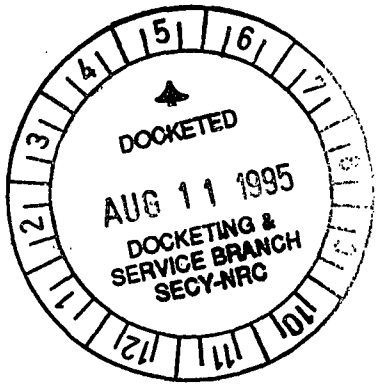

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
SEQUOYAH FUELS CORPORATION and GENERAL ATOMICS	)	Docket No. 40-8027-EA
	)	
	)	
(Gore, Oklahoma Site Decommissioning Funding)	)	August 11, 1995

GENERAL ATOMICS' RESPONSE TO INTERVENORS' MOTION TO COMPEL ANSWERS TO INTERROGATORIES

Pursuant to the Atomic Safety and Licensing Board's ("Licensing Board") Order dated August 8, 1995, General Atomics respectfully submits this response to the Motion to Compel Answers to Interrogatories ("Motion to Compel") submitted by Native Americans For a Clean Environment ("NACE") and the Cherokee Nation (together, the "Intervenors") on July 28, 1995.

SUMMARY

This matter comes before the Licensing Board on the Intervenors' motion seeking an expedited resolution of certain disputes that have arisen concerning the discovery sought by Intervenors from both General Atomics and the Sequoyah Fuels Corporation ("SFC").[1] A fundamental dispute is that the

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1 Although NACE and the Cherokee Nation were admitted as parties to this proceeding in March and July of 1994, respectively, the Intervenors did not initiate their discovery efforts until July 10, 1995. Notably, discovery in this phase of this proceeding closes on September 15, 1995, and timely discovery must be filed or noticed by August 18, 1995. Having sat on their rights for more than a year, the Intervenors now seek expedited resolution of their discovery disputes within the limited time constraints that are of their own making.

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Intervenors seek discovery regarding a jurisdictional theory that goes beyond the explicit or implicit legal or factual predicates to the October 15, 1993 Order that is the subject of this proceeding (hereafter, "1993 Order").

In summary, the Intervenors have cast a wide net with their discovery requests and are attempting to launch a "fishing expedition" in search of factual support for their alternative theory of NRC jurisdiction based upon allegations of fraud, illegality or other improper conduct by General Atomics, e.g., "wrongdoing." See 10 C.F.R. Part 2, Appendix C, § X (1994); NRC Enforcement Policy, 60 Fed. Reg. 34381, 34397 (June 30, 1995). Specifically, the Intervenors are searching for a factual basis for their theory that General Atomics engaged in wrongdoing at the time that its subsidiary, Sequoyah Fuels Holding Corporation, acquired the stock of SFC and obtained NRC approval for the transfer of control of the Sequoyah License. However, the NRC Staff has repeatedly explained that the factual and legal predicates to the 1993 Order at issue in this proceeding do not include any allegation of wrongdoing.[2] In fact, the 1993 Order contains no hint of wrongdoing on the part of General Atomics, nor any allegation of impropriety of any kind associated with NRC's 1988 approval of the acquisition of SFC. Therefore, the

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2 See, e.g., Transcript of Prehearing Conference at 106 (Jan. 19, 1994); "NRC Staff's Answer in Opposition to General Atomic's Motion For Summary Disposition or For an Order of Dismissal" at 13 (April 13, 1994); Transcript of May 31, 1995 Hearing at 252, 254-56.

Intervenors are impermissibly seeking discovery as to matters that are beyond the scope of this proceeding, and General Atomics' objections to specific discovery requests on this ground, as well as on other grounds, must be sustained.

ARGUMENT

I. INTERROGATORIES SEEKING INFORMATION IN SUPPORT OF INTERVENORS' WRONGDOING THEORY ARE IMPROPER.

As set forth in Section VIII of the 1993 Order, the issue in this proceeding is whether the 1993 Order should be sustained. The Licensing Board's "authority pursuant to this directive is to consider 'whether the facts in the order are true and whether the remedy selected is supported by those facts.'" Oncology Servs. Corp. (Order Suspending Byproduct Material License No. 37-28540-01), LBP-94-2, 39 NRC 11, 29 (1994) (quoting Boston Edison Co. (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 45 (1982), aff'd, Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983)). As a Licensing Board has noted elsewhere:

> The bases asserted in an enforcement order thus do provide the principal framework for the proceeding. As a consequence, any legal or factual issue a party wants to propose in challenging (or supporting) an enforcement order must bear some relationship to those bases by tending to establish, either alone or with other issues, that some explicit or implicit legal or factual predicate to the order should not (or should) be sustained.

Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-94-40, 40 NRC 323, 336 n.7 (1994) (emphasis added).

The 1993 Order is neither explicitly nor implicitly predicated upon any allegation of fact suggesting wrongdoing by General Atomics or SFC, or any impropriety associated with the NRC's approval of the transfer of control. To the contrary, the NRC Staff has stated on numerous occasions that it is not alleging any wrongdoing. Facts relating to these matters are simply not implicated by the 1993 Order and are not in issue. Thus, the discovery sought by the Intervenors is not relevant to any factual or legal predicate to the 1993 Order, and is not authorized. Notably, when the Commission affirmed the granting of the Intervenors' petition to intervene in this very proceeding, it clearly contemplated that the intervention would be limited to "participation in a hearing on contested matters that are within the scope of the enforcement action originally brought by the NRC Staff." Sequoyah Fuels Corporation and General Atomics (Decontamination and Decommissioning), CLI-94-12, 40 NRC 64, 71 (1994) (emphasis added).

Nevertheless, the Intervenors assert that their requested discovery should be permitted because their contention regarding NRC jurisdiction over General Atomics "specifically raised the question of whether [General Atomics] knew of the extensive contamination of the SFC site and intentionally shielded itself from liability in order to frustrate the NRC's purpose of protecting the public health and safety." Motion to Compel at 9. In proffering this argument, the Intervenors controvert the very assurances they made to the Commission in arguing that they

should be permitted to intervene in this proceeding.[3] As the Commission specifically noted, NACE had recognized that in this instance "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 the proceeding." Sequoyah Fuels, CLI-94-12, 40 NRC at 70. Curiously, the Intervenors have admitted that "it has been true from the beginning of this case that the 1993 Order does not claim wrongdoing by GA," but nevertheless have asserted that they should be permitted discovery in their attempt to find a basis for such a claim. "[NACE's] and Cherokee Nation's Opposition to General Atomics' Motion for Summary Disposition, to Strike Language from the October 15, 1993 Order, and to Limit Issues in the Proceeding," at 5 (June 12, 1995) (hereafter, "Intervenors' June 12 Opposition") (emphasis added). Such discovery is not reasonably calculated to lead to the discovery of relevant evidence that would be admissible within the scope of the existing proceeding, and it therefore is not permissible.

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[3] The Intervenors have repeatedly acknowledged that they cannot broaden the issues in the proceeding beyond the scope of the Order. See, e.g., "[NACE's] Request For Extension of Time For filing Contentions As of Right and Request For Expedited Consideration," at 2 (Dec. 30, 1993); "[NACE's] Reply to [SFC's] Answer in Opposition to NACE's Motion to Intervene," at 9, 26 (Dec. 30, 1993); "[NACE's] Reply Brief Regarding Appropriateness of Commission Review of LBP-94-5 and Whether Ruling in Section II.A Should Be Sustained," at 2, 7-8 (March 17, 1994); "[NACE's] Brief in Opposition to [SFC's] Appeal of LBP-94-5 and LBP-94-8," at 28 (April 29, 1994).

Moreover, the Intervenors' eleventh-hour discovery requests in this proceeding defy the very purpose of the Licensing Board's June 30, 1995 scheduling order, which bifurcated this proceeding in order to resolve the jurisdictional issue, once and for all, based upon the NRC Staff's theory that General Atomics is a "de facto licensee." See LBP-92-12, 41 NRC 475, ___ (slip op. at 6-8, 18-20). The Board's June 30, 1995 Order limited discovery to this narrow issue and set an aggressive schedule for resolving the issue of NRC's regulatory jurisdiction to impose liability upon General Atomics. Id.

