Helms-Hughes suffers from chronic asthma and her 10-year-old female child also has respiratory problems, as do many residents in the area, which is devoid of industry. (Helms-Hughes' Declaration, Nov. 29, 2002, page2, item 5; Response, Jan. 6, 2003, Page 8)

Helms-Hughes farms the land on which she now resides and has lived at various times since age 3; land where she and her family have lived for three generations. She and family members eat produce from the land and drink the spring water that flows across her land from the Cherokee National Forest which bounds her property. This puts her and her family at risk of consuming airborne radioactive contaminants, such as uranium, which are stored in the body for decades. (Helms-Hughes' Declaration, Nov. 29, 2002, page 2, item 5; Response, Jan. 6, 2003, Page 5)

"Uranium can enter the body through inhalation, ingestion, or direct contamination of open wounds. The health consequences are confined primarily to the organs of concentration: lung, kidney and bone." As a result, one severe health impact is a potential loss of kidney function. (Highly Enriched Uranium Working Group Report, U.S. Department of Energy (December 1996, page 5). Helms-Hughes' mother and an aunt died in renal (kidney) failure. There are other residents in the community who also underwent dialysis during the time of Helms-Hughes' mother's illness and who also have since died in renal failure.

A prudent person would be led to believe and even "presume," as in the Radiation Exposure Compensation Act, that the deposit of radioactive airborne emissions in Helms-Hughes' community since 1957 — especially during the intervening years from NFS's startup to implementation of the Clean Air Act when air pollution controls were virtually nonexistent —

have had a negative impact on the health of Helms-Hughes, her family, and other members of the community. Increased airborne effluent from NFS which will settle on the area during the years of operation of the BLEU Project will further increase the health risks to the community . (Helms-Hughes Response, Jan. 6, 2003, page 4, paragraphs 6-9; pages 5-7; Declaration, Nov. 29, 2002, page 2, item 5)

The Nuclear Regulatory Commission states that its primary mission is to "protect public health and safety, and the environment from the effects of radiation from nuclear reactors, materials, and waste facilities." The congressional mandate that provided this process clearly affords the public a place at the table in the decision-making when public health and safety are at risk. Helms-Hughes has provided this panel with significant health and safety issues which clearly exist, as well as weaknesses in NFS's control of its operations. As a member of the community affected by those issues, Helms-Hughes clearly has a place at the table in this public process and should not have to argue her way to the table. If NRC's public process worked as its mission states, Helms-Hughes and, indeed, other petitioners already would be sitting at the table having their issues addressed for the common good, rather than having the Applicant try to strip away their rights ensured by Congress.

NFS claims it is concerned with protecting and ensuring public health and safety and the environment, yet when the public tries to obtain reasonable assurance from the Applicant that it is doing all it can to meet this end, the Applicant objects to any and all issues voiced by the public. Further, the Applicant attempts to ensure those issues are not heard by this adjudicatory panel by trying to prove "lack of standing" and objecting to the public having a seat at the table. The Applicant has objected to health and safety issues raised by members of the public who live downwind, property owners living near NFS, members of the public who recreate in the area — indeed, everyone who has dared challenge NFS's incomplete, inconsistent, segmented data. The Applicant and the NRC cannot have it both ways: They cannot invite the public to participate in

this process and then deny them that role which is guaranteed by Congress.

The Applicant is attempting to deny this panel and the public a complete picture of the dangers associated with this new process by submitting license amendment requests for the BLEU Project in piecemeal fashion — a direct violation of the National Environmental Policy Act.

The NRC is derelict in its duty as a regulatory authority if it does not demand NFS perform an EIS based on the Applicant's own admission in the EA that the proposed blend-down contains new process operations (Sect. 5.1.2.2, page 5-8, paragraph 1), and that the proposed blend-down process operations are only "patterned after" existing, NRC-licensed processes (Sect. 5.1.2.2, page 5-7, paragraph 2). Conducting a process only "patterned after" existing processes approved for Framatome ANP Inc. under License SNM-1227 (Sect. 5.1.2.3, page 5-10, paragraph 3), does not provide the public reasonable assurance that NFS has sufficient control of its operation to safely and responsibly conduct HEU blend-down on the magnitude of 33 metric tons. In 1998, NFS performed a conversion of only "test quantities" of material which were then manufactured into lead test assemblies for TVA's Sequoyah Unit 2 reactor. The public is being asked to throw caution to the wind and stake their lives on the assumption that NFS and Framatome ANP can safely convert 33 metric tons of HEU based solely on that one test. Not only does NFS have a history of accidents related to criticality issues (Helms-Hughes' Nov. 29, 2002, Declaration, Item 4; Helms-Hughes Jan. 6, 2003, Response, page 5, pagragraphs 3-9), but the public also has not been provided reasonable assurance that Framatome ANP has sufficient control of its operations to carry out this project. Framatome appears to have its own set of problems as evidenced by loss of criticality safety controls at its Richland, Wash., facility on April 2-3, 2002, and the NRC's issuance of "Notification of Significant Enforcement Action" and proposed imposition of a $15,000 penalty. (ADAMS ML022340587, Aug. 22, 2002)

