September 22, 1995

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
SEQUOYAH FUELS CORPORATION GENERAL ATOMICS	)	Docket No. 40-8027-EA
(Gore, Oklahoma Site Decontamination and Decommissioning Funding)	)	Source Material License No. SUB-1010

NRC STAFF'S REPLY TO INTERVENORS' RESPONSE
TO JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT

The NRC Staff, pursuant to leave granted by the Atomic Safety and Licensing Board (Board), hereby files this reply to Intervenors' Response to Joint Motion for Approval of Settlement Agreement (Sept. 8, 1995) (Intervenors' Response).

BACKGROUND

On August 24, 1995, following over six months of settlement negotiations and internal deliberations, Sequoyah Fuels Corporation (SFC) and the Staff filed a Joint Motion for Approval of Settlement Agreement, seeking the Board's approval of a Settlement Agreement, attached to the joint motion, entered into by those parties. In general, the Settlement Agreement requires SFC to devote to the completion of decommissioning of the SFC site all of its present and future assets and revenues, subject to existing legal obligations, less reasonable and necessary expenses, until the NRC has determined that decommissioning has been completed. Native Americans for a Clean

Environment (NACE) and the Cherokee Nation (collectively Intervenors) filed Intervenors' Response on September 8, 1995, expressing concerns (1) that the settlement creates a risk that SFC's funds will be "plundered by creditors who have no justifiable claim to SFC's assets"; (2) that "all claims" against SFC must first be identified and evaluated; (3) that aspects of the ConverDyn arrangement must first be determined to be reasonable and legitimate; and (4) that the settlement waives liability under decommissioning funding regulations "for all time." Intervenors' Response at 1-2. Intervenors specifically argue that further investigation is warranted concerning "senior lien holders" to ensure that SFC pays only legitimate debts. *Id.* at 4-8. In addition, Intervenors state that the settlement "does not make any provision for decommissioning payments from two special accounts" set up by SFC for decommissioning. *Id.* at 8-14. Further, Intervenors seek the disclosure of details regarding the ConverDyn arrangement so that the Board can have sufficient confidence regarding the benefits to accrue to SFC. *Id.* at 14-15. Finally, Intervenors argue that the settlement should not "unconditionally waive the decommissioning regulations as they apply to SFC," and should not "absolve" from decommissioning liability a subsequent holder of title of the contaminated property. *Id.* at 15-16.

DISCUSSION

I. Senior Lien Holders and Outstanding Debts

Intervenors argue that:

> [i]n order to ensure that SFC is paying legitimate obligations and not obligations that belong to GA, and in

> order to ensure that SFC is not allowing creditors to plunder its assets, it is essential that the Board allow further discovery on the identity of these liens, their purpose, when they were incurred, how much they amount to, and the amount of interest that is being or has been charged.

Id. at 4.

The Settlement Agreement acknowledges that SFC's net assets and revenues, which are to be devoted to the completion of decommissioning, may be subject to existing rights of senior lien holders. The Settlement Agreement neither makes any finding that certain lien holders have any rights, nor does it attempt to prioritize any such rights -- it purposefully does not address such matters. Whatever rights such possible lien holders may have can only be determined by a court which has the jurisdiction to adjudicate such potential rights between two private parties. In other words, the Settlement Agreement does not, and was not designed to adjudge the rights of persons not participating in this proceeding, but acknowledges that such persons may have certain rights to assets held by SFC.

Intervenors also express concern that an existing note to Kerr McGee, the prior owner of SFC, "does not appear to be the appropriate responsibility of SFC." *Id.* Intervenors assert "[i]t is therefore necessary to determine, through further discovery and adjudication, what part of this promissory note, if any, SFC should be obligated to pay under the terms of the note, and what part should be the responsibility of SHC, GA's subsidiary." *Id.* at 5-6.

With regard to the Kerr-McGee note, SFC has represented to the Board that "SFC has no intention of resuming any principal or interest payments to Kerr-McGee prior to such time as the NRC Staff determines that decommissioning has been satisfactorily completed." SFC's Reply to Intervenors' Opposition to Settlement Agreement (Sept. 15, 1995) (SFC's Reply) at 5. Should Kerr-McGee seek legal recourse for repayment, a court of competent jurisdiction would need to make a finding as to the rights, if any, of Kerr-McGee. Thus, the Board need not, and should not entertain adjudication on the Kerr-McGee note since Intervenors's concerns about payments on the note are speculative in light of SFC's representations.[1]

It is important to recognize that the Settlement Agreement does not declare in any way which apparent obligations of SFC are legally binding, and does not direct SFC to transfer any funds in connection with such apparent obligations. Therefore, Intervenors' concern that "the settlement proposal would appear to unjustly enrich Kerr-McGee and exonerate GA from liability for the debt on its purchase of SFC, all at the expense of the health and safety of the local community and the pocketbooks of the taxpayers," Intervenors' Response at 7, is misplaced.

