

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE COMMISSION

'94 APR 29 P3:49

In the Matter of)

SEQUOYAH FUELS CORPORATION)
GENERAL ATOMICS)

(Gore, Oklahoma Site)
Decontamination and)
Decommissioning Funding))

Docket No. 40-8027-EA

Source Material License
No. SUB-1010

NRC STAFF'S RESPONSE IN OPPOSITION
TO SEQUOYAH FUELS CORPORATION'S
APPEAL OF LBP-94-5 AND LBP-94-8

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April 29, 1994

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On April 7, 1994, Sequoyah Fuels Corporation (SFC) filed a "Notice of Appeal of LBP-94-5 and LBP-94-8" (Appeal) and supporting brief (SFC Brief).¹ SFC appeals the Atomic Safety and Licensing Board's (Board) rulings in LBP-94-5 and LBP-94-8² because, in SFC's view, the petition to intervene filed by Native Americans for a Clean Environment (NACE) should have been wholly denied. For the reasons stated below, SFC's Appeal should be denied.

¹ Sequoyah Fuels Corporation's Notice of Appeal of LBP-94-5 and LBP-94-8 (Apr. 7, 1994); Sequoyah Fuels Corporation's Brief on Appeal of LBP-94-5 and LBP-94-8 (Apr. 7, 1994).

² Memorandum and Order (Granting Intervention Motion; Referring Ruling to Commission), LBP-94-5, slip op. (Feb. 24, 1994); Memorandum and Order (Supplemental Petition to Intervene), LBP-94-8, slip op. (Mar. 22, 1994).

BACKGROUND

This matter arises out of the October 15, 1993 Order (Order), issued by the Deputy Director for Nuclear Materials Safety, Safeguards, and Operations Support to SFC and its parent corporation, General Atomics (GA). In sum, the Order, *inter alia*, declares SFC and GA liable for providing decommissioning funding and financial assurance for decommissioning the SFC site, and specifically requires GA to provide financial assurance for decommissioning the SFC site in the amount of \$86 million.³ NACE filed a petition to intervene in this proceeding following requests for hearing filed by SFC and GA.⁴ In its Intervention Petition, NACE acknowledged that it is not adversely affected by the Order itself, but argued that it could be adversely affected by one of the possible outcomes of this proceeding, *i.e.*, that the Order is not sustained. *See* Intervention Petition at 3. Potential injury to Mr. Ed Henshaw, a member of NACE who lives near the SFC site, is relied upon by NACE to establish that it has standing. According to NACE, a failure to decontaminate the SFC facility will have a detrimental health and safety impact on Mr. Henshaw; thus, Mr. Henshaw's interests will be

³ *See* NRC Staff's Brief in Response to Commission Order of March 3, 1994 (Mar. 11, 1994), at 1-4, for a more detailed statement of the history of this proceeding.

⁴ *See* 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 (Nov. 18, 1993) (Intervention Petition); Sequoyah Fuels Corporation's Answer and Request for Hearing (Nov. 3, 1993); General Atomics' Answer and Request for Hearing (Nov. 2, 1993).

jeopardized if the Order, a measure to ensure proper decontamination, is not sustained. See LBP-94-5, slip op. at 19.

Following NACE's filing of its Intervention Petition, several affidavits were submitted by SFC and NACE⁵ addressing the merits of whether groundwater passing through SFC property could flow to Mr. Henshaw's property.⁶ The Board decided that it was unable to conclude that no potential for offsite consequences exist, *i.e.*, that there was no potential for injury to Mr. Henshaw. Accordingly, the Board found that there had been a sufficient demonstration of "injury in fact" by NACE to provide standing to intervene as of right. LBP-94-5, slip op. at 26.⁷ SFC contests, *inter alia*, this finding in its Appeal.⁸

⁵ See LBP-94-5, slip op. at 18-19.

⁶ As the Board noted in its decision, NACE has provided insufficient support for the potential for surface water and airborne contamination. LBP-94-5, slip op. at 22 n.14.