The U.S. Department of Energy's "Disposition of Surplus Highly-Enriched Uranium Final Environmental Impact Statement," (FEIS) provides only generic analysis of four proposed sites for the HEU blend-down project, further demanding the need for the Applicant to perform an EIS. At the time of the FEIS (June 1996), the most recent NEPA document addressing NFS's operations was the "Renewal of Special Nuclear Material License SNM-124," (U.S. NRC, August 1991.) On May 7, 1993, NRC issued Amendment No. 3 to SNM-124. At last count, NFS has had a total of 33 amendments to its SNM-124 license since its July 2, 1999, renewal, making way for revisions, adjustments, time extensions, and deletions to accommodate NFS's operation. (i.e., ADAMS Document ML010960361, Oct. 22, 2000, "Nuclear Fuel Services Amendment 12 [TAC NO. L31387] Adjust Liquid Effluent Discharge Limits.") After NFS notified the NRC that it had possibly exceeded its annual effluent discharge limits, per 10 CFR Part 20, for May 2000, NFS requested NRC approval of an expedited amendment of License SNM-124 to allow the Applicant to change liquid effluent action levels and reporting commitments, contained in Chapter 5 of its license, from concentration-based levels to dose-based levels. Rather than enforcing the discharge limits to protect public health, safety, and the environment, NRC approved the expedited amendment of License SNM-124, allowing NFS to discharge even more contaminants.

DOE is only supplying material for this project through TVA and has no direct connection to the processing operations. DOE is not only a bystander, it is outside the loop in the development of this operation. To take generic data from DOE's FEIS for the proposal of this process is akin to Helms-Hughes going to the grocery store in an attempt to find out where the fertilizer came from that fertilized the fields which grew the produce she purchased and consumed. To parallel: DOE, the fourth party, does not have a vested interest in the BLEU Project except to get rid of the fertilizer (surplus high-enriched uranium) by dumping it in the field (on the public). Their FEIS does not suffice to meet NEPA standards. Therefore NFS must

be ordered to provide an updated, current EIS on this project. Obviously, DOE's generic, final FEIS, on which this project ultimately is based, is in sad need of update.

The blend-down of high-enriched uranium into fuel could be a viable financial project for TVA, but TVA is not providing an EIS. Neither is NFS, nor Framatome ANP, which is the apparent overriding financial participant here. The people closest to the project apparently have devised a scheme which would lead a prudent person to believe that they are attempting to deny the public access to relative information and to circumvent the NEPA process.

The BLEU Project is projected to save Tennessee Valley Authority 20 percent in fuel costs and add $150 million to NFS coffers. The Department of Energy will save at least $500 million through the reduction of DOE's surplus high-enriched uranium stockpile. But this project should not be carried out for industry profit at the expense of the health of the surrounding public. Helms-Hughes and other members of the affected public have a right to seek enforcement of state and federal environmental regulations and to ensure that NFS is in compliance with those laws, not above the law. It is imperative that this panel consider all options before proceeding with a project which has such a high degree of risk to the surrounding communities.

I. ENVIRONMENTAL IMPACT STATEMENT

According to the Applicant, Helms-Hughes' Nov. 29, 2002, Declaration raised five issues, ("Applicant's Motion to Strike ...," Jan. 16, 2003, page 3, paragraph 1); the first issue being preparation of an Environmental Impact Statement for the BLEU Project.

In the EA, NFS correctly identified that the BLEU operation would include new processes, (Sect. 5.1.2.2, page 5-8, paragraph 1 and Sect. 5.1.2.2, page 5-7, paragraph 2). In a May 30, 2002, letter to Ms. B. Marie Moore (ADAMS ML021510274), the NRC also correctly identified that the BLEU operations included new processes. "NRC's major comment on the licensing plan of action was that while much of the BLEU preparation facility operations

are activities that previously have been licensed by NRC, several processes appear to be sufficiently different to be subject to the requirements for new processes in 10 CFR 70 Subpart H."

Helms-Hughes also respectfully submits that NFS's Environmental Assessment in regard to the BLEU operation does not provide concrete information from which this panel or the public can derive a full picture of the degree of risk associated with the project. The EA contains a question mark and blank in references to building size (Paragraph 2, Page 3-1), but more importantly, it includes eleven references to information to be included in "forthcoming" license amendment requests or safety analysis/assessments, (Sect. 2.1.4 Paragraph 2, Page 2-14; Sect. 3.9.3, Paragraph 3, Page 3-16; Sect. 3.9.3, Paragraph 1, Page 3-19; Sect. 4.2, Paragraph 2, Page 4-6; Sect. 5.1, Paragraph 1, Page 5-1; Sect. 5.1.1.1, Paragraph 1, Page 5-3; Sect. 5.1.1.1, Paragraph 3, Page 5-4; Sect. 5.1.2, Paragraph 2, Page 5-7; Sect. 5.1.2.2, Paragraph 7, Page 5-8; Sect. 5.1.2.3, Paragraph 7, Page 5-9; Sect. 5.1.2.4, Paragraph 5, Page 5-10).

