

with the Commission's Notice of Opportunity for a Hearing. Accordingly, Mr. Henshaw's Request should be denied.

I. BACKGROUND

A. Regulatory Background

From 1970 to 1993, SFC operated a uranium conversion facility at its site near Gore, Oklahoma ("Facility") pursuant to NRC Source Materials License No. SUB-1010. In 1993, however, SFC advised the NRC that it would shutdown and decommission the facility.²

On January 28, 2003, SFC submitted to the NRC a RP for the Facility in which SFC proposed to construct a disposal cell on the site for disposal of 11e.(2) byproduct material in accordance with the requirements of Appendix A to 10 CFR Part 40 ("Appendix A").³ SFC also requested permission to dispose of certain source material (non-11e.(2) wastes) in the disposal cell,⁴ under the guidance of Attachment 1 to NRC Regulatory Issue Summary ("RIS") 2000-23 (November 30, 2000). The RP was made available to the public on the NRC's Agency Document Access and Management System ("ADAMS") on March 13, 2003.⁵ On March 24, 2003, NRC notified SFC that it had completed its acceptance review of the RP and that it would continue to review the RP.⁶

² RP at 1-1.

³ See Letter from J. Ellis, SFC, to D. Gillen, NRC, January 28, 2003, License Condition 48, Reclamation Plan Submittal.

⁴ *Id.*

⁵ See Accession Number ML030550045 and related documents.

⁶ See Letter from S. Frant, NRC, to J. Ellis, SFC, NRC Acceptance Letter, March 24, 2003. This letter also included requests for additional information ("RAIs") pertaining to the RP.

B. Service of the Request

On April 15, 2003, the NRC published in the *Federal Register* a “Notice of Receipt of Amendment Request and Opportunity to Request a Hearing” pertaining to the SFC RP.⁷ The April 15, 2003 *Federal Register* notice stated that “each request for a hearing must also be served, by delivering it personally or by mail,” to SFC and the NRC Staff.⁸

Contrary to the explicit requirements of the *Federal Register* Notice, Mr. Henshaw did not serve his Request on SFC, personally or by mail. The Request was sent via letter to the Secretary of the Commission, and SFC first learned of this Request on May 30, 2003, when its counsel received a copy of the May 28, 2003 memorandum to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel from the Acting Secretary.⁹ Since Mr. Henshaw never served the Request on SFC, it was not timely filed in accordance with the Commission’s Notice.¹⁰ The failure of Mr. Henshaw to serve SFC is sufficient reason to deny the request, and SFC hereby asks the Commission to do so.

⁷ See 68 *Fed. Reg.* 18268 (April 15, 2003).

⁸ *Id.*

⁹ The Acting Secretary sent a copy of the Request to SFC via Federal Express on May 29, 2003. The Rules of Practice do not specifically discuss service via Federal Express. 10 CFR § 2.710 provides that when computing time for a response, if service is made via Express Mail, two days shall be added. Accordingly, SFC believes its response to this Request is due on June 10, 2003.

¹⁰ Mr. Henshaw’s letter was dated May 15, 2003 and docketed by the NRC Office of the Secretary Rulemakings and Adjudications Staff on May 21, 2003. However, SFC cannot tell from the information it has received when the Request was actually served on the Secretary.

II. MR. HENSHAW HAS FAILED TO DEMONSTRATE THAT HE HAS STANDING

A. A Requestor Must Demonstrate Standing

A hearing on an application for a license amendment is not mandatory. Rather, the NRC will only grant a hearing if one is requested by a person who can:

(1) demonstrate that he or she has standing in accordance with Section 189(a) of the Atomic Energy Act of 1954, as amended (“AEA”)¹¹ and 10 CFR § 2.1205; and (2) articulate in detail a concern that is rational and germane to the proceeding.¹²

Under Subpart L, a party requesting a hearing has the burden to demonstrate that its request should be granted.¹³ To meet this burden, 10 CFR § 2.1205(e) requires that a request for hearing describe “in detail:” (1) the interest of the requestor in the proceeding; (2) how that interest may be affected by the results of the proceeding, including the reasons why the requestor should be permitted a hearing, with particular reference to the factors set out in § 2.1205(h); (3) the requestor’s “areas of concern” about the licensing activity that is the subject of the proceeding; and (4) the circumstances establishing that the request for a hearing is timely in accordance with § 2.1205(d).