⁷ The Board also concluded that NACE's Intervention Petition was timely, and that NACE could intervene as of right to support a Staff enforcement order. LBP-94-5, slip op. at 9-16, 26-35. SFC does not raise the issue of the timeliness of NACE's request for intervention as a basis for its Appeal. Thus, the Staff is not addressing it in this pleading. The second issue was the subject of the Commission's Order of March 3, 1994, which required the parties to file initial briefs. See NRC Staff's Brief in Response to Commission Order of March 3, 1994 (Mar. 11, 1994) (Initial Brief). Given that the Staff has already stated its views to the Commission concerning the issue of intervention as of right to support an enforcement order, *see* Initial Brief at 7-10, the Staff will not duplicate its earlier efforts, but rather respectfully incorporates herein by reference its Initial Brief.

⁸ SFC also bases its Appeal on the issue of whether one may intervene as of right to support a Staff enforcement order, which has already been briefed before the Commission. See *supra* note 7.

DISCUSSION

As the Board noted,⁹ the Commission applies contemporaneous judicial concepts of standing in determining whether a person or organization has sufficiently demonstrated a basis to warrant intervention. *See, e.g., Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976).* "To demonstrate standing, the petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision. [citations omitted] This injury must be to an interest arguably within the zone of interests protected by the governing statute." *Cleveland Electric Illuminating Co., et al. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993).*

SFC does not contend that NACE's purported injury is not within the zone of interests protected by the Atomic Energy Act, as amended. Rather, SFC's arguments focus on whether NACE has demonstrated the requisite injury in fact, and whether NACE's purported injury can be redressed in this proceeding. *See* SFC Brief at 19-28. SFC also challenges the standards used by the Board in analyzing NACE's purported injury. *Id.* at 12-18.

⁹ *See* LBP-94-5, slip op. at 17.

In *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992), the Supreme Court addressed the injury in fact component of standing as follows:

First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally-protected interest which is (a) concrete and particularized, [citations omitted] and (b) "actual or imminent, not 'conjectural' or 'hypothetical'," [citations omitted]. 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." [citations omitted] Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." [citations omitted]

Id. In connection with construction permit and operating license proceedings involving reactors, the Commission "generally has recognized a presumption in favor of standing for those persons who have frequent contacts with the area near a nuclear power plant." *Perry*, CLI-93-21, 38 NRC at 95, citing *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979). In license amendment proceedings, residence near a reactor "is sufficient to establish injury for standing if the proposed action involves an 'obvious potential for offsite consequences.'" *Perry*, CLI-93-21, 38 NRC at 95, citing *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989). "Absent situations involving such obvious potential of offsite consequences, a petitioner must allege some specific 'injury in fact' that will result from the action taken." *St. Lucie*, CLI-89-21, 30 NRC at 329-30. In a specific materials license context, the Appeal Board, finding the

petitioner had demonstrated standing, has stated that it could not decide "that there is no reasonable possibility that [harm from radiation] could occur." *Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility)*, ALAB-682, 16 NRC 150, 155 (1982), citing *North Anna*, ALAB-522, 9 NRC at 56. In *Armed Forces*, one of the members of the petitioner's organization lived within three miles of an irradiation facility, which met the injury in fact test without a showing of a "causal relationship between injury and the licensing action being sought." *Armed Forces*, ALAB-682, 16 NRC at 154.

With the burden to demonstrate standing, NACE has not affirmatively made a showing that groundwater flows or is likely to flow from the SFC facility to Mr. Henshaw's property, which is adjacent to the SFC site. See Henshaw Affidavit (Nov. 19, 1993); Brown Affidavit (Dec. 27, 1993); Brown Affidavit (Jan. 18, 1994). In contrast, SFC has shown that based on available data, some groundwater flows away from Mr. Henshaw's property. See Dietrich Affidavit (Dec. 3, 1993); Smith Affidavit (Jan. 7, 1994). However, NACE has raised enough questions as to what is unknown concerning groundwater flow such that it is within the range of reasonable possibilities that there could be some groundwater flow to Mr. Henshaw from the SFC site. Thus, one cannot say that there is "no reasonable possibility" that Mr. Henshaw will suffer injury.