Helms-Hughes also submits that though the Applicant claims in its "Motion to Strike," (Section 2, page 3) that Helms-Hughes raised 12 new issues, each of those 12 issues further expand on the five original issues raised in her Nov. 29, 2002, Declaration. Numbers 1-3, addressing the matter of cumulative effects of airborne emissions (Helms-Hughes Response, Jan. 6, 2003, page 3-4); No. 4, addressing NFS's experience in conducting HEU downblending (Helms-Hughes Response, Jan. 6, 2003, pages 4-5); No. 6, the EA's evaluation of potential accidents (Helms-Hughes Response, Jan. 6, 2003, pages 4, 7, 9); No. 10, decommissioning funding (Helms-Hughes Response, Jan. 6, 2003, pages 10-12); No. 11, financial assurance and corporate ownership (Helms-Hughes Response, Jan. 6, 2003, page 12); and No. 12, the double-use of Special Nuclear Material License SNM-124 (Helms-Hughes Response, Jan. 6, 2003, pages 12-13; See Attachment), all expand further on issue No. 1, "The preparation of an Environmental Impact Statement," and point to the need for reasonable assurance which can be provided only

by preparation of an Environmental Impact Statement. Some of those enumerated items included under item No. 1 also apply equally to other numbers in the five original issues raised in the declaration.

II. NFS's CONTROL OF OPERATIONS

NFS has not provided reasonable assurance that it has adequate control over its operation ("Motion to Strike ...," Section 2, page 3, item No. 2), an issue raised in Helms-Hughes' Nov. 29, 2002, Declaration (page 1, Item 4). Control of operation refers not only to environmental issues, but demonstration of a decommissioning fund that assures end-of-plant-cycle clean-up; demonstration of the Principal Responsible Parties, as identified by a detailed listing of the partners which make up NFS ownership in the event the Erwin site closes due to development of a situation similar to what occurred at NFS's West Valley Demonstration Project site in New York (Helms-Hughes Response, Jan. 6, 2003, pages 10 and 12). The fact that NFS and General Atomics were using the same SNM-124 license number at the same time (1999) further demonstrates the Applicant's lack of control over its operation, and demands an investigation by the NRC, which oversees Special Nuclear Material licensees. (ADAMS Document ML003670084, Dec. 28, 1999 "Offsite Disposal of Decommissioning Debris"; See Attachment) NFS admits that contaminants have migrated to soils and waters beyond its fenced-in, protected area, demonstrating lack of control of its operation. It also admits that construction and processing operations will result in the release of chemical and radioactive constituents and that its current controls to monitor emissions are inadequate. (EA, Page 4-6, paragraph 2)

The fact that there is litigation pending against NFS in U.S. District Court, Greeneville, Tenn., seeking damages for contamination from radioactive and non-radioactive hazardous substances (Attachment: Impact Plastics, Inc., Preston Tool and Mold, Inc., and Gerald M. O'Connor Jr. vs. Nuclear Fuel Services, Inc., Civil Action No. 2:02-CV-148), is a clear indication

of NFS's inability to adequately control its operation.

The fact that NFS took down its website in a blatant attempt to deny the public access to information at a time when petitioners were preparing arguments relative to the BLEU Project — a move which the Applicant claims was the result of an NRC directive — and the fact that apparently none of the other NRC licensees took down their websites during that period, is suspect and shows lack of management control on the part of the Applicant. Helms-Hughes submits that the Applicant's objection to this issue contained in "Motion to Strike ..." (page 3, Item 8) is further evidence that NFS is lacking in "Control of its Operation." (Helms-Hughes' Nov. 29, 2002, Declaration, page 1, Item 4).

NFS's attempts to limit public access to information by issuing press releases "Upon Inquiry" to reporters who wrote articles that did not cast NFS in a favorable light ("Motion to Strike ..." page 3, Item 9), further points to weaknesses in NFS's management control of its operations. (Helms-Hughes' Nov. 29, 2002, Declaration, page 1, Item 4). (See Attachment)

III. AIRBORNE RADIOLOGICAL CONTAMINANTS

Helms-Hughes not only raised the issue of increased discharges of radioactive contaminants into the air through emissions from the proposed BLEU Project, ("Motion to Strike ...," Section 2, page 3, paragraph 1, Item No. 3), but radiological and chemical contamination of soil and groundwater at the Erwin site, a fact that NFS blatantly has overlooked. (Helms-Hughes' Nov. 29, 2002, Declaration, pages 1-2)

Helms-Hughes submits that Item Nos. 1, 2, 3, 5 and 7 which the Applicant objected to in its "Motion to Strike ...," (Section 2, page 3, paragraph 2) all pertain to issues raised in her Nov. 29, 2002, Declaration (pages 1-2) and further expound on those issues of airborne emissions, contamination of soil and groundwater. Therefore, those issues are neither "late" nor "new."

IV. NUCLEAR MATERIAL TRANSPORTATION ISSUES

Helms-Hughes raised the issue of accidents resulting from the transportation of nuclear material in her Nov. 29, 2002, Declaration (page 3, Item No. 7). There was no objection to the transportation issue, therefore no response is warranted. However, the EA failed to address the issue of transportation risks to her home community of Carter County and surrounding areas.