The Presiding Officer must review the Request to determine if the requestor meets the “judicial standards for standing,” taking into consideration: (1) the nature of the requestor’s rights under the AEA; (2) the nature and extent of the requestor’s property,

¹¹ 42 U.S.C. § 2239(a).

¹² *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 NRC 9 (2001). See also Final Subpart L Rule, 54 *Fed. Reg.* 8269, 8272 (February 28, 1989).

¹³ *The Curators of the University of Missouri*, CLI-95-1, 41 NRC 71 (1995). See also *Babcock and Wilcox Co.* (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-94-4, 39 NRC 47, 48 (1994).

financial, or other interests in the proceedings; and (3) the possible effect of any order that may be entered in the proceeding upon the requestor's interest.¹⁴

The "irreducible constitutional minimum" requirements for standing are that the litigant: (1) suffer an "injury-in-fact" within the "zone of interests" arguably protected by the governing statute that is "concrete and particularized and...actual or imminent, not conjectural or hypothetical;" (2) that there is a causal connection between the alleged injury and the action complained of; and (3) that the injury will be redressed by a favorable decision.¹⁵

In order to demonstrate standing, requestors must first show that the approval of the License Amendment Request ("LAR") is likely to cause them to suffer distinct and palpable injury.¹⁶

[T]he asserted injury must be 'distinct and palpable,' and 'particular [and] concrete,' as opposed to being 'conjectural...[,] hypothetical,' or 'abstract'... [W]hen future harm is asserted, it must be 'threatened,' 'certainly impending,' and 'real and immediate.'¹⁷

An injury in fact showing "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."¹⁸

¹⁴ 10 CFR § 2.1205(h). See also *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996); *Sequoyah Fuels Corp.*, CLI-01-02, 53 NRC 9.

¹⁵ *Bennett v. Spear*, 520 U.S. 154, 167 (1997). See generally, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). See also *In re Northeast Nuclear Energy Co.*, (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 NRC 149, 154 (1998) *aff'd* *NNECO*, CLI-98-20, 48 NRC 183 (1998); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 68 (1996).

¹⁶ See *Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 353 (1999).

¹⁷ *International Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-01-15, 53 NRC 344, 349 (2001), citing *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 121 (1992).

¹⁸ *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

Requestors must then establish a plausible chain of causation between the proposed agency action and the injuries alleged.¹⁹ The alleged injuries must result in a “concretely demonstrable way” from approval of the LAR,²⁰ and requestors must show a likelihood that those injuries would be “redressed” if the relief requested is granted.²¹ “There must ... be a sufficient causal connection between the alleged harm and the requested remedy so that the complaining party ‘stands to profit in some personal interest.’”²²

These assertions must be set forth with particularity. NRC regulations “do not permit the kind of ‘notice pleadings’” provided for in the Federal Rules of Civil Procedure.²³ Rather, requestors must provide detailed descriptions of their positions in order to support standing.²⁴ Nor should the NRC read between the lines of requestors’ statements to particularize injuries for them. “In determining whether injury in fact has been adequately set forth, [the NRC is] limited to assertions actually pleaded.”²⁵

¹⁹ See *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-04, 49 NRC 185, 192 (1999); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994).

²⁰ *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 81 (1993); see also *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 NRC 149, 155 (1998) (“the assertion of an injury without also establishing the causal link to the challenged [agency action] is insufficient to establish...standing”).

²¹ *Westinghouse Elec. Corp.* (Nuclear Fuel Export License for Czech Republic – Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 331 (1994).

²² *Babcock and Wilcox*, LBP-93-4, 37 NRC at 81.

²³ *Shieldalloy Metallurgical Corp.*, CLI-99-12, 49 NRC at 353-354.

²⁴ See 10 CFR § 2.1205(e) (requiring a requestor to “describe in detail,” among other things, its basis for standing).

²⁵ *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 127 (1992); *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 149, 153 (1992).

