

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

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Ivan Selin, Chairman
Kenneth C. Rogers
E. Gail de Planque

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)
)
SEQUOYAH FUELS CORPORATION)
and GENERAL ATOMICS)
)
(Gore, Oklahoma Site))
_____)

Docket No. 40-8027-EA

(Decontamination and
Decommissioning Funding)

SERVED AUG 23 1994

MEMORANDUM AND ORDER

CLI-94-12

The Commission has before it appeals of the Atomic Safety and Licensing Board's orders LBP-94-5, 39 NRC 54 (1994) and LBP-94-8, 39 NRC 116 (1994), which granted intervention in this proceeding to Native Americans for a Clean Environment (NACE). The proceeding stems from a Nuclear Regulatory Commission (NRC) staff enforcement order holding the licensee Sequoyah Fuels Corporation (SFC) and General Atomics (GA), SFC's parent company, jointly and severally liable for providing financial assurance for the decommissioning of SFC's facility near Gore, Oklahoma. See 58 Fed. Reg. 55,087 (Oct. 25, 1993). NACE petitioned for intervention to protect its members' interest in having the order sustained. Both SFC and GA appeal pursuant to 10 C.F.R. § 2.714a the Licensing Board's grant of intervention to a party which favors the enforcement action, and they argue that NACE has not

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met the traditional standards for intervention. We deny the appeals.

I. Background

In LBP-94-5 the Licensing Board found that NACE had established standing, but the Board left unresolved the ultimate determination on intervention pending its ruling on NACE's proffered contentions. The Licensing Board concluded that (1) in a proceeding on a staff enforcement order issued under 10 C.F.R. § 2.202, there is no prohibition against an otherwise qualified petitioner intervening as of right in support of the order; and (2) petitioner NACE had demonstrated that it possesses the requisite interest to entitle it to standing in this instance.

The Licensing Board referred the first ruling noted above to the Commission pursuant to section 2.730(f) rather than awaiting a final ruling on NACE's intervention, because it believed that this ruling affected significantly the structure of both this proceeding and the Commission's adjudicatory process generally. LBP-94-5, 39 NRC at 75-76. Pursuant to a March 3, 1994 Commission order (unpublished), the parties briefed the questions of whether review of the referred ruling would be appropriate in accordance with 10 C.F.R. § 2.786(g) and, assuming that review would be appropriate, whether the Licensing Board's ruling should be sustained.

Prior to the Commission deciding whether to take review of the referred ruling, the Licensing Board, in LBP-95-8, admitted NACE's contentions and, accordingly, granted NACE intervention.

This decision had the effect of making both LBP-94-8 and the earlier ruling in LBP-94-5 appealable to the Commission as of right pursuant to 10 C.F.R. § 2.714a.¹ Because both SFC and GA have appealed the decisions pursuant to 2.714a, the question of whether to review as a matter of discretion the referred ruling in LBP-94-5 is moot. In our review of the Licensing Board's rulings in LBP-94-5, we have fully considered arguments presented in both the parties' briefs on the referred ruling and the parties' subsequent briefs on appeal.

II. Analysis

In their appeals SFC and GA challenge the conclusion that NACE is entitled to standing. SFC and GA do not challenge the admissibility of NACE's contentions, but appeal LBP-94-8 only to the extent that its ultimate conclusion is to grant NACE intervention.² With respect to standing, SFC's and GA's arguments are two-fold. First, they argue that a petitioner who supports an enforcement order cannot establish the requisite interest for standing as of right in a proceeding to determine whether an enforcement order should be sustained. Second, they argue that, even if such intervention is permitted, NACE has failed to demonstrate that its members' interest will be harmed

¹ See Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-472, 7 NRC 570, 571 n.1 (1978).

² GA did not file a separate brief on appeal, but filed a notice of appeal and adopted the grounds and arguments set forth in SFC's brief on appeal. General Atomics' Notice of Appeal (Apr. 7, 1994).

if the order is not sustained or that any such harm is likely to be redressed by a favorable decision in this proceeding. We turn first to the issue of intervention as of right in proceedings on staff enforcement orders.