If the Settlement Agreement is approved by the Board, SFC is then subject to sanctions for any violation of the Settlement Agreement (paragraph 7 of the Settlement

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[1] Intervenors' suggestion of proceedings to pierce the corporate veil (Intervenors' Response at 6-7) as to the rights and obligations between the various private parties (SFC, SHC, GA, and Kerr McGee), as opposed to determining the NRC's regulatory authority over a particular entity, is also inappropriate because the NRC is not vested with the power to adjudicate the respective contractual rights of private parties unrelated to the conduct of licensed activities.

Agreement), including the provision under which SFC must devote all of its net assets and net revenues to the completion of decommissioning (paragraph 2 of the Settlement Agreement). Were the Staff to have a basis to believe that a person or entity to whom SFC transferred or paid funds had no legal entitlement to such funds, those funds would come within the scope of SFC's net assets and the Staff could, therefore, bring an enforcement action against SFC seeking sanctions for violating the Settlement Agreement if SFC did not seek the return of such funds to be added to its pool of assets or revenues. The Staff believes that under these circumstances and provisions in the Settlement Agreement, there is sufficient assurance that SFC will appropriately conserve its assets and revenues for decommissioning.[2]

II. Decommissioning Reserve and Escrow Account

Intervenors assert that the Settlement Agreement "does not make any provision for decommissioning payments from two special accounts which have been set up by SFC explicitly for purposes of decommissioning." Intervenors' Response at 8. The two special accounts identified by the Intervenors are a decommissioning reserve account, referenced in Section 7.5 of the SFC license, and the $750,000 financial assurance mechanism (letter of credit) established pursuant to 10 C.F.R. § 40.36.

A reserve account is a book entry or an accounting mechanism representing an estimated liability. SFC has clearly stated that its decommissioning reserve account has

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[2] The Staff did not seek a clause in the Settlement Agreement that would require prior Staff approval of all SFC expenditures and repayments. Such a prior approval clause would be tantamount to the Staff managing the daily affairs of SFC, which the Staff does not seek to do, and does not believe is in the public interest.

never been a cash account, and is backed only by the assets of SFC. SFC's Reply at 7. This is in no way inconsistent with the terms of the license,[3] or the letter from L. Rouse to Sequoyah Holding Corporation (Oct. 27, 1988), cited by Intervenors and attached to Intervenors' Response, approving the transfer of SFC from Kerr McGee to Sequoyah Holding Corporation. More importantly there are no terms in the license that require funds represented by the decommissioning reserve to be placed in a 10 C.F.R. § 40.36 financial assurance mechanism. The Settlement Agreement goes beyond mere accounting entries and estimated reserves, and binds SFC to dedicate to decommissioning whatever assets and revenues in fact exist and will exist in the future, subject to reasonable and necessary expenses in continuing operations to decommission the facility. Accordingly, Intervenors' concern about an accounting reserve should not bar approval of the

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[3] Section 7.5 "Financial Arrangements" of the SFC license provides in its entirety that:

> [SFC] has established a reserve account to which charges are accrued on an annual basis during the remaining life of the Sequoyah Facility. Since the value of 1978 dollars will vary in subsequent years, the annual charge to the reserve will be adjusted by use of a pricing index. The 1983 value used for current reserve accounts is $4,011,407 which has been adjusted for the additional costs for ponds and lagoons. The reserve account activity will be audited annually as part of the routine annual audit. A special audit report on the reserve account activity will be available at the Sequoyah Facility for review by the NRC I&E personnel.
>
> [SFC] would consider the posting of a bond as a means of assuring the availability of adequate funds at the time of decommissioning if the State of Oklahoma would require this action through regulation and legislation.

Settlement Agreement. Furthermore, to the extent that the Intervenors may be suggesting that the Board must first find "that the proposed settlement identifies all sources of decommissioning funding . . . that are not subject to prior financial obligations," *see* Intervenors' Response at 11, the Settlement Agreement is deliberately crafted to avoid any limitations that may be created by attempting to list all such sources. Thus, prolonging the Board's approval of the Settlement Agreement for this purpose is not warranted.

