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December 6, 1993

Administrative Judge James P. Gleason, Chairman
Administrative Judge Jerry R. Kline
Administrative Judge G. Paul Bollwerk, III
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Docket No. 40-8027-EA
Sequoyah Fuels Corporation's Answer in Opposition
to NACE's Motion to Intervene

Dear Judges Gleason, Kline and Bollwerk:

Enclosed are copies of:

1. "Sequoyah Fuels Corporation's Answer in Opposition to NACE's Motion to Intervene," and
2. Notices of Appearance on behalf of Sequoyah Fuels Corporation submitted by Maurice Axelrad and John E. Matthews.

It is requested that service on Sequoyah Fuels Corporation in connection with this proceeding be made to the following addressees:

Maurice Axelrad
John E. Matthews
Newman & Holtzinger, P.C.
1615 L Street, N.W.
Suite 1000
Washington, D.C. 20036

and

John H. Ellis, President
Sequoyah Fuels Corporation
P.O. Box 610
Gore, Oklahoma 74435

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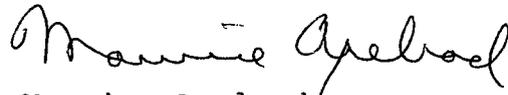
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This is also to inform you that Newman & Holtzinger will not be representing General Atomics in this proceeding. Notices of appearance on behalf of General Atomics are being filed today by the firm of Mays & Valentine.

Very truly yours,



Maurice Axelrad

/tg

Enclosures: As Stated

cc: Service List

proposes to intervene in these proceedings for the purpose of arguing that the NRC should sustain the Order. It contends that its interests and/or that of one of its members will be adversely affected if the Order is not sustained.

SFC opposes the NACE Motion because NACE has failed to meet the standards for late-filed intervention, and in any event, NACE does not have standing to obtain party status in this proceeding. NACE has failed to identify any particularized injury in fact to its organizational interests or the interests of a member of NACE that will be affected by the subject matter of this proceeding, which is "whether the Order should be sustained." Order at 27.

NACE admits that it would not be adversely affected by issuance of the Order and that it had no right to request a hearing on the Order. NACE Motion at 3. Indeed, it is clear that NACE could not have compelled the NRC to issue the Order in the first instance.^{2/} Under these circumstances, as SFC demonstrates below, NACE does not have the requisite standing to participate in this proceeding.

However, NACE contends that it would be adversely affected by this proceeding, if the Order were not sustained or if it were sustained only in part. The NACE Motion therefore

^{2/} NACE could have petitioned the NRC to take enforcement action under 10 CFR § 2.206. However, any such action is within the sole enforcement discretion of the NRC. See, e.g., Arnow v. NRC, 868 F.2d 223, 235 (7th Cir. 1989); Safe Energy Coalition v. NRC, 866 F.2d 1473, 1477 (D.C. Cir. 1989); Massachusetts Public Interest Research Group, Inc. v. NRC, 852 F.2d 9, 19 (1st Cir. 1988).

presents the question of whether a petitioner can claim to be injured based upon the fact that the outcome of the proceeding may be that the NRC will not take an enforcement action (or will take some other lesser action) that the petitioner could not compel in the first instance.

In response to that question, SFC demonstrates below that as a legal matter NACE cannot be injured if the Order is not sustained. Therefore, NACE does not have standing to intervene, because it has not, and cannot, demonstrate a cognizable injury which can result from the outcome of this proceeding. Moreover, even if a petitioner could demonstrate a cognizable injury based upon the NRC's failure to take enforcement action against a third party, NACE has not done so here because the injuries it has identified are highly speculative, conjectural and hypothetical. NACE has failed to meet its burden to identify an injury to a legally-protected interest which is "concrete and particularized," "actual or imminent," and "likely."

BACKGROUND

SFC is the owner of the NRC-licensed facilities at Gore, Oklahoma (hereafter, "SFC Facility"). SFC is the sole licensee named in NRC Source Materials License No. SUB-1010 (Docket No. 40-8027) (hereafter, "SFC License"), and SFC is currently decommissioning the SFC Facility in accordance with the terms of its license, NRC regulations, and the Atomic Energy Act of 1954, as amended ("the Act").

On December 29, 1992, the NRC issued a "Demand for Information" (hereafter, the "DFI") to both SFC and General Atomics ("GA"), a third tier parent company of SFC. SFC and GA responded separately to the DFI. Letter from Mr. Sheppard to Mr. Bernero (Re: Demand for Information Dated 12/29/92) (Feb. 16, 1993); letter from Mr. Blue to Mr. Bernero (Feb. 16, 1993). Simultaneously, SFC filed a notification pursuant to 10 CFR § 40.42(b) that it intended to terminate activities involving materials authorized under the SFC License effective July 31, 1993 or earlier. Letter from Mr. Sheppard to Mr. Bernero (Re: License No. SUB-1010; Docket No. 40-8027; Notification Pursuant to 10 C.F.R. 40.42(b)) (Feb. 16, 1993). Along with this notice, SFC submitted a Preliminary Plan for Completion of Decommissioning ("PPCD"). In accordance with 10 CFR § 40.42(c)(2)(iii)(D), the PPCD included a plan for assuring the availability of adequate funds for completion of decommissioning. On July 7, 1993 SFC informed the NRC that activities at the Sequoyah Facility (other than activities related to decommissioning) had been completed on July 6, 1993. Letter from Mr. Ellis to Mr. Bernero (July 7, 1993).

In its letter transmitting the PPCD, SFC offered to provide to the NRC, on a confidential basis, proprietary commercial and financial information relating to its plan for assuring decommissioning funding.^{3/} SFC had subsequent

^{3/} SFC's funding plan is primarily based upon funds that SFC reasonably expects to receive through commercial

(continued...)

discussions with the NRC Staff regarding this information, and SFC provided such information voluntarily to the NRC. Letter from Mr. Sheppard to Mr. Bernero (Apr. 7, 1993). On July 2, 1993, NRC issued a supplemental Demand for Information requesting additional documents and information. SFC also provided this information to the NRC. Letter from Mr. Ellis to Mr. Bernero (July 21, 1993).

On October 15, 1993, NRC issued the Order to SFC and GA. The Order was published in the Federal Register on October 25, 1993 (58 Fed. Reg. 55,087). It provided that SFC, GA, and "any other person adversely affected by this Order" could request a hearing within 20 days, i.e., by November 4, 1993.

SFC filed an answer dated November 2, 1993 and requested that the Order be withdrawn, or in the alternative, requested a hearing on the Order. GA separately filed an answer dated November 2, 1993 and also requested withdrawal of the Order or a hearing. No other hearing requests were filed with the NRC, and on November 18, 1993 the Secretary of the Commission referred the SFC and GA requests to the Chairman of the Atomic Safety and Licensing Board Panel for further proceedings in accordance with 10 CFR § 2.772(j). This Atomic Safety and Licensing Board was

^{3/}(...continued)

arrangements that it has made with ConverDyn, a uranium conversion services marketing joint venture. The reasonableness of SFC's expectations rests upon highly confidential commercial documents, including sales and cost projections, that are related to ConverDyn.

established on November 22, 1993 (58 Fed. Reg. 63,406 (Dec. 1, 1993)).

On November 18, 1993, NACE submitted its late-filed request to intervene. NACE acknowledges that it had no right to request a hearing on the Order "because NACE was not 'adversely affected' by the order." NACE Motion at 3 (citing Bellotti v. NRC, 725 F.2d 1380, 1381 (D.C. Cir. 1983)). However, NACE seeks to intervene in the hearings requested by GA and SFC "solely for the purpose of protecting its interest in seeing that the October 15 order is fully defended." NACE Motion at 4. NACE denies that its request is late, but rather asserts that its interest in this proceeding and right to intervene was triggered when SFC and GA requested hearings on the question of whether the Order should be sustained.

ARGUMENT

The Order requires that any person other than SFC or GA who requests a hearing "shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR § 2.714(d)." Order at 27.

Similarly, under 10 CFR § 2.714, a person who desires to intervene in an NRC proceeding is required to identify an interest that would be affected by the proceeding. Specifically, 10 CFR § 2.714(a)(2) states:

The petition shall set forth with particularity the interest of the petitioners in the proceeding, how that interest may be

affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (d) (1) of this section, and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

Section 2.714(d) (1) directs the Licensing Board to consider the following three factors:

(i) The nature of the petitioner's right under the Act to be made a party to the proceeding.

(ii) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.

(iii) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

NACE has the burden to submit sufficient information regarding those three factors to establish a right to party status in this proceeding. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-91-2, 33 NRC 42, 44 (1991) ("the burden rests with the petitioner to demonstrate that he or she satisfies the requirements [of the regulation]"); see also Houston Lighting and Power Co., South Texas Project, Units 1 and 2) LBP-79-10, 9 NRC 439, at 459 ("A petitioner is responsible for providing a Board with sufficient information for determining whether that petitioner has standing of right.").

As a threshold question, however, untimely requests to intervene "will not be entertained" unless a determination is made that the request should be granted based upon, in addition

to the factors set out in 10 CFR § 2.714(d)(1), a balancing of the following five factors provided in 10 CFR § 2.714(a)(1):

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

In light of the fact that NACE filed its request fourteen days late, this Answer first demonstrates that NACE has failed to meet the requirements for a late-filed request. Next, this Answer addresses the three factors provided in 10 CFR § 2.714(d)(1). It demonstrates that NACE has no right to a hearing under the Act, that NACE has failed to establish the requisite interest in this proceeding, and that NACE has not established that a possible outcome of this proceeding will in fact injure a cognizable interest. Finally, this Answer shows that NACE has failed to proffer at least one admissible contention under 10 CFR § 2.714(d)(2).