B. Mr. Henshaw Lacks Standing

The Request fails to demonstrate that Mr. Henshaw has standing and fails to identify areas of concern in sufficient detail to show that they are germane to this license amendment proceeding. In his Request, Mr. Henshaw lists a number of interests, including personal and family health, real and personal property, and livestock, and alleges harm to those interests as bases for standing. In each case, however, he fails to particularize how the NRC's approval of the LAR might adversely affect his personal interests. Mr. Henshaw relies on the following generalized and abstract threats of injury:

Improper design of the cell in the proposed environment, improper environmental characterization of the site, and introduction on non-11e.(2) materials into the cell have the potential of detrimental effects on myself, family, property and the environment in which we reside and recreate.

* * *

Possible effects of an improper reclamation plan include but are not limited to: adverse health effects, devaluation of property and physical property damage.²⁶

SFC demonstrates below why such abstract injuries are insufficient to confer standing.

1. There is No Injury-In-Fact

None of the alleged injuries is "particularized and threatened," "certainly impending," or "real and immediate" as required to confer standing. This proceeding does not involve an obvious potential for off-site consequences.²⁷ SFC has ceased operation and there is no potential for any large or sudden releases of radioactivity that

²⁶ Request at para. 2 (emphasis added).

²⁷ See, e.g., *Florida Power and Light Co.* (St. Lucie, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989) (holding that in cases not involving the construction, operation, or major alteration of a nuclear reactor or facility involving an obvious potential for significant offsite consequences, 50-mile proximity is insufficient to establish standing).

could readily impact even nearby properties. Therefore, the Request must establish a plausible chain of causation between approval of the RP and injuries to the requestor's interests. The Request also must demonstrate that the alleged injuries would result in a "concretely demonstrable way" from approval of the RP.²⁸ The burden rests with the Requestor to demonstrate this causation and Mr. Henshaw has not done so.

Apparently to demonstrate an injury, the Request states that Mr. Henshaw is "an adjoining landowner of Sequoyah Fuels Corporation and their operations" and that his property is "surrounded by the licensees property." This allegation is not sufficient to show that Mr. Henshaw might be injured by the proposed activities. As shown in the RP, the SFC property (including both the property owned by SFC and by its corporate parent, Sequoyah Fuels International Corporation) is extensive. Adjoining property southeast of the SFC property is well over a mile from the SFC process area and proposed location of the disposal cell.²⁹ Much of the property between the process area and the properties to the southeast is agricultural land.³⁰ The RP classifies such property as not having been impacted by facility operations and suitable for release for unrestricted use without any remediation.³¹

The Request does not even allege or attempt to demonstrate how any contamination caused by a postulated failure of the disposal cell could adversely impact Mr. Henshaw's stated interests, nor does it allege that any such contamination would be

²⁸ *Babcock and Wilcox*, LBP-93-4, 37 NRC at 81. See also *Northeast Nuclear Energy Co.*, LBP-98-22, 48 NRC at 155.

²⁹ See RP at fig. 2-3, which shows much, but not all of the SFC property.

³⁰ Nothing in the Request indicates the location of Mr. Henshaw's property. It is, in fact, to the southeast, more than a mile from the SFC process area and from the proposed cell location.

³¹ RP, Appendix D at 4-55, 4-56.

transported onto his home and property.³² Further, it only generally alleges “potential” or “possible” physical or other impacts caused by the proposed disposal cell if the design of the cell or the RP is improper.³³ Moreover, the RP indicates that property to the southeast would be not injured. Even assuming the disposal cell were to fail in some undefined way, because of the geohydrologic conditions of the site, any contamination that might be released would not flow onto property to the southeast of the Facility.³⁴ Therefore, there is no obvious potential for “detrimental physical effects”³⁵ on Mr. Henshaw, his family, or his property. Where there is no current injury and a party relies on the threat of future injury, the fact that one can imagine circumstances where a party could be affected is not enough.³⁶

Mr. Henshaw has not established the mandatory plausible chain of causation from approval of the RP to injury to any of his protected interests. A basis for standing similar to that raised by Mr. Henshaw has been rejected where the petitioners lived within two miles of a facility seeking a license amendment to allow extensive decommissioning activities.³⁷ The Presiding Officer held that:

It is not enough for the Petitioners simply to assert that they live close to the...facility. To meet their burden of proving

³² Mr. Henshaw also alleges that the disposal cell potentially will affect the environment in which he recreates. However, he does not identify the location of this area in any meaningful way, nor does he indicate how the proposed activities could have any adverse effect.