A. Availability of Intervention as of Right to Support a Staff Enforcement Order

The Licensing Board concluded that the Commission's statutory and regulatory framework sanctions intervention as of right even for one who supports rather than challenges an enforcement order. In reaching this determination, the Licensing Board relied on the analysis contained in Nuclear Engineering Co. (Sheffield Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737 (1978). In Sheffield, an Atomic Safety and Licensing Appeal Board discussed the question of whether a petitioner who supports a license amendment could intervene as of right in the proceeding. In determining that such a petitioner, if otherwise qualified, could intervene, the Appeal Board stated:

Standing to intervene hinges neither upon the litigating posture the petitioner would assume if allowed to participate nor on the merits of its case.... Rather, the test is whether a cognizable interest of the petitioner might be adversely affected if the proceeding has one outcome rather than another.

7 NRC at 743 (citation omitted). The Licensing Board found that this analysis is equally applicable to an enforcement proceeding. LBP-94-5, 39 NRC at 65-66. Thus, once a hearing is requested by the target of the enforcement order, a petitioner who supports the order may be "adversely affected" by the proceeding, because

a possible outcome of the proceeding is that the order will not be sustained. Id.

On appeal SFC and GA argue that admitting a private party to a proceeding would be appointing in essence a "private prosecutor" to aid in the enforcement of the order. A "private prosecutor," they warn, would severely limit the Commission's enforcement discretion because such an intervenor could object to compromises reached between the target of the enforcement action and the NRC staff and thereby unnecessarily prolong the hearing. Thus, SFC and GA argue that such intervention would severely hamper enforcement action which is within the sole discretion of the Commission. Sequoyah Fuels Initial Brief in Opposition to the Ruling in Section II.A. of LBP-94-5, at 10-14 (Mar. 11, 1994) (hereinafter SFC Initial Brief).

SFC and GA also maintain that only those who oppose an NRC enforcement order are persons "whose interest may be affected by the proceeding" so as to qualify for a hearing under section 189a(1) of the Atomic Energy Act of 1954 (AEA), 42 U.S.C. § 2239(a)(1) (1988), and 10 C.F.R. § 2.714(a), the regulation governing intervention in all formal adjudications conducted pursuant to 10 C.F.R. Part 2, Subpart G. According to SFC and GA, the right to intervene in an enforcement proceeding must be "coextensive" with the right to a hearing under the section 189a of the AEA, and section 189a hearing rights extend only to those persons adversely affected by the order, not by the proceeding. SFC Initial Brief at 15-26. If the Commission's rules otherwise

provided for intervention in a circumstance where the petitioner was not adversely affected by the enforcement order, SFC and GA contend that "the Commission's rules would violate section 189a of the Act." Id. at 24-25.

We do not find SFC's and GA's arguments compelling. Irrespective of whether this proceeding falls within the scope of those hearings mandated by section 189a of the AEA, the Commission has broad authority to hold hearings as it "may deem necessary or proper to assist it in exercising any authority provided in [the AEA],"³ or to define the scope of public participation in its proceedings beyond that which is required by statute.⁴ In exercising this authority, the Commission has permitted participation in its adjudicatory proceedings by those who can show that they have a cognizable interest that may be adversely affected if the proceeding has one outcome rather than another.⁵ Intervention in a proceeding under 10 C.F.R. Part 2, Subpart G, is permitted by regulation in 10 C.F.R. § 2.714, which provides that "any person whose interest may be affected by the

³ AEA § 161c, 42 U.S.C. § 2201(c) (1988).

⁴ Portland Gen. Elec. Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 614 (1976) (and cases cited therein); Public Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 440-441 (1980) (and cases cited therein).