Thus, NACE's request to intervene in these proceedings should be denied.

I. NACE HAS FAILED TO MEET THE STANDARDS FOR LATE INTERVENTION

Although the NRC Staff sent a copy of the Order to NACE at the same time as it was sent to SFC and GA, NACE filed its

intervention request fourteen days after the deadline for filing a hearing request. Under the plain terms of the Order, the NACE Motion is late. However, NACE contends that "the timeliness of NACE's hearing request must be judged in relation to SFC's and GA's hearing request." NACE Motion at 3. Therefore, NACE asserts that its request is timely because "it has acted with reasonable speed by filing [its] motion to intervene within ten days of receiving notice of SFC's and GA's hearing request." Id. Explaining the logic of this position, NACE argues that it was not "adversely affected" by the Order itself, but rather "[t]he potential adverse [e]ffect on NACE's interest in this proceeding arose only when SFC and GA requested a hearing on whether the order should be sustained."

NACE underscores its lack of standing in this proceeding by admitting that "NACE had no right or reason to request a hearing on the order." Without any legal authority to support its position, NACE contends that somehow it acquired a right to obtain party status in this proceeding when SFC and GA exercised their rights to request a hearing. This contention is in conflict with both common sense and the NRC's procedural rules.

For example, the Chairman of an Atomic Safety and Licensing Board recently explained in correspondence which was served upon the parties in Lafayette Clinic (Order Modifying Byproduct Material License No. 21-864-02), EA 91-130 (Memorandum dated Feb. 18, 1992):

Under NRC procedural rules, only those persons who submit a hearing request and the NRC Staff (which is a party in all NRC enforcement proceedings) are eligible for party status in an adjudicatory proceeding regarding an enforcement order. Further, once the time specified in the enforcement order for filing a hearing request has expired, an interested person who wishes to obtain party status in an adjudicatory proceeding regarding the order is obliged to petition for late-intervention. Among other things, a late-intervention petition must address the factors set forth in 10 CFR § 2.714(a)(1).

Letter from Administrative Judge Bollwerk to Mr. Meadows (Feb. 18, 1992).^{4/}

Thus, only those persons who request a hearing are eligible for party status in an enforcement proceeding, and anyone who wishes to obtain party status after the time specified for filing a hearing request has expired must meet the requirements for late-intervention. In contrast, NACE not only ignores the standards for late-intervention provided in 10 CFR § 2.714(a)(1), but explicitly acknowledges that it would not have been eligible to obtain party status if it had filed a timely request for a hearing.

By failing to discuss any of the five lateness factors, NACE has not satisfied its burden of persuasion to affirmatively address the five lateness factors in the request for intervention. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 (1985). Moreover, NACE has no right to

^{4/} For convenience, the correspondence is appended hereto as Enclosure 1.

a second opportunity to address the lateness factors. Id. at 468.

A review of the standards provided in 10 CFR § 2.714(a)(1) makes clear that it would be inappropriate to grant NACE's late-filed request to intervene. First, there is no good cause for NACE's failure to file on time. NACE had actual notice of the Order since it received a copy from the NRC Staff at the same time that SFC and GA received their copies. Further, NACE cites the Federal Register notice, showing that it had additional notice of both the Order and the opportunity provided therein for interested persons to request a hearing. Moreover, NACE was provided with both SFC's and GA's February 16, 1993 responses to the NRC's December 29, 1992 DFI when they were filed. Therefore, NACE could have reasonably expected that SFC and GA would oppose the Order. In any event, if NACE believed that it could have been adversely affected by the Order or any outcome of a proceeding thereon, it was incumbent upon NACE to act in a timely fashion to protect any of its alleged rights.

Second, NACE's interest in this proceeding is protected by the availability of other means. The only interest in this proceeding that NACE has articulated is its purported interest in assuring that NRC take appropriate enforcement action with regard to SFC and GA. NACE has the right under 10 CFR § 2.206 to petition for exactly such relief, and any limited rights that NACE may have are fully vindicated through exercise of that mechanism. The fact that NACE cannot compel NRC to take

enforcement action under 10 CFR § 2.206 merely underscores the fact that NACE's legitimate interests will be unaffected by the outcome of this proceeding.

Third, NACE has failed to establish that its participation will reasonably be expected to assist in developing a sound record. The proponent of the Order, the NRC Staff, is obviously well-equipped to assure the development of a full and sound record. On the other hand, NACE has proffered only unspecified "expert testimony" regarding the costs of SFC's decommissioning. NACE Motion at 6.

Fourth, NACE's interest in seeing that the Order is sustained should be presumed to be adequately represented by the NRC Staff, which is the proponent of the Order. Unlike other cases in which the NRC Staff has argued that it could not represent the private interests of an intervenor,^{5/} there is an identity in interests between NACE and the NRC Staff with respect to the Order. The only interest in this proceeding that NACE has identified is the general public interest in the adequate decommissioning of the SFC Facility, an interest which is presumptively represented fully and adequately by the NRC

^{5/} See, e.g., Washington Public Power Supply System, et al. (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1174-75 (1983), and cases cited therein.

Staff,^{6/} particularly in an enforcement proceeding involving an Order that was initiated and issued by the NRC Staff.

Finally, the presence of NACE as a party to this proceeding would not only be inappropriate, but also would be likely to cause substantial delay. A significant material issue in dispute is the adequacy of SFC's plan for assuring funding for the completion of decommissioning, which is based upon SFC's expectation of funds generated from its arrangements with ConverDyn. Any determination as to the reasonableness of SFC's plan may require review of highly confidential commercial information, including sales and cost projections. NACE's participation in this proceeding will therefore complicate and delay the dissemination and review of such information.

Upon balancing the factors for late intervention, NACE's request for intervention should be summarily dismissed.

II. NACE HAS FAILED TO MEET THE STANDARDS FOR INTERVENTION

A. NACE Has No Right To A Hearing Under The Act

In reviewing a request for intervention, a Licensing Board is directed to consider, inter alia, "[t]he nature of the petitioner's right under the Act to be made a party to the proceeding." 10 CFR § 2.714(d)(1)(i) (1993). The Act does not provide for the right to a hearing with regard to the Order at

^{6/} See, e.g., Federal Communications Commission v. Schreiber, 381 U.S. 279, 296 (1965) (there is a "presumption to which administrative agencies are entitled -- that they will act properly and according to law").

issue in this proceeding. Therefore, this factor should be weighed against granting NACE intervention.

In relevant part, section 189 of the Act provides that "[i]n any proceeding under this Act, for the granting, suspending, revoking, or amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." 42 U.S.C. § 2239(a)(1) (1988) (emphasis added).

The Order purports to make a declaratory judgment that GA and SFC are "jointly and severally responsible" for the decommissioning of the SFC Facility, and seeks to impose requirements upon GA and SFC. Order at 23-26. By its own terms, however, the Order does not in any way take actions to amend or modify the SFC License. Thus, the Order at issue in this proceeding does not involve the "granting, suspending, revoking or amending" of the SFC License, and therefore, any proceeding involving the Order does not implicate section 189.

The NRC Staff is well aware of the difference between an Order that modifies a license and other forms of enforcement action. For example, the NRC has issued orders regarding decommissioning funding which have been clearly styled as an "Order Modifying License."⁷ The absence of such terms in the

⁷ See, e.g., Safety Light Corp., et al., Order Modifying Licenses (Effective Immediately) 54 Fed. Reg. 36,078 (1989). The NRC has also issued other orders to SFC which have been clearly styled as an "Order Modifying License." E.g.,

(continued...)

Order strongly indicates that the NRC did not consider its Order to constitute an action of the type that would implicate section 189.

In fact, the NRC has successfully argued in the federal courts that certain enforcement orders do not fall within the terms of section 189. See, e.g., In re: Three Mile Island Alert, Inc. ("TMI Alert"), 771 F.2d 720, 729-30 (3d Cir. 1985), cert. denied sub nom. Aamodt v. NRC, 475 U.S. 1082, reh'g denied, 476 U.S. 1179 (1986). In TMI Alert the United States Court of Appeals for the Third Circuit held that section 189(a) was "not implicated" when NRC entered an order which lifted an immediately effective suspension of the TMI license, thereby permitting restart of TMI without an opportunity for hearing pursuant to section 189. Id. at 730.

It is therefore clear that NACE cannot have any right under the Act to participate in a hearing regarding the Order. NACE's only potential right to participate in this proceeding is the right to request a hearing afforded under the Order or, arguably, under 10 CFR § 2.714(a)(1) for a person "whose interest may be affected by a proceeding" to petition for leave to intervene. In either case, as demonstrated in sections II.B and II.C below, NACE has failed to establish that it has the

⁷(...continued)

Sequoyah Fuels Corporation, Order Modifying License (Effective Immediately) 56 Fed. Reg. 51,421 (1991).

requisite interest and "injury in fact" to intervene in this proceeding.^{8/}

B. NACE Does Not Have The Requisite Interest To Intervene

NACE has failed to establish a sufficient interest in this proceeding. In order to meet the requirements for standing, an "organization must show injury either to its organizational interests or to the interests of members who have authorized it to act for them." Philadelphia Electric Co. (Limerick Generating Station), LBP-82-43A, 15 NRC 1423, 1437 (1982) (citing Warth v. Seldin, 422 U.S. 490, 511 (1975); Sierra Club v. Morton, 405 U.S. 727, 739-40 (1972)); see also Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-13, 34 NRC 185, 187 (1991). NACE appears to claim both organizational and representational standing.