In their June 12, 1995 pleading, Intervenors have suggested that, based upon the statements of this Board in another context, the NRC Staff might be permitted to develop and introduce additional facts and theories as a result of the discovery process. Intervenors' June 12 Opposition at 5. General Atomics strongly disagrees with the basic premise that the NRC Staff might introduce facts or theories that are not within the scope of the original 1993 Order. However, this issue is not now before the Licensing Board. What is clear, is that even if the NRC Staff had the discretion to expand the scope of the 1993 Order, the decision as to whether or not to take such action is within the NRC Staff's enforcement discretion. By the same token that Intervenors cannot force the NRC Staff to initiate enforcement action based upon allegations of wrongdoing, e.g., Bellotti, 725 F.2d 1380, the Intervenors cannot force the NRC Staff to expand its enforcement action to include allegations of wrongdoing. Assuredly, the Intervenors cannot be permitted to

engage in a fishing expedition to seek facts outside the legal or factual predicates of the 1993 Order in order to seek such an expansion.

Thus, the Intervenors' motion to compel answers to Interrogatory Nos. 19 and 20 to General Atomics should be denied.

II. EVENTS OCCURRING AFTER THE ISSUANCE OF THE 1993 ORDER ARE IRRELEVANT TO THE THEORIES OF JURISDICTION AT ISSUE.

Facts and/or events occurring after October 15, 1993, are not relevant to the subject matter of this proceeding and cannot be reasonably calculated to lead to the discovery of evidence that would be admissible in this proceeding. The issue in this proceeding is whether the order issued to General Atomics and SFC on October 15, 1993 should be sustained, and the scope of this proceeding is limited "to a determination of the sufficiency of the legal and factual predicates outlined in the order as of the time the order was issued." Oncology Services Corp. (Order Suspending Byproduct Material License), LBP-94-2, 39 NRC 11, 26 & n.11 (1994). See also Advanced Medical Systems (One Factory Row, Geneva, Ohio), LBP-90-17, 31 NRC 540, 542-43 n.5, 556-57 (1990). Information relating to events which took place after the 1993 Order was issued could not have formed the basis for the Order and can not bear a reasonable relationship to the factual or legal predicates to the Order.

The Intervenors attempt to distinguish Oncology and Advanced Medical Systems based upon three frivolous arguments. First, Intervenors suggest that these two cases narrowly involve specific past violations or practices, whereas the Order at issue

in this case is intended to impose liability "now and in the future." This argument focuses only upon the remedy sought in the Order, and ignores the fact that the 1993 Order is itself predicated upon specific facts involving actions taken prior to October 15, 1993. Moreover, Intervenors' suggestion that liability for decommissioning funding in the 1993 Order involves ongoing responsibilities that are distinguishable from other enforcement orders has no foundation in reality. Enforcement orders can often impose ongoing licensing obligations, and facts may change over time that might alter an assessment of an order, if one were writing on a clean slate. In fact, this was the very situation faced by the Board in Oncology, which was asked to consider corrective actions taken subsequent to issuance of the Order. However, in Oncology the Licensing Board properly recognized that orders are to be examined based upon the facts extant at the time of issuance. This sensible approach is not only circumscribed by the Licensing Board's authority based upon the limited scope of proceedings, but from a practical perspective, it eliminates the potential that Licensing Boards would be faced with evidentiary questions that become a moving target and thereby hinder resolution of proceedings.

In their second argument, the Intervenors similarly contend that the 1993 Order is somehow unique because it involves an "ongoing relationship between the NRC and the respondent." The Intervenors suggest that "time-based evidentiary limitations" do not apply to the issue of jurisdiction. However, there is no rational basis for this strained distinction. It is nonsensical

to suggest that a Licensing Board could conclude that the NRC did not have jurisdiction on October 15, 1993, but somehow the Order may be sustained because the NRC subsequently acquired jurisdiction. Certainly, the Licensing Board would not be amenable to the converse as an outcome.

In their third argument, Intervenors suggest that somehow discovery of facts relating to events occurring after the Order was issued will assist them in assessing events that occurred prior to October 15, 1993. This specious argument is simply not credible. Evidence regarding SFC's current relationship with its parent companies can neither prove nor disprove whether a relationship that established NRC jurisdiction was in existence during the relevant time frame before issuance of the Order. Moreover, in the absence of a rational cut-off date, the duty to supplement discovery responses would make discovery in this case entirely unmanageable. An ongoing reporting obligation regarding the operations of General Atomics and the Sequoyah companies would not only be unnecessarily burdensome, but would serve no meaningful purpose that bears any relationship to the issues in this proceeding. The Intervenors should not be permitted to impose such wide-ranging obligations under the guise of conducting discovery.