⁵ See Sheffield, 7 NRC at 743. The Sheffield outcome test was cited as the test for injury in Public Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 439 (1980) [hereinafter Marble Hill], the first case in which the Commission articulated its policy on the scope of enforcement proceedings that was subsequently approved by the court in Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983).

proceeding" may petition to intervene. Although the particular circumstances of this proceeding may be somewhat novel, the grant of intervention to a petitioner who supports an enforcement order is not. We have identified a number of instances over the years in which petitioners who support an enforcement order have been permitted to intervene.⁶

Contrary to SFC's and GA's arguments,⁷ the court in Bellotti v. NRC neither directly nor indirectly prohibited this practice. 725 F.2d 1380 (D.C. Cir. 1983). The question before the court in Bellotti was whether the Commission had the authority under section 189a of the AEA to define the scope of an enforcement proceeding and deny a petitioner a hearing on whether to impose more extensive requirements than the staff imposed in its original enforcement order. The Bellotti majority did not address the issue that we face here.⁸

⁶ See generally Kerr McGee Chemical Corp. (Kress Creek Decontamination), LBP-86-18, 23 NRC 799, 802 (1986); Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-85-2, 21 NRC 24, 32-33, 118 (1985), vacated as moot, ALAB-842, 24 NRC 197 (1986); Dairyland Power Coop. (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367, 374-375 (1980), review of certified question, ALAB-618, 12 NRC 551 (1980); Union Electric Co. (Callaway Plant Units 1 & 2), LBP-78-31, 8 NRC 366, 368 (1978), aff'd, ALAB-527, 9 NRC 126 (1979); Consumers Power Co. (Midland Plant, Units 1 & 2), CLI-74-3, 7 AEC 7, 12 (1974).

⁷ Sequoyah Fuels Corporation's Initial Brief in Opposition to the Ruling in Section II.A of LBP-94-5 at 16-17 (March 11, 1994). GA did not file a separate brief on these questions but adopted SFC's arguments. General Atomics Response to the Ruling in Section II.A of LBP-94-5 (March 11, 1994).

⁸ However, the dissent recognized the availability of standing for a petitioner who supports an enforcement order. In reiterating the Commission's position, and hence the position
(continued...)

In Bellotti, the majority of the court expressed the concern that if a petitioner, rather than the Commission, was permitted to define the scope of the enforcement proceeding the Commission would be deluged by petitioners every time the Commission issued an enforcement order, and the scope of many proceedings would be "virtually interminable" and "free ranging." 725 F.2d at 1381. In contrast, NACE recognizes in this instance that it may only intervene with respect to matters found to be within the scope of the staff's enforcement order and may not expand the breadth of the order or proceeding.⁹ Thus, the policy behind the ruling in Bellotti is not relevant here. To the extent that SFC and GA rely on Bellotti to support the notion that a petitioner who favors an order may not intervene as of right, we agree with the Licensing Board that they read Bellotti too broadly.

Moreover, SFC and GA have not raised any argument which would convince us that permitting intervention by a petitioner who supports an enforcement order is detrimental to the

⁸(...continued)
accepted by the majority of the court in Bellotti, the dissent stated that:

If there were a chance that the proceeding would overturn the amendment, the public would have standing, since the plant could return to or remain in its pre-amendment unsafe condition. But this is not a possibility unless the licensee seeks a hearing.

725 F.2d at 1386 (Wright, J., dissenting).

⁹ Native Americans for a Clean Environment's Reply Brief Regarding Appropriateness of Commission Review of LBP-94-5 and Whether Ruling in Section II.A Should be Sustained at 7-8 (March 17, 1994).

Commission's enforcement discretion. Whether and when to initiate enforcement proceedings remains a matter of agency discretion. See Moog Industries, Inc. v. FTC, 355 U.S. 411, 413 (1958); Heckler v. Chaney, 470 U.S. 821, 831 (1985); Advanced Medical Systems, Inc., CLI-94-6, 39 NRC ___, slip op. at 42 (June 9, 1994). Permitting intervention in enforcement proceedings by interested persons does not diminish the agency's discretion in initiating proceedings because, as the Bellotti court held, the Commission need not hold a hearing on whether another path should have been taken. The Commission may lawfully limit a hearing to consideration of the remedy or sanction proposed in the order. See Bellotti, 725 F.2d at 1381-82; Marble Hill, 11 NRC at 440-41.