1. NACE's Organizational Standing

Apparently in support of standing based upon its organizational interests, NACE asserts that "[i]ts purpose is to educate the general public about environmental issues, with emphasis on the nuclear industry." NACE Motion at 2. In addition, NACE asserts a broad interest "in ensuring the adequate and safe decommissioning of the SFC site." Id. at 3. Finally, NACE appears to assert an interest based upon its participation in SFC's separate license renewal proceeding. Id. at 4-5. These

^{8/} For the same reasons, even if this proceeding were considered to implicate section 189, NACE would have failed to establish its right to intervene.

interests are clearly insufficient to establish organizational standing.

The Commission has held that an organization's interest in performing informational activities is insufficient to confer standing. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 57-61 (1992). In doing so, the Commission followed both long-established Commission precedent and the United States Court of Appeals for the District of Columbia Circuit's recent conclusion that it had "never sustained an organization's standing in a NEPA case solely on the basis of 'informational injury.'" Foundation on Economic Trends v. Lyng, 943 F.2d 79, 84 (D.C. Cir. 1991).

In addition, NACE's broad interest in the decommissioning of SFC is likewise insufficient to confer standing. The Commission has long held that "assertions of broad public interest . . . do not establish the particularized interest necessary for participation by an individual or a group in agency adjudicatory processes." Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). Commission practice has made clear that "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." Id. at 333; see also Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 529 (1991).

NACE's participation as a party in the license renewal proceeding has no bearing on whether it has standing to participate in this separate enforcement proceeding.^{2/} See, e.g., Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 91 (1990) (a petitioner for intervention may not base its standing on reference to its participation in other NRC or non-NRC proceedings).

Thus, NACE has failed to establish that it has the requisite organizational interest in this proceeding to confer standing.

2. NACE's Representational Standing

NACE also asserts representational interests based upon an alleged potential injury to its unnamed members which "include[] individuals who live close to the SFC facility and who work and travel within close distance of the facility." NACE Motion at 2. This assertion has no relevance in this proceeding, because well-established NRC precedent makes clear that NACE

^{2/} NACE points out that it is an intervenor in the hearing on SFC's license renewal application, asserts that the disposition of this proceeding on decommissioning funding may affect the Presiding Officer's decision on the terms of dismissal of SFC's license renewal application, and thus claims that "fairness" requires that NACE be given an opportunity to participate in this proceeding. NACE Motion at 4-5. NACE has not provided any legal support for its concept of "fairness," and there is none. The Presiding Officer in the other NRC hearing will reach his decision based upon the merits of the legal and factual arguments that have been presented by all parties. Whether or not NACE has demonstrated an entitlement to participate in the instant proceeding must be based solely upon the merits of the legal and factual arguments presented in this forum.

cannot intervene in order to represent the interests of unnamed individuals who have not authorized it to intervene on their behalf. See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-470, 7 NRC 473, 474 n.1 (1978); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-77-11, 5 NRC 481, 483-84 (1977); Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-75-60, 2 NRC 687, 690 (1975).

SFC acknowledges that an organization can acquire representative standing if one of its members "has standing in his or her own right and the member authorizes the organization to represent his or her interests." See, e.g., Turkey Point, ALAB-952, 33 NRC at 530. Under this approach the organization's standing is derivative of the member's standing. Id. at 531. Consistent with this precedent, NACE relies upon the affidavit of Mr. Ed Henshaw subsequently submitted on November 23, 1993 (hereafter "Henshaw Affidavit"). However, NACE has failed to meet its burden to demonstrate that Mr. Henshaw has the requisite interest to form the basis for NACE's standing.

Mr. Henshaw's only articulated interest in the outcome of this proceeding is based upon the suggestion that he would be adversely affected if the Licensing Board determined that the Order should not be sustained. However, it is not possible that this proceeding could adversely affect a legally cognizable interest of Mr. Henshaw.

The scope of this proceeding is defined by the Order, which permitted SFC, GA and any other interested party to request a hearing on the question of "whether this Order should be sustained." Order at 27. As already noted, and as NACE admits, Mr. Henshaw supports the Order and could not have requested a hearing in this proceeding, because he was not adversely affected by the Order. Thus, Mr. Henshaw cannot have a cognizable interest that would be affected by the outcome of this proceeding.

The Commission has appropriately argued to the D.C. Circuit that only those who oppose an NRC enforcement action can assert an interest in the outcome of a proceeding. Bellotti, 725 F.2d at 1382 & n.2. In Bellotti the Commission noted that it had defined the scope of a proceeding to be limited to "whether the order should be sustained" and argued that this language excluded intervention by any party that did not oppose the Order. Id. Although the D.C. Circuit did not explicitly adopt the Commission's position, it held that the Commission had authority to so limit the proceeding and noted:

As [the Commission] interpret[s] it, this language limits possible intervenors to those who think the Order should not be sustained, thereby precluding from intervention persons such as petitioner who do not object to the Order but might seek further corrective measures.

Id. at 1382 n.2 (emphasis added).

This Commission position was consistent with the Licensing Board's position in Wisconsin Elec. Power Co. (Point

Beach Nuclear Plant, Unit 1), LBP-80-29, 12 NRC 581 (1980). In Point Beach the Director of the Office of Nuclear Reactor Regulation had issued a "Confirmatory Order" amending an operating license, and the order permitted any person whose interest might be affected by the order to request a hearing limited to the issue of "whether the order should be sustained." Id. at 582. In rejecting a request for a hearing, the Licensing Board implicitly acknowledged that the only litigable issue within the scope of such an order would be one "which challenges the remedies proposed by the Director." Id. at 588.

SFC notes that there is some NRC precedent prior to Bellotti which arguably could be interpreted to be in conflict with the position the Commission took before the D.C. Circuit in Bellotti. See Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367 (1980); Nuclear Eng'g Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737 (1978). In La Crosse a Licensing Board allowed petitioners in a proceeding initiated by a show-cause order to intervene because they would allegedly be affected if the NRC did not order the licensee to install the dewatering system proposed by the order. However, La Crosse is inconsistent with the Commission's later position in Bellotti and, in any event, a Licensing Board decision does not constitute binding authority.^{10/} In Sheffield the Appeal Board indicated that a

^{10/} The Commission does "not give stare decisis effect to licensing board conclusions on legal issues not brought to
(continued...)

petitioner could obtain standing to support a licensee's application.^{11/} But, the facts presented by the licensing application at issue in Sheffield are clearly distinguishable from an enforcement proceeding, and, even in that case, the petitioners did not succeed in establishing the requisite injury to obtain standing.

In any event, the logic of the Commission's position in Bellotti is sound, and any contrary inferences which could be drawn from earlier rulings of its subordinate bodies under differing circumstances should be rejected. The regulations commit "total discretion to the NRC on matters of enforcement." Arnow v. NRC, 868 F.2d 223, 235 (7th Cir. 1989); see also Safe Energy Coalition v. NRC, 866 F.2d 1473, 1477 (D.C. Cir. 1989) (section 2.206 request fell "squarely within the category of 'enforcement' actions held presumptively unreviewable"); Massachusetts Public Interest Research Group, Inc. v. NRC, 852 F.2d 9, 19 (1st Cir. 1988). Once the NRC proposes to take an enforcement action, the only persons who have an interest in any

^{10/}(...continued)

[the Appeal Board] by way of an appeal." Consumers Power Co. (Big Rock Point Plant), ALAB-795, 21 NRC 1, 2 (1985); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), ALAB-713, 17 NRC 83, 85 (1983); Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-482, 7 NRC 979, 981 n.4 (1978).

^{11/} In Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 390 n.4 (1983), however, the Appeal Board rejected a petition as untimely and specifically declined to decide whether the petitioners' interest in supporting a license application was cognizable under the Act.

resulting proceeding are those who oppose the proposed agency action. Persons who support the action could not have compelled the NRC to take such action, and therefore, cannot be adversely affected by any result in the proceeding, which, at worst, would leave such persons in the same status as existed before the NRC proposed to take discretionary action.

Mr. Henshaw and NACE simply cannot be adversely affected if the NRC ultimately decides not to take a discretionary enforcement action. Therefore, NACE cannot reasonably claim to have an interest in the outcome of this proceeding. If the proceeding were to result in no Order being issued to SFC and GA, the result would be a return to the status quo ante. If the proceeding results in an Order that imposes fewer requirements upon SFC and/or GA than those proposed, but more than the status quo ante, NACE's interests will likewise remain unaffected. As the Commission has previously stated, "it is not clear how [the petitioners] are adversely affected by an order that does not make the Sequoyah Fuels facility safer, so long as it does not make it less safe." Sequoyah Fuels Corporation (UF₆ Production Facility), CLI-86-19, 24 NRC 508, 514 (1986).

The lack of merit in NACE's argument that it could be adversely affected if the Order were not sustained, in whole or in part, is emphasized by the provision of the Order which authorizes the Director, Office of Nuclear Material Safety and Safeguards, to relax or rescind any of the conditions in the

Order. Order at 26. Even if the Order were fully sustained, NACE and Mr. Henshaw would have no entitlement to prevent the Director from exercising this discretionary authority. NACE and Mr. Henshaw are in no different position if the Director can relax or rescind conditions in a fully sustained Order than if the conditions are relaxed or rescinded during the proceeding. Thus, they cannot be adversely affected by the outcome of the proceeding.