Nothing in the Settlement Agreement releases the $750,000 financial assurance mechanism which exists pursuant to 10 C.F.R. § 40.36. This mechanism is separate from any legally binding obligation that SFC may have to repay funds used initially to implement the 10 C.F.R. § 40.36 instrument. If such funds are in fact required to be repaid, this action would not in any way reduce the funds available for decommissioning under the $750,000 financial assurance mechanism. Thus, Intervenors' assertion that "the proposed agreement turns a $750,000 segregated decommissioning guarantee into just another one of SFC's debts," *see* Intervenors' Response at 12, is without basis.[4]

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[4] Intervenors also raise as a Settlement Agreement issue the pending request of SFC for approval to change the form of the existing financial assurance mechanism from a letter of credit to an escrow account. *See* Intervenors' Response at 12-14. The Staff believes that this is a separate matter to be considered only within the context of the pending request. Certainly, any additional interest earned from the establishment of an escrow account would become an SFC asset that would be governed by the existing terms of the Settlement Agreement.

III. ConverDyn Arrangement

In the October 15, 1993 Order issued to SFC and General Atomics (1993 Order), which gave rise to this proceeding, the Staff stated that its "review of the information provided by SFC and GA in response to the Demands for Information, indicates that the proposed ConverDyn arrangement appears to be a *bona fide* business arrangement among the various parties and their principals." 1993 Order at 9. ConverDyn has now been in operation for two years. Information concerning its performance, and revenues received by SFC, have been submitted to the Staff and reviewed as recently as several months ago. It is not clear what benefit would now be served by the Board somehow attempting to adjudicate the "reasonableness" of the terms of the ConverDyn arrangement. Even assuming *arguendo* that the Board concluded that the ConverDyn arrangement was "unreasonable," there is no remedy suggested by the Intervenors that would put SFC in any better position. Accordingly, Intervenors' concerns in this regard should not bar approval of the Settlement Agreement.

IV. Waiver of Decommissioning Regulations As to SFC

Intervenors assert that "the proposed Settlement Agreement appears to absolve SFC of any future liability for decommissioning, regardless of whether it remains a functioning commercial entity and resumes some other type of profitable business against which decommissioning funds could be assessed." Intervenors' Response at 15-16. In addition, Intervenors argue that "the agreement should not absolve SFC's successors in title to the contaminated property of liability for decommissioning funding." *Id.* at 16.

The Settlement Agreement requires SFC to devote all net assets and revenues to the completion of decommissioning "until the NRC Staff determines that such decommissioning has been satisfactorily completed." Paragraph 2 of the Settlement Agreement. Under paragraphs 1a. and 1b. of the Settlement Agreement, these net assets and revenues are to be derived from all present and future assets and revenues from whatever source. Thus, Intervenors' concern that the Settlement Agreement does not reach future sources of income is fully addressed by the Settlement Agreement. Furthermore, should there be any residual concern, the forbearance language in paragraph 6 of the Settlement Agreement, which Intervenors apparently believe constitutes the absolution raised by the Intervenors, simply reflects that the Staff will not continue to sue SFC for decommissioning funding assurance in light of the obligations in the Settlement Agreement, which will become legally binding and subject to sanctions for any violation thereof, once approved by the Board. Forbearance from continued litigation, of course, is the essence of any settlement, and is entirely reasonable.

As to Intervenors' final point, Intervenors fail to identify which provision of the Settlement Agreement they believe would "absolve SFC's successors in title to the contaminated property of liability." The Staff can only respond by stating that it believes no such provision exists. Accordingly, the Board should dismiss Intervenors' final concern.

CONCLUSION

In consideration of the foregoing, the Board should issue an order approving and incorporating the Settlement Agreement.

Respectfully submitted,

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Dated at Rockville, Maryland
this 22nd day of September 1995

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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SEQUOYAH FUELS CORPORATION	)	Docket No. 40-8027-EA
GENERAL ATOMICS	)	
	)	Source Material License
(Gore, Oklahoma Site	)	No. SUB-1010
Decontamination and	)	
Decommissioning Funding)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S REPLY TO INTERVENORS' RESPONSE TO JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT" in the above-captioned matter have been served on the following by deposit in the United States mail, first class; or as indicated by single asterisk through deposit in the Nuclear Regulatory Commission's internal mail system; or as indicated by double asterisk by facsimile transmission; or as indicated by triple asterisk by hand delivery this 22th day of September 1995.

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