

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL

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Before Administrative Judges:
Charles Bechhoefer, Presiding Officer
Thomas D. Murphy, Special Assistant

OFF.
P.O.
ADJ.

In the Matter of)

SEQUOYAH FUELS CORPORATION)
Gore, Oklahoma)

Docket No. 40-8027-MLA-4
ASLBP No. 99-770-09-MLA

October 15, 1999

SEQUOYAH FUELS CORPORATION'S MOTION FOR LEAVE TO REPLY
TO THE NRC STAFF'S ANSWER

I. INTRODUCTION

Sequoyah Fuels Corporation (SFC) moves the Presiding Officer for leave to reply to "NRC Staff's Answer to the State of Oklahoma's Supplemental Request for Hearing," which was served by mail on October 1, 1999 (Staff Answer). The basis for this motion is that the Staff Answer takes positions regarding the applicability or interpretation of certain laws and regulations, as discussed more fully below, that were not raised by the State of Oklahoma's Supplemental Request and that SFC did not anticipate and could not reasonably have anticipated. As a result, these issues are not directly addressed in the Response filed by SFC on September 24, 1999. SFC requests that it be heard on these issues before the Presiding Officer makes any ruling based on them.

II. DISCUSSION

The Staff Answer relies on Appendix A to 10 CFR Part 40 at numerous places as authority for concluding that certain alleged injuries of fact provide a basis for standing or that certain areas of concern identify issues that are germane to the proceeding. If granted leave to reply, SFC will show that Appendix A to 10 CFR Part 40 is not applicable to the SFC Decommissioning Plan and that even if it did apply, certain of the criteria cited in the Staff Answer would not apply to the proposed disposal cell.

In addition, the Staff Answer relies on the NRC Staff's plans for an environmental review of the Decommissioning Plan as a basis for asserting that the proceeding may consider radiological doses beyond 1000 years, as well as nitrate contamination that is not directly associated with source, byproduct or special nuclear material. An SFC reply would show that the NRC Staff's review in accordance with 10 CFR Part 51 and the National Environmental Policy Act does not provide a basis for considering either of these matters in this proceeding.

The Staff's Answer also asserts that 10 CFR § 20.1403(c) requires that SFC provide a contract with a long term custodian. While SFC did discuss the requirements of this regulation, the NRC interpretation of it is so at odds with its plain meaning that SFC could not have anticipated that the NRC Staff would take this position. An SFC reply would show that in adopting Subpart E to 10 CFR Part 20, the Commission decided not to require that a custodian be identified, and that the NRC Staff has recognized in other places that the regulations do not contain such a requirement.

III. CONCLUSION

A reply from SFC would provide the Presiding Officer with a more complete basis for ruling, and would assure that SFC has an opportunity to be heard on these issues before they become the basis for decisions in this proceeding. Accordingly, SFC requests leave to file Sequoyah Fuels Corporation's Reply to the NRC Staff's Answer, a copy of which is being served with this Motion.

Respectfully submitted,



Alvin H. Gutterman
Donald J. Silverman
Goran P. Stojkovich
Morgan, Lewis & Bockius, LLP
1800 M Street, NW
Washington, DC 20036
(202) 467-7468
facsimile: (202) 467-7176
e-mail: gutt7468@mlb.com
Counsel for Sequoyah Fuels Corporation

Dated: October 15, 1999

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL**

**Before Administrative Judges:
Charles Bechhoefer, Presiding Officer
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| In the Matter of) SEQUOYAH FUELS CORPORATION) Gore, Oklahoma) |) Docket No. 40-8027-MLA-4) ASLBP No. 99-770-09-MLA))) |
| | October 15, 1999 |

**SEQUOYAH FUELS CORPORATION'S REPLY
TO THE NRC STAFF'S ANSWER**

I. INTRODUCTION

Sequoyah Fuels Corporation (SFC) hereby replies to "NRC Staff's Answer to the State of Oklahoma's Supplemental Request for Hearing," which was served by mail on October 1, 1999 (Staff Answer). The Staff Answer concluded, contrary to the SFC Response dated September 24, 1999 (SFC's Response), that the Attorney General of the State of Oklahoma's Supplemental Request for Hearing demonstrates that Oklahoma has the requisite standing to participate as a party and identifies areas of concern germane to the challenged action. In the course of explaining the basis for these conclusions, the Staff Answer discusses numerous alleged injuries and proffered areas of concern, arguing that some do not meet the applicable requirements and that others do. SFC's Response analyzed these same alleged injuries and areas of concern and concluded that none meet the applicable legal standards. Clearly, there are numerous points on

which the Staff Answer and SFC's Response disagree, as well as many on which they agree. SFC continues to urge adoption of the positions stated in its September 24, 1999 Response, but is not repeating the bases for those positions in this Reply. For example, SFC's Response argues that the requested relief -- denial of NRC approval of the Decommissioning Plan-- would not redress the alleged injuries. The Staff Answer reaches the opposite conclusion. Although SFC continues to urge that the requested relief would not redress the alleged injuries, it is not elaborating on that argument in this Reply. Instead, this Reply focuses on arguments in the Staff Answer that were not and could not have been anticipated by SFC.