³³ Request at para. 2.

³⁴ RP at figure 2.2 and Appendix B, Section 8.5. Figure 2.2 shows topographic features that include lower land elevations between the SFC process area and properties to the southeast of the facility that would channel away surface water. Appendix B, Section 8.5 shows that projected future distribution of groundwater contamination does not extend toward the southeast of the process area.

³⁵ Request at para. 2.

³⁶ See *Commonwealth Edison Co.*, CLI-99-04, 49 NRC at 192.

³⁷ *Babcock and Wilcox*, LBP-93-4, 37 NRC at 83.

that they have the requisite injury in fact, the Petitioners also must provide some evidence of a causal link between the distance they reside from the facility and injury to their legitimate interests.³⁸

In 1994, based on the limited facts available at that time, the Commission found that Mr. Henshaw had standing to intervene in a previous proceeding regarding SFC decommissioning.³⁹ There, Native Americans for a Clean Environment (NACE), relied on an affidavit from Mr. Henshaw as its basis for standing. SFC argued then, as it does now, that Mr. Henshaw does not have standing because there is no potential for him to be injured by SFC decommissioning. The Commission based its finding that Mr. Henshaw had standing on NACE's allegation that there might be "deep groundwater flow patterns" that might bring SFC contamination to groundwater below the Henshaw property.⁴⁰ Since then, however, SFC has conducted extensive studies of the hydrogeological characteristics of the SFC site, and confirmed that groundwater from the SFC Facility flows west toward the Robert S. Kerr Reservoir.⁴¹ Deep groundwater flow has been shown to be limited by the extremely low hydraulic conductivity of the underlying sandstone.⁴² The studies also show that the geologic fault near the site is not significant to the Facility hydrogeology.⁴³ These extensive new studies show that the possibilities previously alleged do not exist. In his Request, Mr. Henshaw does not allege any

³⁸ *Id.* at 84. See also *International Uranium (USA) Corp.* (Source Material License Amendment), LBP-01-08, 53 NRC 218 (holding that a party who lived and worked one block from an affected radioactive materials transportation route did not established standing.)

³⁹ *Sequoyah Fuels Corp and General Atomics* (Decontamination and Decommissioning Funding) CLI-94-12, 40 NRC 64 (1994).

⁴⁰ *Id.* at 74.

⁴¹ RP, Appendix B at 79.

⁴² *Id.* at 80.

⁴³ *Id.* at 78-79.

deficiencies in such studies, nor does he identify any mechanism by which contamination could be transported to his property from the SFC site. Accordingly, the previous Commission finding was based on different facts than are now present.

Mr. Henshaw also appears to allege that a hearing should be granted to “protect the health and safety of the public.”⁴⁴ This interest, however, constitutes the type of generalized grievance regarding broad public interest concerns that have repeatedly been held not to provide bases for standing.⁴⁵ “[A] generalized grievance shared in substantially equal measure by all or a large class of citizens will not result in a distinct and palpable harm sufficient to support standing.”⁴⁶ Further, Mr. Henshaw has not asserted how or why he is authorized to represent the interests of the general public. Thus, this assertion regarding the general public falls far short of the particularized injuries required to demonstrate standing in an NRC proceeding.

For the above reasons, Mr. Henshaw has failed to establish that he has standing to intervene in this proceeding.

C. The Areas of Concern Are Not Germane to the Proceeding

In addition to the requirement to demonstrate that the Requestor has standing, the Request must also describe in detail “the requestor’s areas of concern about the licensing activity that is the subject matter of the proceeding.”⁴⁷ In considering a request, the

⁴⁴ Request at para. 3.

⁴⁵ See, e.g., *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Quivira Mining Co. (Ambrosia Lake Facility, Grants, New Mexico)*, CLI-98-11, 48 NRC 1, 6 (1998); *Florida Power & Light Co.*, CLI-89-21, 30 NRC at 329-30; *Transnuclear Inc.*, CLI-77-24, 6 NRC 525, 531 (1977).

⁴⁶ *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1)*, CLI-83-25, 18 NRC 327, 333 (1983).