NACE has failed to show the requisite interest in the outcome of this proceeding to establish standing, and its request to intervene should therefore be dismissed. Moreover, SFC demonstrates below in section II.C that even if NACE could assert a cognizable interest, it has not established that it would be injured in fact by any outcome in this proceeding.

C. NACE Has Failed To Establish That Its Interests Could Be Injured By The Outcome Of This Proceeding

In determining "whether a petitioner has established the requisite 'interest' to intervene, the Commission has long applied contemporaneous judicial concepts of standing."

Cleveland Electric Illuminating Co., et al. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, Docket No. 50-440-OLA-3, slip op. at 8 (Sep. 30, 1993) (and cases cited therein); see also Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976). A clear statement of the judicial requirements for standing was recently provided by the

Supreme Court in Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992):

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally-protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

112 S. Ct. at 2136 (brackets and ellipses in original) (citations omitted).

Although variously described, the basic precepts contained in the Lujan formulation and its predecessors have been consistently applied in NRC case law. See, e.g., Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 81 (1993); Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-67 (1991).^{12/} Significantly, it is clear that in order to

^{12/} The Commission's recent decision in Perry, CLI-93-21, slip op. at 8-15, supports the position that there has been no invasion of any legally protected and concrete interest of NACE in this proceeding. In Perry, the Commission endorsed again the basic requirements for standing set forth in Lujan (Id. at 9), determined that under Lujan "[s]tanding may be based upon the alleged loss of a procedural right 'so long as the procedures in question are designed to protect some threatened concrete interest'" (Id. at 12 (footnote

(continued...)

establish "injury in fact" for standing, a petitioner must have a real stake in the outcome of the proceeding. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48, aff'd, ALAB-549, 9 NRC 644 (1979). Therefore, NACE must establish that it, i.e., Mr. Henshaw, will likely suffer a real and tangible personal injury if the proposed NRC Order issued against SFC and GA is not fully sustained.

NACE has a substantial and difficult burden to establish standing in this case, because the proposed discretionary NRC Order is being issued to impose requirements upon SFC and GA. The Order would not permit SFC or GA to engage in any previously unauthorized activity which could potentially affect NACE's interests. In addition, the Order would not in any way reduce or eliminate pre-existing license, regulatory, or statutory requirements. Thus, the only possible outcomes in this proceeding are (1) maintenance of the status quo ante; (2) imposition of all of the requirements of the Order, which are favored by NACE; or (3) imposition of some of the requirements of

^{12/}(...continued)

omitted)) and recognized that "to confer standing a procedural injury must be linked to a concrete injury." (Id.) In this case, however, there has been no loss of any procedural right since, as it acknowledges, NACE had no right to request a hearing on the NRC's Order. (NACE Motion at 3). Thus, there has been no invasion of any legally protected interest. Nor are the procedures involved (governing challenges to NRC enforcement orders) "designed to protect" NACE's interest. Lujan, 112 S. Ct. at 2143 & n.8. Furthermore, as discussed below, NACE has failed to show a sufficient "concrete interest" in the proceeding or any "concrete injury."

the Order, which are favored by NACE. NACE cannot therefore be injured by this proceeding.

Where a petitioner is attempting to intervene in the government's efforts to regulate a third party, injury in fact is "ordinarily 'substantially more difficult' to establish." Lujan, 112 S. Ct. at 2137 (quoting Allen v. Wright, 468 U.S. 737, 758 (1984); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 44-45 (1976); and Warth v. Seldin, 422 U.S. 490, 505 (1975)). The Lujan Court stated that when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed" to establish standing, than in a situation where the plaintiff himself is the object of the government action. Id. at 2137 (emphasis in original). Since NACE alleges that its injury arises from a potential NRC "lack of regulation" of SFC in that the Order might not be fully sustained in the hearing, it is "substantially more difficult" for NACE to establish standing.

In its efforts to meet its substantial burden, NACE asserts standing based upon the alleged adverse effects the proceeding could have on Mr. Henshaw. In his affidavit, Mr. Henshaw asserts that he is concerned with potential contamination to his property, risks of radioactive and chemical effects upon his and his family's health, and "the social and economic impacts of living next to a de facto nuclear waste

dump."^{13/} Mr. Henshaw notes these concerns, asserts that SFC needs to commit adequate funds in order to do an adequate job of decommissioning, and concludes ipse dixit that his interest in a clean and healthful home environment will be "jeopardized" if the Order to SFC and GA to provide \$86 million in assured funding is not sustained.

NACE's proffered "injury in fact" resulting from the possible outcomes of this proceeding is not in any way concrete, particularized, actual, or imminent. Rather, the proffered injury is hypothetical, conjectural, and highly speculative, and relies on multiple assumptions. Before any injury could befall Mr. Henshaw, the rescission or relaxation of the Order would have to result in lessened funding to SFC, such lessened funding would

^{13/} Mr. Henshaw alleges that his home is "adjacent to the Sequoyah Fuels site." Henshaw Affidavit at ¶ (2). However, as shown in paragraph 5 of the enclosed Affidavit of John S. Dietrich (Enclosure 2), Mr. Henshaw's property is located more than one mile from the nearest portion of the fence surrounding the 85-acre SFC industrial site and more than 0.6 miles from the associated pond areas to be decommissioned in accordance with NRC requirements. In any event, if NACE seeks to imply that an individual's geographical proximity to the facility of a materials licensee is sufficient, standing alone, to establish that individual's standing, it is mistaken. As noted, for example, in a recent decision involving decommissioning of the facility of a materials licensee, the Commission has made clear that there are no presumptions based on geographical proximity in proceedings involving non-reactor licensees, and that a petitioner must demonstrate the particular impact that the planned action will have on his legitimate interests. Apollo, LBP-93-4, 37 NRC at 83-84. The Presiding Officer found that a petitioner who lived less than one eighth of a mile from the facility had failed to demonstrate a causal link between the distance he resided from the facility and injury to a legitimate interest, and denied standing.

have to result in a less than adequate decommissioning of the SFC Facility, and such presumed inadequate decommissioning would have to result in migration of contaminated groundwater and surface water that affects Mr. Henshaw's property.

NACE has failed to demonstrate that these multiple assumptions have any validity or that its hypothetical injuries are fairly traceable to a possible outcome in this proceeding. If the Order is not sustained at all, or if it is only partially sustained, SFC will still be obligated to decommission the SFC Facility in accordance with NRC requirements. For example, SFC will still be required to have a plan for assuring that there are adequate funds for the completion of decommissioning. There is no possible outcome in this proceeding under which SFC will be relieved of its legal obligation to properly and safely decommission the SFC Facility, and it would be inappropriate to presume that SFC will not obey the law. The United States Supreme Court has recognized and affirmatively applied the presumption that an individual "will obey the law." Leroy Fibre Company v. Chicago, Milwaukee & St. Paul Railway Company, 232 U.S. 340, 349 (1914); see also United States v. Norton, 97 U.S. 164, 168 (1877) ("It is a presumption of law that officials and citizens obey the law and do their duty . . .").

Moreover, and most importantly, even if it were permissible to assume that SFC would fail to properly decommission the SFC Facility due to inadequate funding as suggested by NACE, Mr. Henshaw has utterly failed to posit any

concrete personal injury which might result from the existence of residual contamination at the SFC Facility. For example, Mr. Henshaw's concern that "contaminated groundwater and surface water will migrate onto my property" defies reality.^{14/}

As demonstrated in the attached Affidavit of John S. Dietrich ("Dietrich Affidavit") (Enclosure 2), Mr. Henshaw's property is southeast of the approximately 85-acre SFC industrial site and associated pond areas to be decommissioned in accordance with NRC requirements. Dietrich Affidavit at ¶ 5. His home is across Route 10 and across Interstate 40 from the SFC site, more than one mile from the nearest portion of the fence surrounding the 85-acre industrial site, and more than 0.6 miles from the nearest point at SFC's fertilizer ponds. Id. Throughout the course of the operation of the SFC facility, extensive information has been developed on the environmental conditions at the site, including the flow of groundwater and surface water. Id. at ¶ 7. Potentiometric groundwater flow maps show that groundwater under the area of industrial activity at SFC's site

^{14/} Similarly, Mr. Henshaw has utterly failed to show that the status of decommissioning of the SFC Facility would have any concrete "social and economic impacts" upon him. Henshaw Affidavit at ¶ 3. Moreover, general economic concerns and purely economic personal interests are not within the proper scope of NRC proceedings. See Public Service Co. of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-470, 7 NRC 473, 474-76 (1978). For example, the potential for diminished property values is not within the zone of interests protected by the Act or NEPA. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980).

nearest to Mr. Henshaw's property flows generally westward and away from such property. Id. at ¶ 8. There is no indication of a groundwater flow path which would allow flow of groundwater from beneath SFC's industrial site and associated pond areas to reach Mr. Henshaw's property.^{15/} Id. at ¶ 9.