III. THE SELECTION OF DOCUMENTS BY GENERAL ATOMICS AND ITS COUNSEL FOR USE IN ANSWERING THE INTERROGATORIES IS NON-DISCOVERABLE WORK-PRODUCT.

Interrogatory No. 18 sought identification of documents "relied on" by General Atomics in answering the Interrogatories. General Atomics objected, in part, on the ground that the

interrogatory sought disclosure of the mental impressions, conclusions, opinions or legal theories of counsel, which are not subject to discovery. The Intervenors, citing no authority, simply assert that the request is "reasonable" and should be allowed. Intervenors thus fail to address the specific objection at all.

That discovery cannot be had of the mental impressions, conclusions, opinions or legal theories is expressly recognized in 10 C.F.R. § 2.704(b)(2),[4] which represents a partial codification of the common law protection of litigation work product. See Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed.2d 451 (1947) (describing the doctrine protecting the mental thought processes as well as tangible work product prepared for purposes of litigation from discovery). Moreover, it is well established under the parallel provision of the Federal Rules of Civil Procedure, Fed.R.Civ.P. 26(b)(3), as well as the common law concerning work product, that the selection by counsel of relevant documents from the universe of available evidence is itself work-product protected from discovery. See Shelton v. American Motors Corp., 805 F.2d 1323, 1329 (8th Cir. 1986) (the "mental selective

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4 Section 2.704(b)(2) provides that the "discovery of documents" that are "prepared in anticipation of or for the hearing by or for another party's representative" may be had only under certain extraordinary circumstances. Moreover, even if documents are discoverable, "the presiding officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative." Thus, the mental work product of attorneys or other representatives are entitled to absolute protection.

process reflects [counsel's] legal theories and thought processes, which are protected as work product"); Spork v. Peil, 759 F.2d 312, 316 (3d Cir. 1985) ("the selection and compilation of documents by counsel in this case in preparation for pretrial discovery" is protected opinion work product), cert. denied, 106 S.Ct. 232 (1985).

Indeed, the U.S. Supreme Court has recognized that

> [p]roper preparation of a client's case demands that he assemble information, sift wheat he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.

Hickman, 67 S.Ct. at 393.

It makes no difference, moreover, whether the selection of documents was by General Atomics' personnel or by its counsel, because client work product is as much entitled to protection as attorney work product. See Advisory Committee Note to Rule 26(b)(3), 48 F.R.D. 487, 502.

Interrogatory No. 18 on its face intrudes into the protected area. It directly seeks the identification of those documents culled by General Atomics and its counsel from the available universe of documents for the purpose of answering the Interrogatories. The fruit of that selection discloses the opinion of General Atomics and its counsel as to what documents are of particular relevance to the area of inquiry. That assembly and sifting of documents is work product, and should be protected.

IV. GENERAL ATOMICS' RELATIONSHIP WITH "SFC-MD" HAS BEEN ADEQUATELY DISCLOSED.

Interrogatory Nos. 22 and 23 demand information concerning General Atomics' role in the creation of SFC-MD and as to General Atomics' "corporate management relations" with SFC-MD. General Atomics objected to these interrogatories on the grounds that they are irrelevant and vague. However, regardless of the objections, General Atomics believes that it has adequately answered these interrogatories. SFC-MD was organized by the company that sold SFC to a subsidiary of General Atomics -- i.e., General Atomics had no role in its establishment. General Atomics' relationship with SFC-MD was merely derivative of General Atomics' relationship with SFC -- i.e., SFC-MD was an unincorporated division of SFC, which is a wholly-owned subsidiary of Sequoyah Fuels International Corporation, which is a wholly-owned subsidiary of Sequoyah Holding Corporation, which is a wholly-owned subsidiary of General Atomics. This information has been provided to the Intervenors, and adequately answers the two interrogatories.[5]

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5 The Intervenors contend that the "American Business Directory" lists Neal Blue as "CEO" of SFC-MD. Regardless of what the Directory lists, Neal Blue simply was not "CEO" of SFC-MD. The Intervenors' basis for inquiry into the area, therefore, is not "sound" as asserted, but rather simply incorrect.