SFC argues that the agency's discretion will be hampered because a third party intervenor could object to compromises reached between the NRC staff and the licensee and thereby thwart settlement and unnecessarily prolong a hearing. Once proceedings have been initiated, however, the staff's discretion is never absolute. While the agency's enforcement discretion may be at its zenith as the agency decides whether to initiate enforcement action, that discretion does not negate the participatory rights in agency proceedings under statute or regulation once a proceeding has been initiated or a matter set for hearing.

Even in the absence of a third party intervention in a proceeding, settlements between the staff and the licensee, once a matter has been noticed for hearing, are subject to the review of the presiding officer. 10 C.F.R. § 2.203. Thus, once an

enforcement order has been set for hearing at a licensee's request, the NRC staff no longer has untrammelled discretion to offer or accept a compromise or settlement. In any pending proceeding, the presiding officer's approval of settlement is a matter that must give due consideration to the public interest.¹⁰

As we noted, the admission of an intervenor like NACE to an enforcement proceeding is not new. The Commission has permitted such intervention for approximately two decades, and the alleged detrimental effects on the Commission's enforcement discretion warned by SFC and GA have not materialized. In this instance, a hearing will be held in any event at the request of SFC and GA, so considerable NRC resources will be devoted to a hearing irrespective of NACE's intervention. We see no harm to either the Commission's enforcement discretion or the public interest in permitting third party participation in a hearing on contested matters that are within the scope of the enforcement action originally brought by the NRC staff.

We conclude that the Licensing Board correctly applied the Sheffield "outcome" test to the circumstances here and correctly determined that an otherwise qualified petitioner may intervene as of right to support a staff enforcement order issued pursuant

¹⁰ However, parties may not simply object to settlement in order to block it, but must show some substantial basis for disapproving the settlement or the existence of some material issue that requires resolution. See generally Pennsylvania Gas & Water Co. v. FPC, 463 F.2d 1242, 1246-47, 1249-52 (D.C. Cir. 1972).

to section 2.202. We turn next to the question of whether NACE has demonstrated the requisite interest to be granted intervention in this proceeding.

B. NACE's Standing

In order for NACE to be admitted as a party in this enforcement proceeding it must first demonstrate that it has an interest which may be affected by the proceeding; i.e., it has standing to participate. At the heart of the standing inquiry is whether the petitioner has "alleged such a personal stake in the outcome of the controversy" as to demonstrate that a concrete adverseness exists which will sharpen the presentation of issues. Duke Power Co. v. Carolina Env. Study Group, Inc., 438 U.S. 59, 72 (1978) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). To demonstrate such a "personal stake," the Commission applies contemporaneous judicial concepts of standing. Accordingly, a petitioner must (1) allege an "injury in fact" that is (2) "fairly traceable to the challenged action" and (3) is "likely" to be "redressed by a favorable decision."¹¹ The Licensing Board found that NACE satisfied the threshold elements for standing. Absent a gross misapplication of the facts or applicable law, we are not inclined to disturb the Licensing Board's judgment on standing. See Gulf States Utilities Co.

¹¹ Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2136 (1992) (citations and internal quotations omitted); see also Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993).

(River Bend Station, Unit 1), CLI-94-___, slip op. at 6-7 (Aug. 23, 1994). We address each of the standing elements in turn.