Since Mr. Henshaw's property is located at a high point in the surrounding land, surface water runoff near his land is generally away from his property. Id. at ¶ 10. Moreover, surface water at the SFC site drains westward or northwestward away from Mr. Henshaw's property, because the local topography includes at least three substantial impediments to the flow of surface water south to such property. These include drainage ditches installed south of the 85-acre site and south of the fertilizer pond area, a significant natural depression north of Interstate 40 (as indicated by an unnamed tributary), and

^{15/} NACE's lack of standing based upon any alleged impact of groundwater from the SFC site upon Mr. Henshaw was also reflected in a recent decision by a Hearing Examiner in a proceeding before the Oklahoma Water Resources Board ("OWRB") on SFC's application for revision of the Industrial Waste Disposal Permit No. WD-75-074. See Order dated June 28, 1993, appended hereto as Enclosure 3. NACE sought representational standing based on its concern that its members would be impacted by potential contamination of the groundwater at the SFC facility from a newly constructed stormwater retention pond, which was being contested by NACE. As SFC's representatives recall the discussion at the June 28, 1993 prehearing conference, NACE indicated that Mr. Henshaw was the NACE member who resided most closely to the SFC facility. It was estimated that his residence was approximately 1½ miles from the stormwater retention pond. The Hearing Examiner denied NACE representational standing and further stated that: "Individuals who live 1½ and 4 miles away, away from the flow of groundwater in this area, would not have had standing."

drainage ditches installed as part of the highway system, as well as highway embankments (including a 16-foot rise in Interstate 40). Id. at ¶ 11. These topographical features make it impossible for surface water from SFC to drain onto Mr. Henshaw's property. Id. at ¶ 12.

In short, the SFC Facility does not pose any current or reasonably foreseeable danger to Mr. Henshaw; the fact that Mr. Henshaw may perceive an imagined danger is irrelevant to the inquiry into his standing.

Finally, NACE's purported injury cannot be redressed in this proceeding. NACE's claim to injury is based upon the notion that it would be harmed if the Order were not fully sustained. NACE appears to be claiming to be entitled to assurance that SFC and GA will not receive any relief from the conditions imposed by the Order. However, as noted above, the terms of the Order itself provide that the Director of the Office of Nuclear Material Safety and Safeguards has discretion to relax or rescind the conditions imposed by the Order. Order at 26. Even if the Licensing Board fully sustained the Order, NACE would continue to be subject to the Director's ongoing authority to relax or rescind the Order. Therefore, NACE would still be subject to its purported injury (the potential grant of relief to SFC or GA) even if it were to prevail and the Order were sustained. The only way that NACE could achieve a remedy would be if the Director were to be deprived of his ongoing authority under the Order. Such requested relief would be beyond that proposed in

the Order and would therefore fall precisely within the type of relief determined in Bellotti to be unavailable to a petitioner.

NACE has failed to establish the requisite standing to intervene in this proceeding, and its request to intervene therefore should be denied.

III. NACE HAS FAILED TO PROFFER AN ADMISSIBLE CONTENTION

NACE has also failed to submit any contention that satisfies the criteria contained in 10 CFR § 2.714(d)(2).

Section 2.714(d)(2)(i) specifies that a contention must satisfy 10 CFR § 2.714(b)(2), which requires that the contention contain:

1. A specific statement of the issue of law or fact to be raised or controverted § 2.714(b)(2).
2. A brief explanation of the bases of the contention § 2.714(b)(2)(i).
3. A concise statement of the alleged facts or expert opinion which support the contention § 2.714(b)(2)(ii).
4. Sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact § 2.714(b)(2)(iii).

Under the heading of "Specific Issues on Which NACE Seeks to Intervene," NACE states that it seeks to be heard in opposition to nine "claims" which it alleges were made in the answers filed by SFC and GA. NACE Motion at 5-7.^{16/} None of

^{16/} A tenth "issue" raised by NACE does not identify any claim, but seeks to reserve NACE's "right to respond to further attacks." NACE Motion at 8. Such a statement obviously does not constitute an admissible contention.

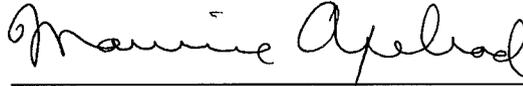
these purported "specific issues" satisfies the requirements of 10 CFR § 2.714(b)(2) for an admissible contention.^{17/} NACE does not state any issue of law or fact with sufficient specificity, does not provide any explanation of the bases of its position, does not state any alleged facts or expert opinion which support its position and does not provide any information to show that a genuine dispute exists on a material issue of law or fact. In fact, each of NACE's "specific issues" simply amounts to an unsupported statement that NACE disagrees with SFC or GA. In view of this blatant disregard for the Commission's requirements, none of NACE's purported contentions can be admitted.

^{17/} In revising 10 CFR § 2.714(b)(2) in 1989, the Commission pointed out that "the amendments . . . would raise the threshold for the admission of contentions" 54 Fed. Reg. 33,168 (1989). This higher threshold was acknowledged in Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155 (1991), in which the Commission held that the revised provisions of 10 CFR § 2.714(b)(2) "demand that all petitioners provide an explanation of the bases for the contention, a statement of fact or expert opinion upon which they intend to rely, and sufficient information to show a dispute with the applicant on a material issue of law or fact. If any one of these requirements is not met, a contention must be rejected."

CONCLUSION

FOR THE FOREGOING REASONS, NACE's request to intervene in these proceedings should be denied.

Respectfully submitted,



Maurice Axelrad
John E. Matthews

NEWMAN & HOLTZINGER, P.C.
1615 L Street, N.W., Suite 1000
Washington, DC 20036
(202) 955-6600

ATTORNEYS FOR
SEQUOYAH FUELS CORPORATION

December 6, 1993

12591

Enclosure 1

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD '92 FEB 19 A9:18

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Charles N. Kelber
Dr. George F. Tidey

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

SERVED FEB 19 1992

In the Matter of

LAFAYETTE CLINIC

(Order Modifying Byproduct
Material License No.
21-00864-02)

Docket No. 030-13204-OM

E.A. 91-130

ASLBP No. 92-655-03-OM

February 18, 1992

MEMORANDUM

(Submitting Correspondence Between Lafayette Clinic
and the Licensing Board for Docketing and Service)

By this memorandum, the Licensing Board submits the
accompanying copies of correspondence between counsel for
Lafayette Clinic and the Board for filing in the docket of
this proceeding and service upon those persons on the
service list for this proceeding.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

G. Paul Bollwerk, III
G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland

February 18, 1992

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
WASHINGTON, D.C. 20555

February 18, 1992

Mark S. Meadows, Esq.
Assistant Attorney General
Mental Health Division
Department of Attorney General
State of Michigan
Post Office Box 30217
Lansing, Michigan 48909

Dear Mr. Meadows:

Your letter of February 6, 1992, requested information concerning the status of your client Lafayette Clinic relative to an adjudicatory proceeding involving the clinic's 10 C.F.R. Part 30 nuclear materials license that is pending before an Atomic Safety and Licensing Board that I chair.

The Order Modifying License at issue in the proceeding, which was published in the Federal Register on October 11, 1991 (56 Fed. Reg. 51,415), stated that within twenty days of the Order's October 3 date of issuance, licensee Lafayette Clinic, Dr. Natraj Sitaram, Dr. Thomas M. Sullivan, or any other person adversely affected by the Order could file an answer to the Order. The Order also declared that in such an answer, a hearing could be requested. Pursuant to this directive only Dr. Sitaram (after obtaining several filing extensions) submitted an answer to the Order. In his answer, he requested a hearing.

Under NRC procedural rules, only those persons who submit a hearing request, and the NRC staff (which is a party in all NRC enforcement proceedings) are eligible for party status in an adjudicatory proceeding regarding an enforcement order. Further, once the time specified in the enforcement order for filing a hearing request has expired, an interested person who wishes to obtain party status in an adjudicatory proceeding regarding the order is obliged to petition for late-intervention. Among other things, a late-intervention petition must address the factors set forth in 10 C.F.R. § 2.714(a)(1).

In your letter, you also note that Dr. Sarwer-Foner, Director of Lafayette Clinic, is on the service list for the proceeding. You suggest that this raises some question

about the status of Lafayette Clinic as a party to the proceeding. It is my understanding that, as a courtesy and irrespective of whether the licensee files a hearing request, the NRC Office of the Secretary (which is responsible for maintaining the service list for all NRC adjudicatory proceedings) routinely places the licensee's designated contact on the service list for any enforcement adjudication in which the terms of its license are at issue.

In this regard, it may interest you to know that if you would like to have your name added to the service list for the proceeding (or substituted for that of Dr. Sarwer-Foner) or if Lafayette Clinic wishes to be removed from the service list, as counsel to the clinic you can request such action by writing to Emile L. Julian, Esq., Chief, Docketing and Service Branch, Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, or by calling Mr. Julian at (301) 504-1966.

Sincerely,



G. Paul Bollwerk, III
Administrative Judge

cc: Service List in Docket
No. 030-13204-OM w/attached
2/6/92 Letter from Meadows
to Bollwerk

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



STANLEY D. STEINBORN
Chief Assistant Attorney General

FRANK J. KELLEY
ATTORNEY GENERAL

LANSING
48913

February 6, 1992

The Honorable G. Paul Boliwerk, III
Chairman
Atomic Safety and Licensing Board
United States Nuclear Regulatory
Commission
Washington, D.C. 20555

Re: Docket Number 030-13204-OM, E.A. 91-130, ASLBP
Number 92-655-03-OM

Dear Judge Boliwerk:

My client, Lafayette Clinic, through its director, Gerald Sarwer-Foner, has provided me with a copy of the Memorandum and Order issued by you on January 28, 1992. That Memorandum and Order reschedules to some future date a pre-hearing conference previously scheduled for February 5, 1992.

The purpose of my letter is to ascertain the status of Lafayette Clinic in regard to the hearing requested in the above matter. Your Order makes reference to a telephone conference call on January 24, 1992, in which "the parties to this enforcement proceeding requested that we put off the pre-hearing conference now scheduled for February 5, 1992. According to the litigants..."