Presiding Officer is directed to “determine that the specified areas of concern are germane to the subject matter of the proceeding.”⁴⁸ In adopting these requirements, the Commission explained that:

This statement of concerns need not be extensive, but it must be sufficient to establish that the issues the requestor wants to raise regarding the licensing action are within the range of matters that properly are subject to challenge in such a proceeding.⁴⁹

The Commission has since elaborated that the concerns must be “truly relevant ... to the license amendment at issue.”⁵⁰ “In addition to being truly relevant, the concerns must also be rational.”⁵¹

The Request does not explicitly identify any areas of concern. It identifies the following issues which may be intended as areas of concern. None of them, however, is sufficient to meet the requirement of 10 CFR 2.1205(e)(3). The following is a summary of the general concerns raised by the Request and an explanation of why they are not sufficient.

Improper design of the cell in the proposed environment, improper environmental characterization of the site, and introduction of non-11e.(2) byproduct materials into the cell have the potential of detrimental physical effects on myself, family, property and the environment in which we reside and recreate.

* * * *

The information submitted by the applicant does not demonstrate that my interests will be protected or that adequate steps have been taken to protect the health and safety of the general public in the near future let alone in perpetuity as will be

⁴⁷ 10 CFR § 2.1205(e)(3).

⁴⁸ 10 CFR § 2.1205(h).

⁴⁹ Informal Hearing Procedures for Materials Licensing Adjudications, 54 *Fed. Reg.* 8269, 8272 (Feb. 28, 1989).

⁵⁰ *Sequoyah Fuels Corp.*, CLI-01-02, 53 NRC at 10.

⁵¹ *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), LBP 99-46, 50 NRC 386, 395 (1999) (quoting *Babcock and Wilcox Co.* (Pennsylvania Nuclear Services Operations, Park Township, Pennsylvania), LBP 94-12, 39 NRC 215, 217 (1994)).

necessary given the long half lives and toxicity of the constituents proposed to be left on site.

The above concerns have no substance, and should not be accepted as areas of concern in this proceeding. Even under the liberal pleading standards of subpart L proceedings, concerns that are too vague are not to be considered germane.⁵² In this case, although specific aspects of the proposed cell design, site environmental characterization and disposal of non-11e.(2) byproduct material may well be proper subjects for areas of concern, the failure to specify any particular aspects of the cell design, site characterization study or proposed waste disposal makes it impossible to determine whether the issues are sought to be raised that are germane.⁵³ In fact, as written, the area of concern is so broad that one cannot determine whether it is even confined to issues under review by the NRC Staff. Clearly, these concerns lack “sufficient specific content to render [them] germane to the proceeding in any meaningful way.”⁵⁴

III. CONCLUSION

Mr. Henshaw has failed to demonstrate the essential minimum requirements for

⁵² See *Sequoyah Fuels Corp.* LBP-99-46, 50 NRC at 401 (noting that an area of concern that is too vague is not considered germane).

⁵³ See *id.* at 399.

⁵⁴ *International Uranium (USA) Corp.* (Source Material License Amendment), LBP-01-08, 53 NRC 204, 215 (2001). See also *Molycorp, Inc.* (Washington, Pennsylvania Temporary Storage of Decommissioning Wastes), LBP-00-010, 51 NRC 163, 173 (2000) (noting that an area of concern that is not adequately supported can be rejected).

standing and has not identified any areas of concern that are germane to this proceeding. In addition, he failed to timely serve the Request in accordance with the provisions of the Notice of Opportunity for Hearing. Accordingly, the Request should be denied.

Respectfully submitted,



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
)

SEQUOYAH FUELS CORPORATION,)
Gore, Oklahoma Site)

Docket No. 40-8027

(Request to Amend License No. Sub-1010 to)
Address Site Reclamation))
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Sequoyah Fuels Corporation's Answer Opposing Request For Hearing Filed By An Individual Resident Of The State Of Oklahoma were served upon the persons listed below by e-mail and U.S. mail, first class, postage prepaid, on this 10th day of June 2003.

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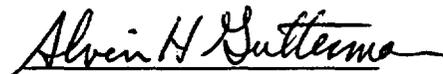
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