1. Injury in Fact

The alleged injury, which may be either actual or threatened,¹² must be both concrete and particularized,¹³ not "conjectural," or "hypothetical". O'Shea v. Littleton, 414 U.S. 488, 494 (1974). As a result, standing has been denied when the threat of injury is too speculative. See, e.g., Whitmore v. Arkansas, 495 U.S. 149, 158-59 (1990); Los Angeles v. Lyons, 461 U.S. 95, 105 (1983). An organization seeking representational standing on behalf of its members may meet the "injury-in-fact" requirement by demonstrating that at least one of its members, who has authorized the organization to represent his or her interest, will be injured by the possible outcome of the proceeding. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389-400 (1979).

NACE provided an affidavit from one its members, Mr. Ed Henshaw, who authorized NACE to represent his interest. Mr. Henshaw asserted that, if the Sequoyah Fuels facility is not decommissioned properly, his and his family's health will be adversely affected because contaminated ground and surface water will migrate from the SFC site and contaminate the nearby Henshaw

¹² National Wildlife Federation v. Hodel, 839 F.2d 694, 704 (D.C. Cir. 1988) (quoting Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982)).

¹³ Allen v. Wright, 468 U.S. 737, 756 (1984).

property. He believes that if GA and SFC succeed in their challenge to staff's enforcement order adequate funds will not be available to properly decommission the site. To support Mr. Henshaw's assertions, NACE provided affidavits from Mr. Timothy P. Brown, a professional hydrogeologist. Mr. Brown examined data regarding the flow paths of groundwater in the area and concluded from the available data that one could not rule out the possibility that contaminated groundwater could migrate from beneath the SFC site and contaminate groundwater and eventually the well water on the Henshaw property. Mr. Brown provided examples of flow paths that lead to the Henshaw property and asserted that migration of contamination into these paths could not be ruled out without further testing.¹⁴

Although the NRC staff concedes that NACE has standing,¹⁵ SFC, joined by GA, oppose the sufficiency of NACE's showing of standing. Answer in Opposition to NACE's Motion to Intervene (Dec. 6, 1993) (hereinafter SFC Answer). According to SFC, data gathered from extensive testing at the SFC site indicate that no groundwater flow path exists which would allow flow of groundwater from beneath the site to reach Mr. Henshaw's property. To support this conclusion, SFC provided affidavits

¹⁴ NACE's Reply to SFC's Answer in Opposition to NACE's Motion to Intervene [hereinafter NACE Reply], Attachment C (Dec. 30, 1993).

¹⁵ NRC Staff's Response to NACE's Motion for Leave to Intervene, at 5 (December 13, 1993).

from Mr. John S. Dietrich, its Technical Services Vice President,¹⁶ Mr. Bert J. Smith, Director of Hydrogeology for a consulting firm that provided groundwater characterization studies for the SFC facility, and Mr. Kenneth Schlag, a hydrogeologist with SFC.¹⁷ SFC also submitted a June 28, 1993 order issued by a Hearing Examiner for the Oklahoma Water Resources Board, which denied NACE intervention in a proceeding involving SFC's application for revision of a waste disposal permit. SFC Answer, Enclosure 3. The order is a brief, one-page document in which, without explanation, the Hearing Examiner concluded that NACE's members who live within one and a half to four miles away from the flow of groundwater do not have standing.

The Licensing Board found that NACE had established the requisite injury to intervene in this proceeding. The Board found that there is uranium contamination of the soil and groundwater beneath the SFC main processing facility and nearby pond areas. Further, after reviewing various data submitted by NACE and SFC, including analysis in the Brown, Dietrich, Schlag, and Smith affidavits, the Licensing Board found that groundwater flow charts "at a minimum" support Mr. Brown's assertion that the groundwater flow patterns are "variable and complex". LBP-94-5, 39 NRC at 70. Essentially, the Board concluded that there is a

¹⁶ SFC Answer, Enclosure 2.