I had planned on being at the pre-hearing conference scheduled for February 5, 1992, and I presumed that the Lafayette Clinic is a party to these proceedings. It is Lafayette Clinic's license which is the subject of the administrative hearing. While Dr. Sitaram no longer has access to the research laboratories at Lafayette Clinic, and thus, no longer has the opportunity to conduct experiments pursuant to the license possessed by Lafayette Clinic, the NRC has placed restrictions upon the license and imposed penalties upon Lafayette Clinic relative to

The Honorable G. Paul Bollwerk, III
Page 2

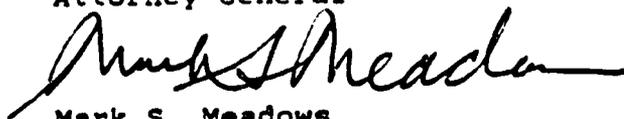
matters which apparently will be decided in this administrative hearing.

I am perplexed, therefore, as to the "parties joint request" which resulted in the postponement of the pre-hearing conference. If one party is the Nuclear Regulatory Commission, and one party is Dr. Sitaram, I presume that the Lafayette Clinic is not a party to this proceeding since it was not a participant in the telephone conference. Yet, Dr. Sarwer-Foner is on the service list attached to the Order. As a result, I request some confirmation, from you, as to the status of Lafayette Clinic in this matter given that it involves Lafayette Clinic's license.

Please advise me as soon as possible of my client's status in this matter.

Very truly yours,

FRANK J. KELLEY
Attorney General



Mark S. Meadows
Assistant Attorney General
Mental Health Division
Post Office Box 30217
Lansing, MI 48909
(517) 373-3577

53/dr/msm/lafay-1

December 3, 1993

AFFIDAVIT OF JOHN S. DIETRICH

I, John S. Dietrich, being duly sworn, hereby state as follows:

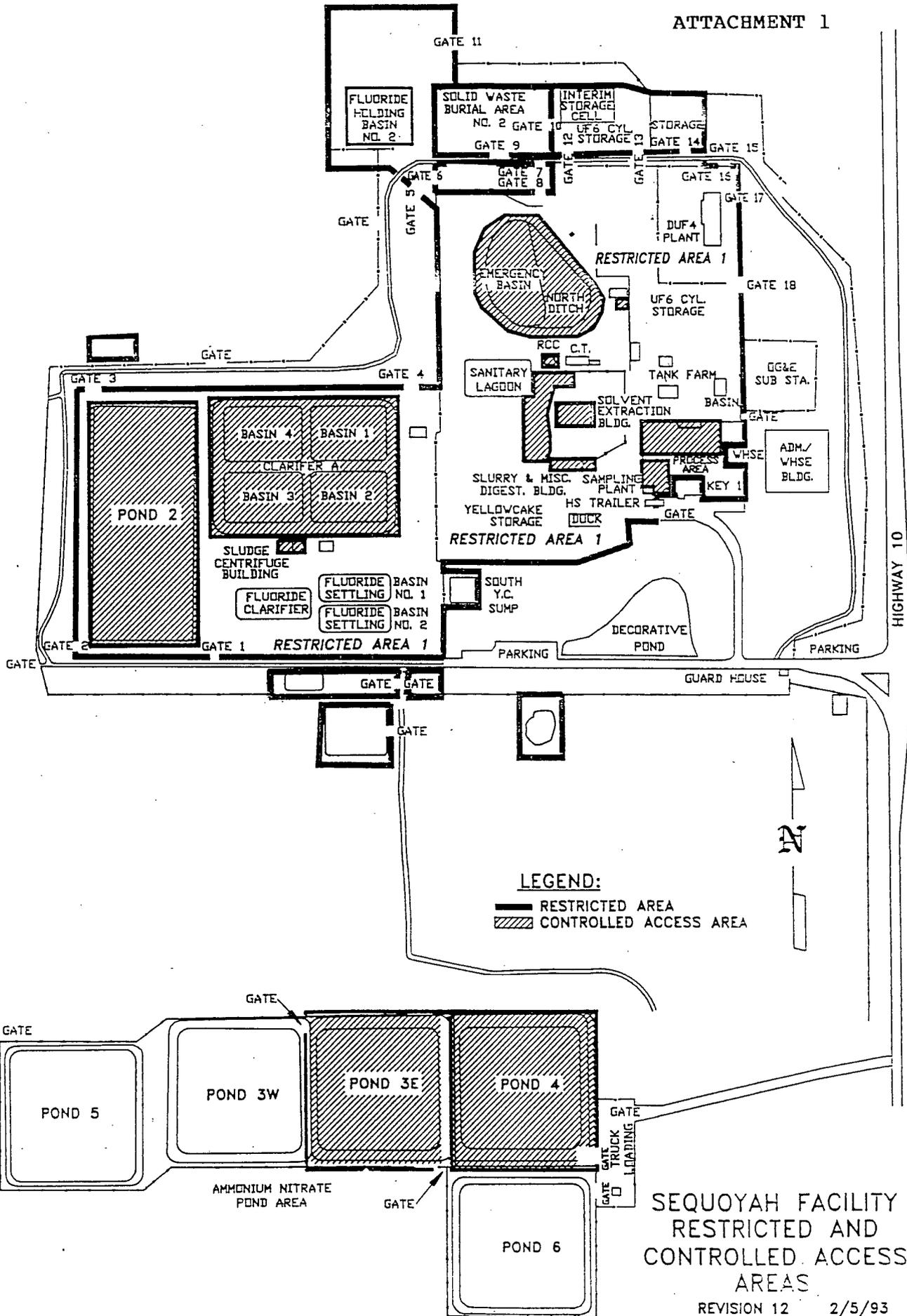
1. I am Vice President, Technical Services, of Sequoyah Fuels Corporation ("SFC"). My business address is Sequoyah Fuels Corporation, P.O. Box 610, Gore, Oklahoma 74435.
2. The purpose of this affidavit is to provide information responding to the "Affidavit of Ed Henshaw," dated November 19, 1993 (the "Henshaw Affidavit"), submitted to support the "Motion for Leave to Intervene in Proceeding Regarding Sequoyah Fuels Corporation's and General Atomics' Appeal of Nuclear Regulatory Commission's October 15, 1993, Order," dated November 18, 1993 (the "NACE Motion") in a letter dated November 23, 1993.
3. In paragraph 2 of the Henshaw Affidavit, Mr. Henshaw states: "My home is adjacent to the Seqoyah (sic) Fuels site."
4. Figure 1-2 of the "Preliminary Plan for Completion of Decommissioning" ("PPCD") filed by SFC with the U.S. Nuclear Regulatory Commission ("NRC") on February 16, 1993, shows the approximately 85-acre SFC industrial site and the associated pond areas to be decommissioned in accordance with NRC requirements. (See Attachment 1 to this affidavit.)
5. Attachment 2 to this affidavit also shows the SFC site to be decommissioned in accordance with NRC requirements, additional property to the south owned by SFC, (north of I-40 and west of Highway 10), and the general location of Mr. Henshaw's home, southeast of the SFC site. As can be seen from Attachment 2, Mr. Henshaw's home is across Route 10 and across Interstate 40 from the SFC site, is more than one mile from the nearest portion of the fence surrounding SFC's 85 acre industrial site, and is more than 0.6 miles from the nearest point at SFC's fertilizer ponds.
6. In paragraph 3 of the Henshaw Affidavit, Mr. Henshaw states that he is concerned about risks to his health and the health of his family if the SFC site is not properly cleaned up and decommissioned, particularly

that "contaminated groundwater and surface water will migrate onto [Mr. Henshaw's] property."

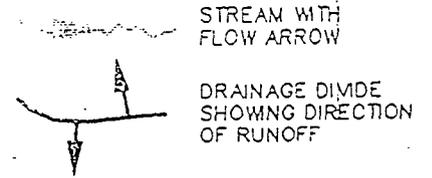
7. Throughout the course of the operation of the SFC facility, many reports have been developed that described the environmental conditions at the site, including the flow of groundwater and surface water. The most comprehensive of these is the Facility Environmental Investigation (FEI) implemented by SFC in the fall of 1990 and concluded in the summer of 1991. The results were summarized in the "Facility Environmental Investigation Findings Report" submitted to the NRC on July 31, 1991. The results of additional investigations conducted in 1991 were summarized in the "Addendum Facility Environmental Investigation Findings Report" submitted to the NRC on May 21, 1992. In addition, in responding to questions relating to the NRC's environmental assessment of the SFC facility in 1992, SFC obtained and analyzed a substantial amount of information regarding the environmental conditions at the site, including the hydrogeology of the SFC site. This information was provided by SFC to the NRC in submittals entitled "Questions for Clarification -- SFC Environmental Assessment" on September 4, 1992 and October 30, 1992.
8. With respect to Mr. Henshaw's property, the nearest area of industrial activity at SFC's site is in the fertilizer ponds area. This area is approximately 0.6 miles northwest of Mr. Henshaw's property. Attachment 3 is a potentiometric groundwater flow map prepared in August, 1992 which shows that groundwater under the fertilizer ponds flows in a generally westward direction. A potentiometric map of the same area prepared in August 1987 agrees with the 1992 map and shows that little or no change in groundwater flow direction has occurred since 1987. (See Attachment 4). In each case, the groundwater flow is clearly indicated to be generally westward and away from Mr. Henshaw's property.
9. On the basis of the information presented above, there is no indication of any groundwater flow path which would allow flow of groundwater from beneath SFC's industrial site and associated pond areas to reach Mr. Henshaw's property.
10. Attachment 2 is a map of surface water runoff patterns in the vicinity of the SFC industrial site. Lines are

drawn indicating drainage divides in the area. A drainage divide is a "ridgeline" of relative high ground from which runoff moves downhill. Mr. Henshaw's land is located at a relative high point in the surrounding land as indicated by the drainage divide passing through his property. Therefore, surface runoff near his land is generally away from his property.