In conducting its analysis, the Board relied upon language in *Perry*, where the Commission stated that it could not "conclude that no potential for offsite consequences

is posed" by the proposed action, in finding that the petitioner had demonstrated standing. *Perry*, CLI-93-21, 38 NRC at 95-96. This statement in *Perry* immediately followed the Commission's discussion therein of *St. Lucie*, where the Commission had spoken in terms of an "obvious potential" for offsite consequences. To the extent that the Board here found, from a review of the parties' affidavits, that it could not conclude there is no "obvious potential" for harm to NACE, or "no reasonable possibility" of harm, the Staff agrees that under that analysis, NACE has demonstrated standing.

SFC argues that the Board deviated from *Lujan* and applied a new, essentially lesser "no potential for offsite consequences" standard, which should be limited to the facts in *Perry*. If the Board's reliance upon the "no potential for offsite consequences" language in *Perry* indicates it believed that that case established a new lower standard, and then applied it to judge NACE's showing of standing, the Staff agrees with SFC that such a reduced standard should be limited to the facts in *Perry*, where "special" procedural rights were at issue. *See Perry*, CLI-93-21, 38 NRC at 94 n.9. In *Perry*, the licensee sought an amendment to remove the schedule for the withdrawal of reactor vessel material specimens from the technical specifications to the updated safety analysis report (USAR). Changes in the withdrawal schedule, once in the USAR, would have to be approved by the agency, but would not trigger hearing rights. The petitioner claimed that if deprived of an opportunity to challenge future changes to the withdrawal schedule, surveillance of the reactor vessel may become lax, which may prevent detection of a

weakened vessel; this ultimately could result in the vessel's failure, and release of radioactivity into the environment.

It is not clear that the Commission in *Perry* intended any change in the analysis of standing, notwithstanding the "special" procedural rights at issue. The Commission did state in its conclusion that "[a]t this stage in deciding threshold standing, we cannot conclude that no potential for offsite consequences is posed by the loss of notice and opportunity for a hearing to challenge future changes to the withdrawal schedule." *Perry*, CLI-93-21, 38 NRC at 95-96. However, the Commission went on to say that "[t]he material condition of the plant's reactor vessel *obviously* bears on the health and safety of those members of the public who reside near the plant's vicinity." *Id.* at 96 (emphasis added). Thus, the use of the language "obviously bears on the health and safety" appears to indicate that the Commission did not intend to deviate at all from *St. Lucie's* "no obvious potential for offsite consequences" standard. The Board's statement of a "no potential" benchmark would not be in error, therefore, if applied to the *St. Lucie* threshold.¹⁰

¹⁰ SFC also argues that the Board's standard shifts the burden to the licensee to prove that there is no potential for offsite consequences, once a petitioner establishes residence in close proximity to a materials facility. SFC Brief at 14. The ultimate burden of establishing standing rests with the petitioner. *See Lujan*, 112 S.Ct. at 2136. NACE met its initial burden of making a showing of injury by filing the Henshaw affidavit. SFC, by filing opposing affidavits, overcame the presumption of injury that the Henshaw affidavit established. Notwithstanding SFC's elimination of that presumption, NACE submitted further evidence in the form of affidavits that established that injury could still be a reasonable possibility. SFC cites to no part of the Board's opinion that indicates that the ultimate burden shifted to SFC.

SFC argues that NACE has failed to show that the failure to sustain the Order would result in migration of contaminated groundwater to Mr. Henshaw's property. SFC attempts to make much of multiple events that must occur before NACE could suffer injury. *See* SFC Brief at 20. According to SFC, if the Order is not sustained, SFC will still be "obligated" to decommission the site in accordance with NRC requirements. The bottom line, according to SFC, is that NACE's alleged injury "is hypothetical, conjectural, and highly speculative." *Id.*

When issuing the Order, the Staff determined that the Order was necessary to assure the availability of adequate funding for decommissioning. *See* Order at 22. In other words, without the Order, reasonable assurance that SFC would be able to adequately fund decommissioning was lacking. Contamination of surrounding areas cannot be ruled out as a reasonable possibility if adequate funding for decommissioning activities is not assured. The Staff agrees that SFC will continue to have an obligation to decommission the site, but having an obligation is not the same as being able to perform the obligation. Thus, the Board's implicit conclusion that NACE's purported injury is not "highly speculative," but is sufficiently "concrete, particularized, actual, or imminent" to meet standing requirements, could not be said to be "irrational." *See Duquesne Light Co., et al.* (Beaver Valley Power Station, Unit No. 1), ALAB-109, 6 AEC 243, 244 (1973) (conclusion of Licensing Board as to whether petitioner alleged a sufficient interest to establish standing will not be disturbed unless it appears to be irrational).