V. ENVIRONMENTAL ASSESSMENT CONSIDERATION OF "POPULATION GROWTH, NEW SCHOOLS, AGING POPULATION GROWTH, [AND] THE LACK OF AN ACCEPTABLE EVACUATION PLAN IN THE EVENT OF AN ACCIDENT"

This issue also was not challenged by NFS, however, the stated growth must be properly addressed in an EIS produced by NFS.

VI. CONCLUSION

The veiled attempt by the Applicant to take Helms-Hughes out of this process is an attempt to deny valid safety issues and health concerns that have not been addressed in the EA, and the motion to strike must be denied by this panel because public health and safety issues must override the scheme devised by the Applicant to sidestep this EIS process. This panel is being asked to change the entire direction of this small company. Not only have they not shown that they have the expertise, the financial backing, or collectively the safety culture and management culture to ensure public health and safety, but NFS has not provided Helms-Hughes or this panel with reasonable assurance that they can perform an operation of the magnitude that they are attempting to foster off on this community. Therefore, Helms-Hughes respectfully requests this panel deny the Applicant's request for motion to strike part of Helms-Hughes Response.

CERTIFICATE OF SERVICE

I certify that on January 27, 2003, copies of KATHY HELMS-HUGHES' RESPONSE TO APPLICANT'S MOTION TO STRIKE PART OF HELMS-HUGHES RESPONSE TO NUCLEAR FUEL SERVICES, INC.'S JANUARY 16, 2003, MOTION TO DENY HELMS-HUGHES REQUEST FOR STANDING AND LEAVE TO INTERVENE were served on the persons listed below by ~~facisimile~~ transmission with copies and attachments to follow in first-class U.S. Mail. E-mail per Diane Curran

Alan S. Rosenthal, Presiding Officer
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
E-mail: rsnthl@comcast.net; sam4@nrc.gov
Facsimile: (301) 415-5599

Office of Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Facsimile: (301) 415-1672

Richard F. Cole, Administrative Judge
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission

Washington, D.C. 20555-0001

E-mail: rfc1@nrc.gov

Facsimile: (301) 415-5599

Daryl Shapiro

Shaw Pittman, LLP

2300 N Street N.W.

Washington, D.C. 20037

E-mail: Daryl.Shapiro@shawpittman.com

Facsimile: (202) 663-8007

Diane Curran

Harmon, Curran, Spielberg & Eisenberg, LLP

1726 M Street, NW, Suite 600

Washington, D.C. 20036

Facsimile: (202) 328-6918

E-mail: dcurran@harmoncurran.com

Rules and Adjudications Branch

Office of the Secretary

U.S. Nuclear Regulatory Commission

Washington, D.C. 20555

E-mail: hearingdocket@nrc.gov

Facsimile: (301) 415-1672

C. Todd Chapman, Esq.

King, King and Chapman, PLLC

125 S. Main St.

Greeneville, TN 37743

E-mail: chapman@xtn.net

Facsimile: (423) 639-3629

Neil J. Newman, Esq.*

Nuclear Fuel Services

1205 Banner Hill Road

Erwin, TN 37650-9718

Jennifer Euchner, Esq.

David Cummings, Esq.

Office of General Counsel

U.S. Nuclear Regulatory Commission

Washington, D.C. 20555

E-mail: jme@nrc.gov, dac3@nrc.gov

Facsimile: (301) 415-3725

Louis Zeller

Blue Ridge Environmental Defense League

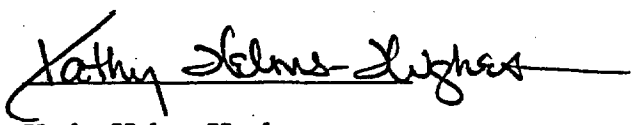
P.O. Box 88

Glendale Springs, NC 28629

E-mail : BREDL@skybest.com

Facsimile: (336) 982-2954

* Copies sent by U.S. Mail only



Kathy Helms-Hughes

P.O. Box 58

Hampton, Tenn. 37658

December 28, 1999

Dr. Keith E. Asmussen, Director
Licensing, Safety & Nuclear Compliance
General Atomics
P.O. Box 85608
San Diego, CA 92186-9784

SUBJECT: OFFSITE DISPOSAL OF DECOMMISSIONING DEBRIS (TAC NO. L31183)

Dear Dr. Asmussen:

We have reviewed your request, dated November 15, 1999, for authorization of off-site disposal of decommissioning debris from the General Atomics site. We reviewed your beta and gamma surveys and the gamma spectroscopy analyses of soils under the asphalt removed from the hot cell area and performed a confirmatory survey during the week of August 2-6 (NRC Inspection Report 70-734/99-01). These activities provide reasonable assurance that the radionuclide concentrations in the debris meet the release criteria in your NRC-approved site decommissioning plan. Based upon this review and survey, we have determined that disposal of this material to an unrestricted area, as you propose, is in accordance with 10 CFR Part 20 Subpart K and is therefore acceptable. This authorization does not relieve General Atomics from compliance with any other applicable Federal, State, or local requirements that are outside NRC's regulatory authority.

If you have questions, please contact Ms. Mary Adams at 301-415-7249, or by email at MTA@NRC.GOV.