¹⁷ SFC's Reply to NACE's Supplemental Factual Allegations, New Arguments, and Request for Discretionary Intervention, Enclosure 1 and 2 (January 11, 1994) (hereinafter SFC Reply).

possibility that contaminated groundwater could find its way to Mr. Henshaw's property by either a fault zone running from the SFC site to the Henshaw property or by way of deeper flow patterns undetected by SFC. The Licensing Board found particularly compelling the fact that SFC itself had stated that deeper flow patterns are "expected" and that the direction of these deeper flow patterns had not been measured. Id. (citing SFC Reply to NACE's Reply, encl. 1, attach. A-2, at HYD 5-2).

On appeal, SFC and GA argue that the Licensing Board improperly concluded that there is any possibility that contaminated groundwater could flow from SFC's site to Mr. Henshaw's property.¹⁸ Both NACE and the NRC staff filed responses in opposition to these arguments.

SFC asserts that the injury is speculative. However, SFC does not challenge two important findings that formed in part the basis for the Board's conclusion that NACE had demonstrated injury in fact: (1) that there is a fault running from the SFC site to Mr. Henshaw's property and (2) that deeper groundwater flow patterns are "expected" and unmeasured. LBP-94-5, 39 NRC at 69-70. Although NACE has not established the existence of these flow patterns with certainty, such certainty is not required at this threshold stage.¹⁹

¹⁸ SFC Brief on Appeal of LBP-94-5 and LBP-94-8 [hereinafter SFC Appeal], at 24-26 (Apr. 7, 1994).

¹⁹ See generally Los Angeles v. National Highway Traffic Safety Admin., 912 F.2d 478, 495 (D.C. Cir. 1990); Hodel, 839 F.2d at 713 (standing granted to an organization representing
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SFC argues that, even if it were possible for contaminated groundwater to be carried onto Mr. Henshaw's property, NACE has failed to show whether Mr. Henshaw has ever used or can use the groundwater under his property. Such proof would entail still more technical studies, which at this threshold stage are unnecessary. Mr. Henshaw has alleged a reasonable threat of contamination of his well water. In addition, Mr. Brown, a professional hydrogeologist, stated that if the groundwater on Mr. Henshaw's property becomes contaminated it may adversely affect the quality of well water on the property, thereby impacting the health of the Henshaw family. Although SFC's hydrogeologists challenged many of the matters raised in Mr. Brown's first affidavit, these hydrogeologists did not challenge the conclusion that groundwater contamination on Mr. Henshaw's property could affect the well water on that property.

The determination by the Oklahoma Hearing Examiner is neither binding on the Commission nor compelling. It does not address many of the specific issues raised in this proceeding. Indeed, it is devoid of any explanation for its conclusion that NACE had failed to show injury.

Thus, we conclude that NACE is not required to go further at this threshold stage to establish injury in fact. It is enough that NACE has demonstrated a realistic threat to Mr. Henshaw of

¹⁹(...continued)
petitioner claiming injury from soil disturbance from mining, despite industry's arguments that the alleged injury could only occur "upon the chance occurrence of eight events," one of which only had "a 0.8% chance of occurring").

sustaining a direct injury as result of contaminated groundwater flowing from the SFC site to his property.²⁰

Finally, we note the Board and parties have spent considerable time discussing whether the Commission's recent Perry²¹ decision provided new standards for determining standing. It did not. Notwithstanding that we have already determined that NACE has demonstrated a particularized injury, we briefly discuss our holding in Perry to avoid any further confusion.

In Perry, the petitioner challenged an amendment authorizing a procedural change to remove the reactor vessel specimen withdrawal schedule from the licensee's Technical Specifications. Although the licensee's continued adherence to the withdrawal schedule is required by Commission regulations, this change eliminated the opportunity for a hearing in the event of future changes to the withdrawal schedule. The Commission determined

²⁰ NACE also argued that insufficient funds for decommissioning could lead to inadequate security and survey checkpoint measures, increasing the risk that contaminated materials could be transported off site. In support of this argument, NACE cited a December 1993 incident where contaminated radios were found offsite, a November 1992 incident of leakage of radioactive material found on a vehicle transporting material from SFC site, and leakage of uranium-contaminated slurry from an SFC tank truck during shipment to New Mexico. NACE Reply at 22-23. The Licensing Board did not address NACE's arguments that inadequate funds could lead to improper surveying and security leading to offsite contamination. Because we determine that NACE has demonstrated injury in fact from potential contamination of groundwater, for the purposes of this case we need not reach this separate issue.