V. THE RELATIONSHIP BETWEEN GENERAL ATOMICS AND TENAYA, GAES, GAESLP, AND GATC HAS NO BEARING ON ANY ISSUE IN THIS CASE.

Interrogatory No. 31 sought discovery of the corporate relationships between General Atomics and several other entities, including Tenaya Corporation ("Tenaya"), General Atomics Energy Services ("GAES"), General Atomics Energy Service Limited Corporation ("GAESLP"), and General Atomics Technologies Corporation ("GATC"). General Atomics objected to the portion of the interrogatory concerning these entities on the ground that discovery of the relationship between private corporate entities which are not parties and which do not fall within the corporate structure between General Atomics and SFC is not relevant to any issue in the case.

The Intervenors' only specific argument in support of this interrogatory provides telling evidence of the Intervenors' refusal to honor any boundaries in this case. The Intervenors argue that this interrogatory might lead "to the discovery of evidence as to whether General Atomics controls SFC through its parent (Tenaya) or subsidiaries" -- i.e., the Intervenors are arguing that they should be allowed to engage in a fishing expedition to seek evidence that might bear upon an indirect control theory. However, a theory of indirect control has no factual support, and is not supported by any contentions in the 1993 Order. Moreover, the interrogatory as framed would not even obtain the evidence of control upon which it is purported to be justified. It seeks to discover the relationship between General Atomics, not SFC, with each entity.

Interrogatory No. 31 seeks evidence well outside the boundaries of this case. Even the Intervenors' own justification for the interrogatory is founded on speculation and conjecture, and would not be served in any event by an answer. Interrogatory No. 31 is improper, and General Atomics should not be required to respond.

VI. INTERROGATORY NO. 32 IS SO VAGUE, BROAD AND OPEN-ENDED AS TO BE IMPOSSIBLE TO ANSWER ABSENT GREAT EFFORT; HENCE, THE INTERROGATORY IS UNDULY BURDENSOME.

Interrogatory No. 32 seeks broadside discovery of essentially every fact relating to any SFC "corporate standards, criteria, and procedures related to the protection of health, safety, and the environment at the SFC plant" that were "prepared or approved by General Atomics." (Emphasis added.) The interrogatory demands, for each standard, criteria and procedure an explanation (1) how it was developed; (2) when it was developed; (3) how it was applied (presumably by SFC); (4) when it was applied (presumably by SFC); and (5) "in what way it is superior to or subordinate to any other standards, criteria or procedures for the SFC facility."

The interrogatory simply asks too much. It seeks detailed information about policies based on broad "related to" and "approved by" standards that potentially would sweep up every SFC policy General Atomics ever heard of, no matter how trivial. Moreover, the interrogatory purports to require General Atomics to make subjective judgments about each such policy.

Interrogatories function when they seek specific information about a discrete topic. Interrogatories are not designed, however, to give a party the opportunity to require another party

to write book-length treatises on a given topic. When an interrogatory goes too far, it becomes unduly burdensome. The value of the answer is outweighed by the difficulty and expense of writing the book. See Anker v. G.P. Searle & Co., 126 F.R.D. 515, 518 (M.D.N.C. 1989) (court on motion to compel should weigh relevance of discovery against burden on the other party); 8A C. Wright, A. Miller, R. Marcus, Federal Practice and Procedure: Civil § 2174 at 303 (2nd ed. 1994) ("interrogatories that require a party to make extensive investigations, research, or compilation or evaluation of data for the opposing party are in many circumstances improper").

Interrogatory No. 32 is too general and broad, and General Atomics' objection should be sustained.

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

Intervenors' flaunting of the boundaries of this proceeding should be curbed. General Atomics respectfully requests that the Licensing Board deny the Intervenors' Motion to Compel.

Due to the potential importance of the issues involved in the motion, General Atomics requests oral argument.

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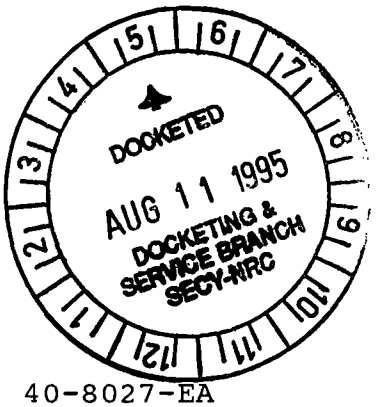

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	)	
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing General Atomics' Response to Intervenors' Motion to Compel Answers to Interrogatories was served on August 11, 1995, upon the following persons by deposit in the United States mail, first class postage prepaid and properly addressed, and to the persons marked with an asterisk (*) by telecopy:

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