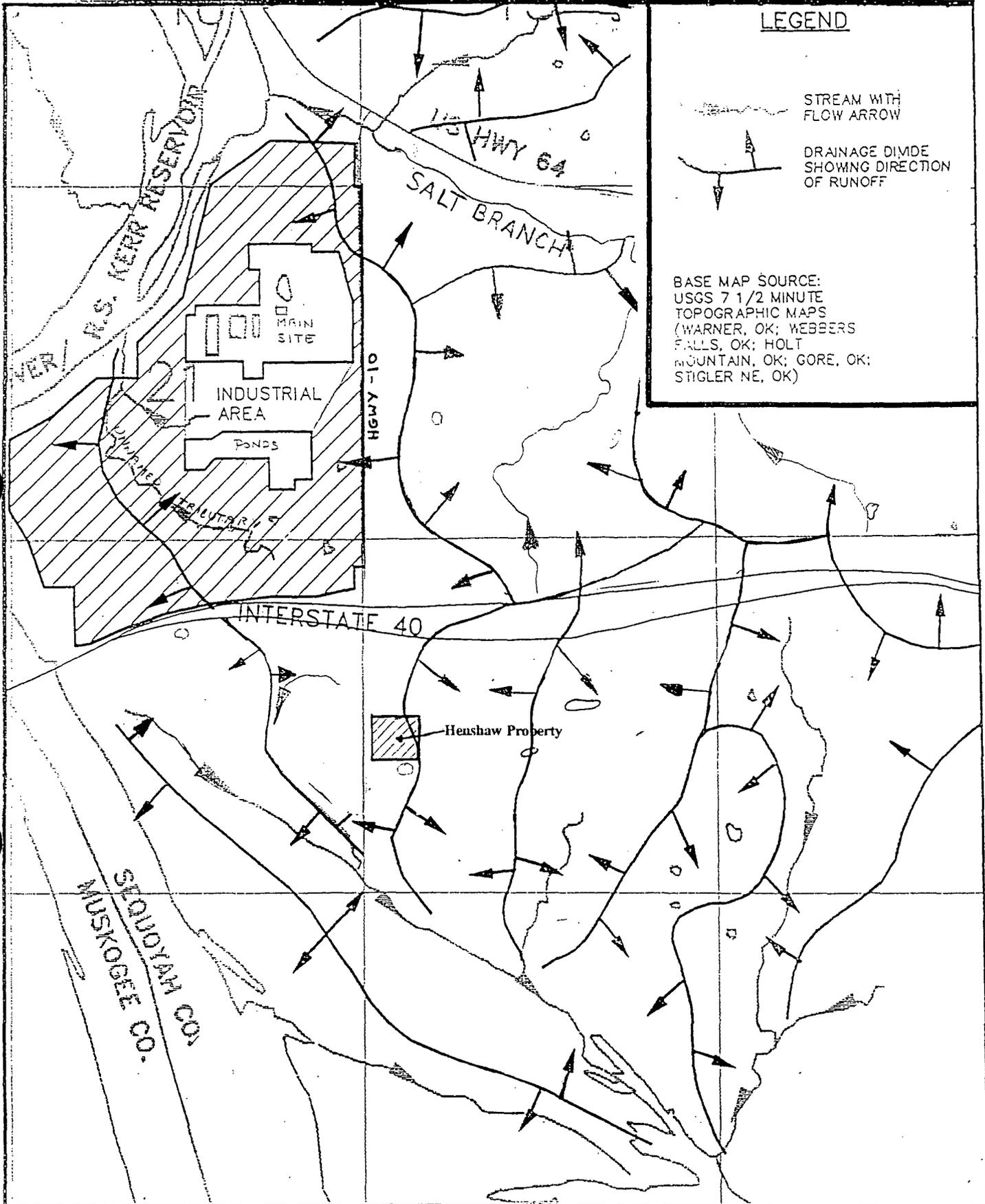
11. Furthermore, surface water at the SFC site drains westward or northwestward towards the headwaters of the Robert S. Kerr Reservoir, and away from Mr. Henshaw's property. This is because the topography between SFC's industrial site and I-40, north of Mr. Henshaw's home, includes at least three substantial topographical impediments to flow of surface water from SFC's property south to Mr. Henshaw's property. First, there are drainage ditches installed south of the main site and south of the fertilizer pond area that drain surface water runoff to the west and into the headwaters of the Kerr Reservoir. Second, there is a significant natural depression north of Interstate 40 at the south end of SFC's property which also drains to the northwest as indicated by an unnamed tributary which runs northwest to Kerr Reservoir (see Attachment 2). Third there are drainage ditches installed as part of the highway system which drain runoff from the highway embankments on the west side of highway 10 as it passes under I-40, and from the north side of I-40. These ditches drain to the west and northwest. I-40 rises about 16 feet above the surrounding land providing a block to surface water flow past the highway and Highway 10 rises 2 to 3 feet as it passes under I-40. Therefore surface water north of I-40 and west of Highway 10 must drain northwest or west to the reservoir.
12. All of the topographical features described above make it impossible for surface water from SFC to drain onto Mr. Henshaw's property.



LEGEND

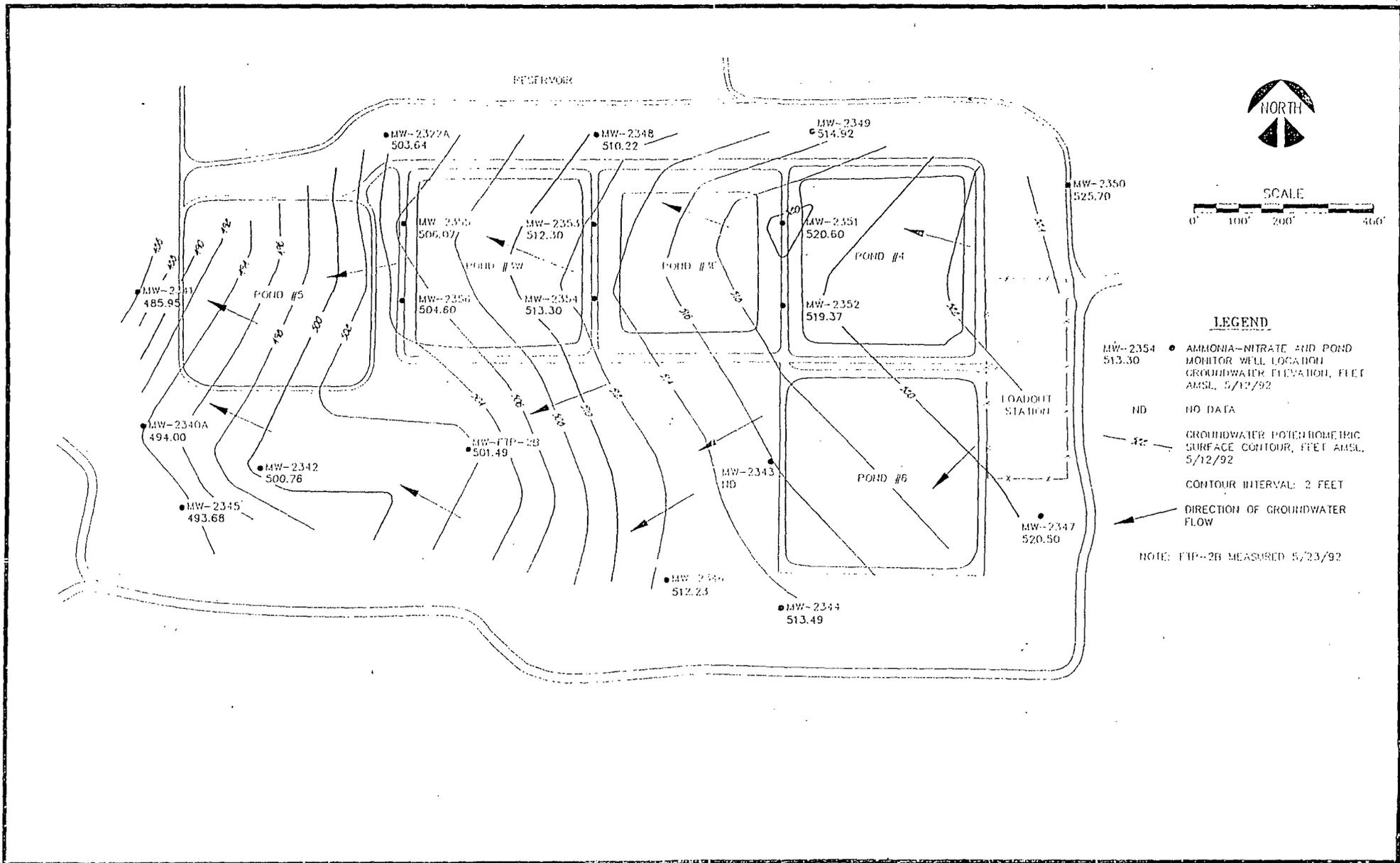


BASE MAP SOURCE:
 USGS 7 1/2 MINUTE
 TOPOGRAPHIC MAPS
 (WARNER, OK; WEBBERS
 FALLS, OK; HOLT
 MOUNTAIN, OK; GORE, OK;
 STIGLER NE, OK)