Sincerely,

Original signed by

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

Docket 70-734
License SNM-124

DISTRIBUTION: [COMPLETED]

Docket 70-734	PUBLIC	NRC File Center	Region IV
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DATE	12/24/99	12/27/99	12/21/99 12/27

July 25, 2002

FOR RELEASE UPON INQUIRY

Media Contact:
Tony Treadway
Tele: (423) 926-9494, ext. 112

Nuclear Fuel Services acted quickly to correct issues related to inspections

(Erwin, TN) – Nuclear Fuel Services, Inc. (NFS) officials responded to issues related recent inspections made of its facility by the U.S. Nuclear Regulatory Commission (NRC).

An issue related to the inspection involved a back-up testing procedure for the plant's alarm system. "It is important to note that the plant's alarm system is tested on a frequent basis and works properly," explained NFS Vice President of Safety and Regulatory Marie Moore. "The matter at issue does not involve whether the system was working properly or that the primary test had not been performed, but the procedures related to a secondary test. After the secondary back-up test issue was raised, NFS acted appropriately to complete the secondary test. The test proved that the system also responded correctly."

The NRC also noted that the back up test issue had not been properly entered into the company's internal notification system for safety and regulatory matters. "It is important to note that the system is not part of the required regulatory method for issue tracking," said Moore. "However, that issue has also been rectified with proper entry of the back-up test matter."

NFS continues to operate in a safe and efficient manner in all matters related to the safety of its employees, the public or the environment," Moore concluded.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

IMPACT PLASTICS, INCORPORATED, a Tennessee Corporation, PRESTON TOOL AND MOLD, INC., a Tennessee Corporation, and GERALD M. O'CONNOR, JR.,	*	CIVIL ACTION
Plaintiffs,	*	NO. 2:02-CV-148
vs.	*	
NUCLEAR FUEL SERVICES, INC., a Maryland Corporation,	*	
Defendant.	*	

SECOND AMENDED COMPLAINT

Plaintiffs, Gerald M. O'Connor, Jr., Impact Plastics, Incorporated, and Preston Tool and Mold, Inc., hereby file this Second Amended Complaint pursuant to the Court's Order of December 4, 2002, and would show the Court as follows:

COUNT I

DAMAGE TO REAL PROPERTY AND OTHER PROPERTY INTERESTS:

1. Count I of this case arises out of certain claims for damages to real property and an ongoing business resulting from environmental contamination from non-radioactive hazardous substances.[1]

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[1] 42 U.S.C. § 9601(14) reads as follows:

The term "hazardous substance" means (A) any substance

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000-FACSIMILE (423) 756-4801

2. The plaintiffs are owner, lessor and lessees of real property located at 1070-A Industrial Drive, Erwin, Tennessee (hereinafter the "Contaminated Property"). Plaintiff O'Connor is a citizen of the State of Tennessee; plaintiff, Impact Plastics, Incorporated, is a domestic corporation organized in the State of Tennessee; and, plaintiff, Preston Tool and Mold, Inc., is a domestic corporation organized in the State of Tennessee.

3. Defendant, Nuclear Fuel Services, Inc. ("NFS"), is a corporation organized under the laws of the State of Maryland. The primary purpose and processes of NFS is recycling irradiated uranium in spent nuclear fuel. This process has led to a substantial contamination of the NFS property which is adjacent to and south of the Plaintiffs' property. NFS's agent for service

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designated pursuant to section 1321(b)(2)(A) of title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

of process is Dwight D. Ferguson, Jr., 205 Banner Hill Road, Erwin, Tennessee.

4. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332 (the amount in controversy exceeding $75,000) and it further has jurisdiction pursuant to 42 U.S.C. § 9607(a) and § 9613(b).[2]

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[2] Section 9607(a) reads as follows:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section -
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment ...
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal, ... from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance shall be liable for -
>
> (A) all costs of removal or remedial action incurred by the United States ...
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

Section 9613(b)and)f) read as follows:

> Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a)(2) as well as 42 U.S.C. § 9613(b)(as quoted herein).

6. Upon information and belief, plaintiffs do believe that the groundwater beneath the defendant's property is presently, or was at one point of time, contaminated with chloroform, 1,2 dichloroethylene (1,2 DCE), tetrachloroethylene (PCE), trichloroethylene (TCE), vinyl chloride, tributyl phosphate (TBP), U-236, depleted U isotopic, Tc-99, 129-Iodine, uranium 233/234, uranium 235/236, uranium 238, plutonium 238, plutonium 239/240, thorium 228, 230, 232.

7. Defendant, NFS, has allowed certain of the above designated non-nuclear hazardous substances to migrate from its facility to the property of the Plaintiffs. The Plaintiffs, during

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district in which the release or damages occurred, or in which the defendant resides, may be found or has his principal office. For the purposes of this section, the fund shall reside in the District of Columbia.

(f) CONTRIBUTION. -

(1) CONTRIBUTION. - Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a), during or following any civil action under section 9606 or under section 9607(a). Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. in resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or section 9607.