Moreover, causality may be properly inferred. In *Armed Forces*, the Appeal Board specifically rejected the notion that the petitioner was required to show a causal relationship between the purported injury, exposure to cobalt-60, and the license renewal action to permit an irradiation facility to continue to possess cobalt-60. *Armed Forces*, ALAB-682, 16 NRC at 154. A showing of close geographic proximity was sufficient. *Id.* This case should be no different. The SFC site continues to "possess" radioactive materials, which could leach into the surrounding environment. NACE, therefore, should not have to prove causality, at least to the extent SFC would appear to deem necessary. In sum, a proper inference may be drawn that the purported potential injury to NACE from improper decontamination, resulting from the inability to fund decontamination efforts, is "fairly traceable" to failure to sustain the Order. *See Lujan*, 112 S.Ct. at 2136.

SFC takes issue with the Board's finding that NACE had met its burden to establish injury in fact "even though it presented not a scintilla of information" establishing that contaminants from the SFC site would reach Mr. Henshaw's property or that he would come in contact with them. *See SFC Brief* at 26. It is true that NACE did not affirmatively show that contaminated water does or would likely flow to Mr. Henshaw's property. Rather, NACE argued for the most part through its affidavits that SFC's affirmative conclusions that groundwater flows away from Mr. Henshaw's property was based on incomplete information. However, to analogize to summary judgment proceedings, the Board essentially concluded that NACE has raised a colorable

fact dispute concerning whether groundwater could flow to Mr. Henshaw's property, and thus has met its burden to establish standing. One cannot say that the Board's conclusion in this regard was "irrational," based on its review of the affidavits submitted by the parties. *See Beaver Valley, ALAB-109, 6 AEC 243, 244.* Accordingly, the Board's conclusion should be sustained.

Finally, SFC argues that NACE's injury cannot be likely redressed by a favorable decision. SFC asserts that because the terms of the Order provide that its provisions may be relaxed by the Director of the Office of Nuclear Materials Safety and Safeguards (NMSS), NACE would still be subject to its purported injury even if the Order were sustained. *See SFC Brief at 27-28.*

Undoubtedly, implicit in the provision of the Order regarding relaxation by the Director of NMSS¹¹ is that no relaxation or rescission of the conditions would be authorized in the face of resulting harm to the public health and safety. Thus, it is "likely" as opposed to "merely speculative" that NACE's purported injury would be redressed by the Order, because it is likely no relaxation would occur if it resulted in a threat to the health and safety of any member of the public, including NACE and Mr. Henshaw. Accordingly, SFC's argument in this regard should be rejected.

¹¹ *See Order at 26.*

CONCLUSION

In view of the foregoing, SFC has not demonstrated that NACE's petition to intervene should have been wholly denied. Therefore, SFC's appeal should be denied.¹²

Respectfully submitted,



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Dated at Rockville, Maryland
this 29th day of April, 1994

¹² At the conclusion of its Brief, SFC requests that, with respect to whether NACE should be granted intervention as a matter of discretion, the Commission not remand the issue to the Board, but instead decide the issue firsthand. *See* SFC Brief at 28 n.20. The Staff would not object to such a procedure, recognizing that the Commission has the discretionary authority to permit participation in agency proceedings. *See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, CLI-93-3, 37 NRC 135, 141 (1993).

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GENERAL ATOMICS)	
)	Source Material License
(Gore, Oklahoma Site Decontamination)	No. SUB-1010
and Decommissioning Funding))	
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE IN OPPOSITION TO SEQUOYAH FUELS CORPORATION'S APPEAL OF LBP-94-5 AND LBP-94-8" in the above-captioned matter have been served on the following by deposit in the United States mail, first class, or as indicated by one asterisk by deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by two asterisks by facsimile transmission, or as indicated by three asterisks by hand, this 29th day of April, 1994:

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