²¹ Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1) CLI-93-21, 38 NRC 87 (1993).

that the petitioner had alleged a particularized procedural injury that was fairly traceable to the challenged amendment and was likely to be redressed by a favorable decision. 38 NRC at 93. Then, in finding that this procedural injury was linked to a concrete injury, the Commission employed a commonly applied presumption in Commission case law; i.e., persons who have frequent contacts in the area near a nuclear power plant are presumed to meet the requirements for standing by demonstrating that the proposed action involves an "obvious potential for offsite consequences." Id. at 95 (quoting Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 & 2), CLI-89-21, 30 NRC 325, 329-30 (1989)). The Commission determined that the presumption applied in Perry because the "material condition of the plant's reactor vessel obviously bears on the health and safety of those members of the public who reside in the plant's vicinity." Perry, 38 NRC at 96.²²

²² Contrary to SFC's arguments, such a presumption based on geographic proximity is not confined solely to Part 50 reactor licenses, but is also applicable to materials cases where the potential for offsite consequences is obvious. Armed Forces Radiobiology Inst. (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 153-54 (1982). The determination of how proximate a petitioner must live or have frequent contacts to a source of radioactivity depends on the danger posed by the source at issue. The rule of thumb generally applied in reactor licensing proceedings (a presumption of standing for persons who reside or frequent the area within a 50 mile radius of the facility) is not applied in material cases. See Final Rule, Informal Hearing Procedures for Materials Licensing Adjudications, 54 Fed. Reg. 8269, 8272 (Feb. 28, 1989); Proposed Rule, Informal Hearing Procedures for Materials Licensing Adjudications, 52 Fed. Reg. 20,089, 20,090 (May 29, 1987). However, a presumption based on geographical proximity (albeit at distances much closer than 50 miles) may be applied where there is a determination that the

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2. Causation

The second element of standing is causation. It must be demonstrated that the injury is fairly traceable to the proposed action. See Hodel, 839 F.2d at 705. Such a determination is not dependent on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible. Id. The question at issue here with respect to causation is whether NACE has demonstrated that the threat of injury to Mr. Henshaw is fairly traceable to improper decontamination and decommissioning of the SFC site and whether improper decontamination and decommissioning of the facility is fairly traceable to insufficient decommissioning funding.

The Commission has already recognized that adequate funds are necessary to ensure timely and proper decommissioning to protect public health and safety. In adopting the final rule involving general requirements for decommissioning, the Commission indicated that its intent was to ensure that all facilities are decommissioned in a safe and timely manner and that "adequate licensee funds will be available for this purpose." General Requirements for Decommissioning Nuclear Facilities, Final Rule, 53 Fed. Reg. 24,018 (June 27, 1988). The NRC staff asserts here that the reason behind issuance of the order is that staff lacked adequate assurance that the funds

²²(...continued)
proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences. See, e.g., Armed Forces, 16 NRC at 153-54; Northern States Power Co. (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 45 (1990).

would be available to properly decontaminate and decommission the SFC site. NRC Staff Response in Opposition to SFC's Appeal of LBP-94-5 and LBP-94-8, at 9 (Apr. 29, 1994). Therefore, as in the general case, the threat of inadequate decommissioning here is fairly traceable to insufficient funds. However, the question remains whether the threat of injury to Mr. Henshaw is fairly traceable to improper decommissioning.