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SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

the period of time that this migration of non-nuclear hazardous substances was occurring, were innocent purchasers as defined in 42 U.S.C. § 9601(35)(A),(B), of the property in question. Plaintiffs have recently been made aware of the fact that the following non-nuclear hazardous substances exist in the groundwater beneath their facility in concentrations above the applicable Environmental Protection Agency (EPA) and State of Tennessee Maximum Contaminant Level (MCL), as promulgated under the Safe Drinking Water Act and Tennessee's Water Quality Act:

> Tetrachloroethene found at a maximum concentration of 3,400 ppb exceeding the 5 ppb MCL;
>
> Trichloroethene found at a maximum concentration of 81 ppb exceeding the 5 ppb MCL;
>
> Cis-1, 2 dichloroethene found at a maximum concentration of 130 ppb exceeding the 70 ppb MCL; and
>
> Vinyl chloride found at a maximum concentration of 12 ppb exceeding the 2 ppb MCL.

Hereinafter, these non-nuclear hazardous substances, all of which exceed the federal and state permissible regulatory levels as promulgated under the Safe Drinking Water Act and Tennessee's Water Quality Act shall be referred to as "the Contaminants".

8. The Defendant was aware of the migration of the above contaminants and consciously allowed the migration to occur through negligence and a conscious disregard for the property rights and value of the Plaintiffs' property. The Defendant's disregard for the Plaintiffs' rights constitutes a reckless

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000 • FACSIMILE (423) 756-4801

deviation from the standard of care that an ordinary person would exercise under the circumstances found herein. The Defendant failed to contain the release of contaminants, in violation of 42 U.S.C. § 9607(a) and § 9613(f).

9. Environmental reports prepared by or on behalf of NFS (over a number of years) show that the Defendant has negligently allowed the contaminants originating from Defendant's property to migrate and impact upon the groundwater beneath the property of the Plaintiffs. NFS or persons acting upon NFS's behalf have made available to the general public reports indicating that the groundwater beneath the Plaintiffs' property has been impacted by the hazardous substances described above (the contaminants).

COUNT II

NUISANCE

10. The allegations of paragraphs 1 through 9 are hereby incorporated by reference and made a part hereof as if each such allegation were fully set forth herein.

11. The Defendant has committed a public and private nuisance per se pursuant to Tenn. Code Ann. § 69-3-114(a) by discharging the contaminants onto Plaintiffs' property and into the waters of the State of Tennessee as defined by Tenn. Code Ann. § 69-3-103(33).

12. The Defendant has committed negligence per se in violating Tenn. Code Ann. § 69-3-115(4)(c). The Defendant has knowingly discharged the above enumerated contaminants (hazardous

LAW OFFICES
SPEARS, MOORE, REDMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

substances) into the waters of the State of Tennessee (§ 69-3-103(33)). Specifically, the Defendant has knowingly discharged the contaminants into the groundwater which has migrated into the Plaintiffs' property and subsequently into the Nolichucky River.

13. The Defendant, in allowing hazardous substances (the contaminants) to migrate from its property into the groundwater surrounding its facility, has engaged in an ultra hazardous activity and is subject to strict liability for any damages caused thereby.

14. All of the ultra hazardous contaminants listed above were under the exclusive possession and control of the Defendant. The defendant's exclusive possession and control of the contaminants is demonstrated by the fact that the depleted uranium, Tc-99, and 129 Iodine which are found intermixed with the contaminants are unique to the Defendant's facility and its manufacturing operation. Therefore, the Defendant is liable to the Plaintiffs under the theory of res ipsa loquitur.

15. For many years, up until the present day, NFS has conducted manufacturing and other operations on its property which contributed to the release of the contaminants.

16. In the absence of contaminants beneath the Plaintiffs' property, which migrated from NFS's property due to the negligence and recklessness of the Defendant, the Plaintiffs' property would

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000 • FACSIMILE (423) 756-4801

be worth substantially more than it is at the present time. But, because of the migration of the contaminants, the Plaintiffs' property has become stigmatized to the extent that there has been a substantial diminution of the value of the property. The presence of the dangerous contaminants will probably prompt the Plaintiffs to move their operations away from all of the dangers created by the contaminants in the groundwater. The necessary movement of the operation, along with the diminution of the property value, creates a substantial amount of damages to the Plaintiffs.

17. Plaintiffs have demanded that NFS take immediate steps to abate the presence of contaminants on and beneath the Plaintiffs' property and to abate the migration of those contaminants from NFS's property. NFS has failed to abate the movement of the hazardous substances (the contaminants) impacting on the Plaintiffs' property from NFS's property in a manner sufficiently expeditious to prevent diminution in the fair market value of Plaintiffs' property.

18. The migration of contaminants from the NFS property onto and beneath the Plaintiffs' property has significantly interfered with the property's utility, reputation and value and prompted a substantial diminution of the value of that property as well as significantly interfering with the operations of the lessees, Impact Plastics, Inc., and Preston Tool and Mold, Inc.

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SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

19. Even if NFS abates the presence of these hazardous substances (the contaminants) in the groundwater beneath the Plaintiffs' property in the future, that property will continue to suffer diminution in value as a result of having been impacted by the contaminants in the past, as well as the threat of future impact by contaminants from the NFS property.

20. NFS has caused or otherwise allowed the contaminants to be released into the environment such that they have impacted Plaintiffs' property. NFS has failed to take reasonable steps to abate these contaminants.

21. The contaminants from NFS's property have substantially interfered with the Plaintiffs' use and enjoyment of the Plaintiffs' property.