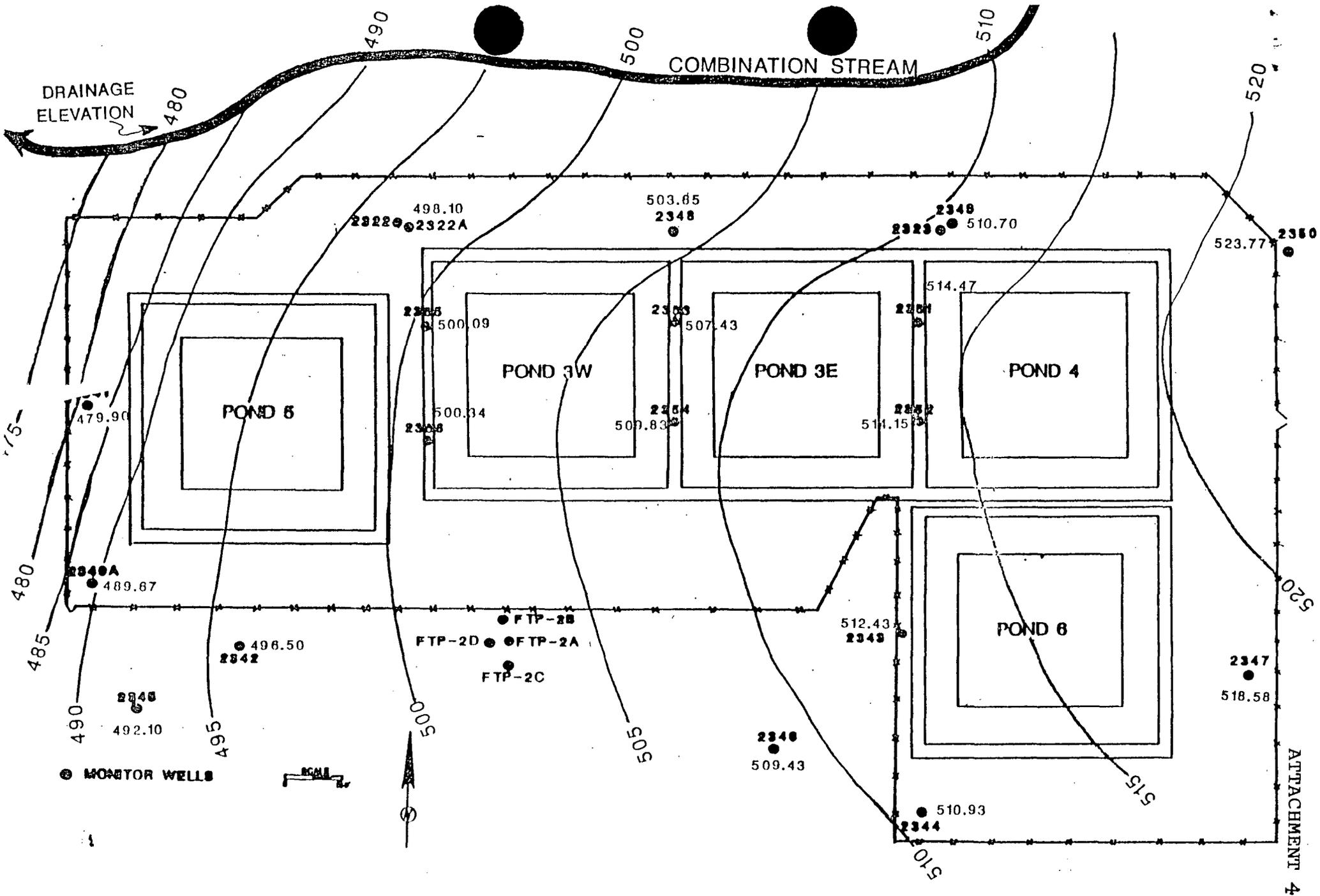


Surface Water Runoff Patterns





WATER TABLE CONTOUR MAP FOR LINED POND AREA, AUGUST 1992



WATER TABLE CONTOUR MAP FOR LINED POND AREA, AUGUST 1987

**BEFORE THE OKLAHOMA WATER RESOURCES BOARD
STATE OF OKLAHOMA**

In re Application of Sequoyah Fuels)
Corporation for Revision of Industrial)
Waste Disposal Permit No. WD-75-074)

ORDER

On this 28th day of June, 1993, a pre-hearing conference was held before the undersigned Hearing Examiner. Applicant Sequoyah Fuels Corporation ("SFC") was represented by R. Thomas Lay and James R. Barnett. The Native Americans for a Clean Environment ("NACE") was represented by Lance Hughes and Ed Henshaw. Staff of the Board were also present.

The Hearing Examiner began the conference by considering the threshold issue of whether NACE had standing to protest the application. After hearing from representatives of NACE, SFC and the Board's staff, the Hearing Examiner ruled and announced that NACE did not have standing. The NACE organization does not have a legally cognizable interest in the outcome. The public interest which NACE has in this matter is not direct, immediate and substantial enough to have standing. Furthermore, even applying the test used in federal courts to determine whether an organization has standing, it was not established that any of NACE's members would have had standing to protest in their own right. Individuals who live 1 1/2 and 4 miles away, away from the flow of groundwater in this area, would not have had standing.

Accordingly, because the threshold issue of standing was not satisfied, there is no reason to go any further with a pre-hearing conference, and this matter shall proceed without a hearing. NACE's request for a hearing is denied.

Copies of this order shall be sent by CWRB staff via first class regular mail to SFC, NACE and DEQ staff.

It is so ordered this 28th day of June, 1993.

/s/ Jerry Barnett
Hearing Examiner

ORIGINAL

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD

'93 DEC -6 P3:58

Before Administrative Judges:

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

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)
)

SEQUOYAH FUELS CORPORATION)
and GENERAL ATOMICS)

(Sequoyah Facility))
)

Docket No. 40-8027-EA

NOTICE OF APPEARANCE OF COUNSEL

Notice is hereby given that Maurice Axelrad enters an appearance as counsel for Sequoyah Fuels Corporation in the above-captioned proceeding.

Name: Maurice Axelrad

Address: Newman & Holtzinger, P.C.
1615 L Street, N.W.
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Washington, D.C. 20036

Telephone: (202) 955-6600

Admissions: District of Columbia Court of Appeals; State of New York Court of Appeals

Name of Party: Sequoyah Fuels Corporation
P.O. Box 610
Gore, Oklahoma 74435

Maurice Axelrad

Maurice Axelrad
Newman & Holtzinger, P.C.
1615 L Street, N.W., Suite 1000
Washington, D.C. 20036

Date: December 6, 1993

ORIGINAL

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD 93 DEC -6 P3:58

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OFFICE OF SECRETARY
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BRANCH

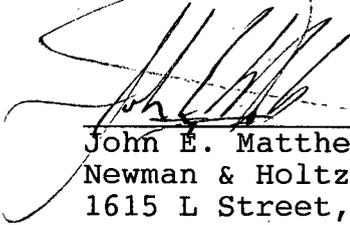
In the Matter of)
)
SEQUOYAH FUELS CORPORATION)
and GENERAL ATOMICS)
)
(Sequoyah Facility))

Docket No. 40-8027-EA

NOTICE OF APPEARANCE OF COUNSEL

Notice is hereby given that John E. Matthews enters an appearance as counsel for Sequoyah Fuels Corporation in the above-captioned proceeding.

Name: John E. Matthews
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Admissions: District of Columbia Court of Appeals
Name of Party: Sequoyah Fuels Corporation
P.O. Box 610
Gore, Oklahoma 74435



John E. Matthews
Newman & Holtzinger, P.C.
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Washington, D.C. 20036

Date: December 6, 1993

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD '93 DEC -6 P3:58

OFFICE OF SECRETARY
DUCKETING & SERVICE
BRANCH

In the Matter of)
)

SEQUOYAH FUELS CORPORATION)
and GENERAL ATOMICS)
)

(Sequoyah Facility))
_____)

Docket No. 40-8027-EA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing letter from Maurice Axelrad to Judges Gleason, Kline and Bollwerk dated December 6, 1993, and its enclosures (Sequoyah Fuels Corporation's Answer in Opposition to NACE's Motion to Intervene and notices of appearance) were served upon the following persons on the date shown below either by delivery by messenger (as shown by a single asterisk) or by deposit in the United States mail, first class postage prepaid and properly addressed (as shown by a double asterisk):

Office of the Secretary*
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Docketing & Service Branch
(Original and two copies)

Office of Commission Appellate Adjudication*
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge James P. Gleason, Chairman*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge G. Paul Bollwerk, III*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge Jerry R. Kline*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Steven R. Hom, Esq.*
Susan L. Uttal, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

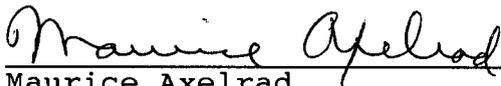
Diane Curran, Esq.*
c/o IEER
6935 Laurel Avenue, Suite 204
Takoma Park, Maryland 20912

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P.O. Box 610
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John R. Driscoll**
General Atomics
P.O. Box 85608
San Diego, California 92186-9784

Dated this 6th day of December 1993.


Maurice Axelrad

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(202) 955-6600