SFC did not contest the Board's finding here that the staff's October 1993 enforcement order made it "clear" that there is uranium contamination of the soil and groundwater on the SFC main processing facility and the nearby pond areas with sufficient safety significance to warrant remediation before the property can be released for unrestricted use. LBP-94-5, 39 NRC at 68-69. In our discussion above regarding "injury in fact", we have already determined that there is a threat that this contaminated groundwater, if not remedied, may find its way to flow paths leading to Mr. Henshaw's property. Since the decontamination and decommissioning activities are intended to prevent or remediate the groundwater and other contamination on the SFC site, we find that NACE has demonstrated that the threat of injury to Mr. Henshaw is fairly traceable to inadequate decontamination and decommissioning.

3. Redressability

The third element of standing requires that "it must be 'likely,' as opposed to merely 'speculative' that the injury will be 'redressed by a favorable decision.'" Lujan, supra, 112 S.Ct.

at 2136 (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 43 (1976)). On appeal, SFC argues that the threat of injury to Mr. Henshaw is not redressable. It notes that, pursuant to staff's October 1993 order, the Director of Nuclear Materials Safety and Safeguards retained the authority to relax or rescind the order. SFC maintains that, even if the Licensing Board sustains the order, the Director could still subsequently relax it. Therefore, according to SFC, the alleged threat to Mr. Henshaw will remain irrespective of the outcome of this proceeding. SFC Appeal at 27-28.

Clearly one possible outcome of the proceeding is that the order will be sustained, without subsequent modification or rescission, and SFC and GA will be held responsible for providing the full financial assurance required by the order. SFC does not challenge that this outcome would redress Mr. Henshaw's threatened injury. Full responsibility for the entire amount required by the order is the most likely result, if the order is sustained. SFC's suggestion that the staff, after receiving a favorable decision sustaining the order, would then modify or rescind the order, is the more speculative outcome. Moreover, even if the order is modified, such modification could not be accomplished without the staff's determination that good cause warranted such relief, consistent with the public health and safety, and adjudicatory findings by the Board relating to necessary funding to ensure public health and safety could not be ignored. Therefore, it is likely, as opposed to merely

speculative, that if the order is sustained it will assure proper funding for decontamination and decommissioning and thereby redress the threat of injury to Mr. Henshaw.

Having found an injury in fact that is redressable by a favorable decision, we conclude that the Licensing Board properly found that NACE demonstrated standing as of right to participate in this proceeding.²³

²³ Having found that NACE has standing as of right to participate in this proceeding, we need not reach the question of whether NACE should be granted discretionary intervention.

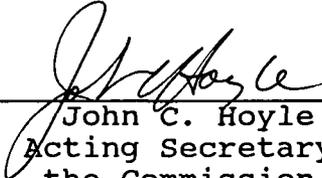
III. Conclusion

For the reasons stated in this decision, SFC and GA's appeals are denied. The Licensing Board's order in LBP-94-5 granting standing to NACE is affirmed. To the extent that LBP-94-8 relies upon a finding of standing, LBP-94-8 is affirmed.²⁴

It is so ORDERED.

For the Commission




 John C. Hoyle
 Acting Secretary of
 the Commission

Dated at Rockville, Maryland,
 this 23rd day of August 1994.

²⁴ The Licensing Board's decision in LBP-94-8 addresses NACE's submitted contentions. SFC and GA did not appeal the Board's findings with respect to the contentions, but only the Board's reliance upon an earlier finding of standing for NACE. Accordingly, the Commission reaches no conclusion on LBP-94-8's discussion of the contentions.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

SEQUOYAH FUELS CORPORATION
GENERAL ATOMICS
(Gore, Oklahoma, Site Decontamina-
tion and Decommissioning Funding)

Docket No.(s) 40-8027-EA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM ORD (CLI-94-12) DTD 8/23 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

Office of Commission Appellate
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U.S. Nuclear Regulatory Commission
Washington, DC 20555

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U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

Administrative Judge
Jerry R. Kline
Atomic Safety and Licensing Board
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Administrative Judge
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Dated at Rockville, Md. this
23 day of August 1994


Office of the Secretary of the Commission