22. As a result of the migration of the contaminants, NFS is liable to the Plaintiffs for maintaining a continuing nuisance which has caused damage to each Plaintiff's interest in the relevant real property by diminishing that property's rental value and its fair market value. NFS has exhibited a reckless and conscious disregard for the Plaintiffs' property rights so as to amount to gross negligence.

WHEREFORE, Plaintiffs respectfully demand and pray for judgment against Defendant as follows:

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

(a) That process issue and be served upon Defendant requiring it to appear and answer this Second Amended Complaint as required by law;

(b) That judgment be entered in favor of Plaintiffs and against Defendant in an amount equal to the diminution in value and the costs to move the manufacturing operations caused by the Defendant's creation and maintenance of a continuing nuisance.

(c) That judgment be entered in favor of Plaintiffs and against Defendant for punitive damages as well as all costs of this action, including Plaintiffs' reasonable attorneys' fees.

(d) That Plaintiffs be granted such other and further relief as hereby justified by the evidence and the law and as this Court may deem just and proper.

COUNT III

TRESPASS:

23. The allegations of Paragraphs 1 through 22 are hereby incorporated by reference and made a part hereof as if each such allegation were fully set forth herein.

24. Although NFS has, for quite some time, been conscious of the fact that the contaminants it has released from its property into the groundwater beneath the Plaintiffs' property create a substantial and unjustifiable risk to Plaintiffs' property, NFS has made no effort to remove those contaminants. All of which

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

constitutes a reckless disregard on the part of NFS for Plaintiffs' rights.

25. By allowing the contaminants to migrate from the NFS property to the Plaintiffs' property, and by failing to remove said contaminants, NFS is liable for continuing trespass and, in addition to and exclusive of trespass, the Defendant is in violation of the Safe Drinking Water Act (42 U.S.C. § 300j-8), which has caused damage to Plaintiffs' interest in real property by reducing the Plaintiffs' property's rental value and fair market value.

26. The Plaintiffs have given to the Defendant proper notice under 42 U.S.C. § 300j-8, the Safe Drinking Water Act (§ 1449) of a proposed citizen's suit.

WHEREFORE, Plaintiffs respectfully demand and pray for a judgment against Defendant as follows:

(a) That process issue and be served upon Defendant requiring it to appear and answer this Second Amended Complaint as required by law.

(b) That Plaintiffs are entitled to such relief under § 300j-8 as is afforded them by the statute and that judgment be entered in favor of the Plaintiffs against the Defendant for its violation of the Safe Drinking Act which constitutes under the statute a trespass to Plaintiffs' property.

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000-FACSIMILE (423) 756-4801

(c) That judgment be entered in favor of Plaintiffs and against Defendant for punitive damages as well as all costs of this action, including Plaintiffs' reasonable attorneys' fees.

(d) That Plaintiffs be granted such other and further relief as hereby justified by the evidence and the law and as this Court may deem just and proper.

COUNT IV

THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT ("CERCLA"):

27. The allegations of Paragraphs 1 through 26 are hereby incorporated by reference and made a part hereof as if each such allegation were fully set forth herein.

28. The Plaintiffs would state that the Defendant, NFS, operates a facility within the meaning of 42 U.S.C. § 9601(9) and that the Defendant continuously, over a number of years, has released hazardous substances (as defined by 42 U.S.C. § 9601(14) and (22)) into the environment. The Defendant is therefore an operator of a facility within the terms of 42 U.S.C. § 9601(20)(A).

29. The Defendant, as an operator of a hazardous waste facility, has discharged its waste in such a manner that the hazardous wastes have migrated (with Defendant's knowledge) onto and into the Plaintiffs' property and, subsequent thereto, into the waters of the State of Tennessee (the Nolichucky River). The Plaintiffs have only recently been advised of the hazardous substances that have migrated to their property in violation of 42

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P.O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000-FACSIMILE (423) 756-4801

U.S.C. § 9607(a) and as a result of that information, the Plaintiffs have been forced to expend costs (response) to determine the extent of the migration of hazardous substances on their property from the Defendant's facility.

30. The Defendant is the owner and operator and a person who disposed of hazardous substances at its own facility, as defined by 42 U.S.C. § 9607(a)(1) and (2). The Defendant, with knowledge of this disposal, allowed the hazardous substances to migrate onto and under the Plaintiffs' property, thus creating a situation where the Plaintiffs' property becomes a facility under 42 U.S.C. § 9601(9).

31. One of the Plaintiffs is an innocent purchaser of the property as defined in 42 U.S.C. 9601(35) and neither Plaintiff is subject to liability under 42 U.S.C. § 9607 because they are afforded the defense established in paragraph (b)(3) of that section.

32. The Plaintiffs seek recovery of all necessary costs of response incurred by them pursuant to 42 U.S.C. § 9607(a)(B) and/or contribution of any of their costs pursuant to 42 U.S.C. § 9613(f)(1).

33. The Plaintiffs further seek a declaratory judgment as to liability on any future response costs pursuant to 42 U.S.C. § 9613(g)(2) which they may incur in the future because of the hazardous substances which have migrated from Defendant's facility to the Plaintiffs' property.

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

34. This Court has exclusive original jurisdiction over this matter, as well as venue with regard to this matter, pursuant to 42 U.S.C. § 9613(b).

35. Plaintiffs inform the Court that they have supplied a copy of this Second Amended Complaint to the Attorney General of the United States and to the Administrator of the Environmental Protection Agency pursuant to 42 U.S.C. § 9613(l).

WHEREFORE, Plaintiffs respectfully request a judgment from this Court against the Defendant as follows:

(a) That process issue and be served upon the Defendant requiring it to appear and answer this Second Amended Complaint as required by law.

(b) That a judgment be entered in favor of the Plaintiffs and against the Defendant for the amount of response costs incurred by the Plaintiffs under 42 U.S.C. § 9607(a) to date.

(c) That a declaratory judgment be entered in favor of the Plaintiffs against the Defendant for all future response costs incurred subsequent to this action with regard to the Defendant's violation of 42 U.S.C. § 9607(a). Said declaratory judgment being made available to the Plaintiffs under the auspices of 42 U.S.C. § 9613(g).

(d) That the Plaintiffs be granted such other and further rights to which they are entitled under 42 U.S.C. § 9601 et seq., as this Court may deem just and proper.

LAW OFFICES
SPEARS, MOORE, REHMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000 • FACSIMILE (423) 756-4801

COUNT V

ALTERNATIVE PLEADING

36. The allegations of Paragraphs 1 through 35 are hereby incorporated by reference and made a part hereof as if each such allegation were fully set forth herein.

37. NFS has caused or otherwise allowed a "nuclear incident," as that term is defined in 42 U.S.C. § 2014(q), to occur at its facility in Erwin, Tennessee. This nuclear incident arises out of the release of, or resulting from, the radioactive, toxic, explosive, or other hazardous properties of "source," "special nuclear," or "byproduct materials," as those terms are defined in 42 U.S.C. § 2014(e),(z), and (aa). Said nuclear incident is the proximate cause of the Plaintiffs' loss of, or damage to, their property or loss of use of property as earlier described in this pleading.

38. Alternatively, the Plaintiffs, without relinquishing their position that all damages and liabilities visited upon the relevant property were caused by the contaminants directly related to the Clean Water Act, the Safe Drinking Water Act, and CERCLA, allege that as a result of this nuclear incident, Plaintiffs' property has been exposed to radioactive materials in doses or levels that exceed the maximum permissible amounts allowed by federal regulations. The federal regulations exceeded by NFS's release of radioactive materials include, but are not necessarily

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

limited to, 40 CFR § 141.15 (maximum contaminant level for gross alpha particle activity) and 10 CFR § 20.1402 (radiological criteria for unrestricted use).

39. Plaintiffs' damages have been caused, at least in part, by the harmful properties of "source," "special nuclear," or byproduct materials," and therefore the Plaintiffs have stated a claim against the defendant for "public liability" under the Price-Anderson Act, 42 U.S.C.A. § 2210 et seq. In the alternative, Plaintiffs assert that, based on information and belief, defendant is not indemnified by the Nuclear Regulatory Commission as provided by 42 U.S.C. § 2210(c) and that therefore Plaintiffs' cause of action is not preempted by the Price-Anderson Act as provided by those cases following Gilberg v. Stephan Company, 24 F. Supp. 2d 325 (N.J. 1998). In the absence of federal preemption of this cause of action, the applicable standard of care may include state laws and standards with the defendant's liability being determined by all relevant state and federal standards.

WHEREFORE, Plaintiffs respectfully request a judgment from this Court against the Defendant as follows:

(a) That process issue and be served upon the Defendant, requiring it to appear and answer this Second Amended Complaint as required by law.

(b) That a judgment be entered in favor of the Plaintiffs and against the Defendant.

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000 • FACSIMILE (423) 756-4801

(c) That the Plaintiffs be granted such other and further rights to which they are entitled under 42 U.S.C. § 9601 et seq., as this Court may deem just and proper.

Respectfully submitted,

James W. Gentry, Jr. (TN Bar # 817)
Carl Eugene Shiles, Jr. (TN Bar #11678)
SPEARS, MOORE, REBMAN & WILLIAMS
801 Broad Street, Sixth Floor
P.O. Box 1749
Chattanooga, TN 37401-1749
(423) 756-7000

Gorman Waddell (TN Bar # 1105)
Robert Arrington (TN Bar # 1108)
MOORE, STOUT, WADDELL & LEDFORD
238 Broad Street
P.O. Box 1345
Kingsport, TN 37662
(423) 246-2344

By:_____

Date: January 9, 2003

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000-FACSIMILE (423) 756-4801

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been served upon Stephen E. Fox, McKinnon, Fowler, Fox & Taylor, 130 East Market Street, Johnson City, Tennessee 37604 and upon Allan E. Floro, Esq., Nixson Peabody LLP, 990 Stewart Avenue, Garden City, New York 11530, by transmitting a true and exact copy of same via Federal Express overnight delivery to said counsel at the above addresses.

This 9th day of January, 2003.

SPEARS, MOORE, REBMAN & WILLIAMS

By:_____
James W. Gentry, Jr.

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LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000-FACSIMILE (423) 756-4801