II. ARGUMENT

A. The Requirements of 10 CFR Part 40, Appendix A Do Not Apply to the SFC Facility

The Staff Answer relies on Appendix A to 10 CFR Part 40 (Appendix A) at numerous places as authority for concluding that certain alleged injuries provide a basis for standing or that certain areas of concern identify issues that are germane to the proceeding. In each of these instances, the Staff refers to Appendix A criteria as being "required," stating "applicable limits" or setting concentration levels that SFC "must not exceed." Such arguments are made at pages 7 (ns.3 and 5), 12 (n.9), and 31. These Staff arguments are wrong; Appendix A does not apply to the SFC facility.

When SFC proposed an on-site disposal cell in 1993, the NRC had not adopted the radiological criteria for license termination, and Appendix A was the regulatory provision that was most similar to the circumstances at the SFC site. Consequently, SFC stated its belief that Appendix A provided "a useful conceptual approach for an engineered onsite isolation facility for contaminated soils and other materials at SFC." Preliminary Plan for Completion of Decommissioning, 2-5. Since then, the NRC adopted the

radiological criteria for license contamination (10 CFR § 20.1401 et seq.), and SFC submitted the Decommissioning Plan that is the subject of this proceeding. The Decommissioning Plan does not rely on Appendix A standards as acceptance criteria. Instead, it demonstrates compliance with the NRC's radiological criteria for license termination. The NRC notice of opportunity for hearing states that SFC Decommissioning Plan proposes a disposal cell "constructed to the technical criteria of 10 CFR Part 40, Appendix A." SFC understands this statement to be an acknowledgment that some Appendix A criteria are analogous, not that they are in any way applicable. SFC is not aware of either it or the NRC Staff ever having stated previously that Appendix A contains any requirements that are legally applicable to SFC.

Appendix A is entitled "Criteria Relating to the Operation of Uranium Mills and the Disposition of Tailings or Wastes Produced by the Extraction or Concentration of Source Material From Ores Processed Primarily for Their Source Material Content." The SFC facility is a uranium hexafluoride production facility, not a uranium mill as that term is generally understood. The regulations clearly distinguish production of uranium hexafluoride from uranium milling. See 10 CFR § 40.31(f). SFC agrees that wastes at the SFC facility may be considered wastes produced by the extraction or concentration of source material (i.e., 11e(2) byproduct material), but that alone would not make Appendix A applicable to the SFC facility. Appendix A focuses solely on uranium mills and tailings or waste systems at mill sites. When the Commission amended Appendix A in 1985 to incorporate the standards adopted by the Environmental Protection Agency it stated "[t]he Nuclear Regulatory Commission is issuing amendments to its regulations governing the disposal of uranium mill tailings." 50 Fed. Reg 41,852 (October 16, 1985).

Even if one were to accept, for argument's sake, that Appendix A criteria do apply to the SFC facility, the Staff Answer misinterprets some of them. In particular, at pages 7 (footnotes 3 and 5) and 31 the Staff Answer cites Appendix A criteria 5A(3) and 5B(5)(a). The introductory section of Criterion 5, however, states that criteria 5A-5D "apply during operations and prior to the end of closure." Since closure ends with the completion of decommissioning, and the postulated impacts from the disposal cell all are alleged to occur long after disposal cell closure, these criteria simply would not impose any requirements regarding the design of the disposal cell.

At page 12 (footnote 9), the Staff Answer cites Appendix A, Criterion 6 as establishing an applicable limit for radon emitted from disposed waste at the SFC Site. As discussed above, SFC does not believe that this Criterion is legally applicable, but does believe that it provides relevant guidance. Consequently, as discussed in SFC's September 24, 1999 Response at 26-27, SFC does intend that its disposal cell will limit radon emission to less than the 20 pCi/m² that Criterion 6 prescribes for uranium mill tailings sites. As the NRC Answer notes (at 12), the Decommissioning Plan estimates the disposal cell radon emission rate will be less than .5 pCi/m².

B. NEPA Does Not Authorize the NRC to Craft New Radiation Protection or Nitrate Standards for SFC

The Staff Answer also relies on the NRC's plans for environmental review of the Decommissioning Plan as a basis for asserting that this proceeding may properly consider doses beyond 1,000 years; as well as nitrate contamination not directly associated with source, by-product, or special nuclear material. As discussed below, however, NRC Staff review in

accordance with the National Environmental Policy Act (NEPA) and 10 CFR Part 51 does not provide a basis for considering either matter in this proceeding.

First, with respect to time frames of interest for evaluating possible radiation exposures, the NRC Staff takes the position that, pursuant to NEPA, there are no limits. In discussing Oklahoma's alleged area of concern over groundwater contamination beneath the SFC site and in various other contexts, the Staff states:

SFC objects that Oklahoma provides no evidence that releases would exceed the TEDE limits within the one thousand year time frame involved in restricted release, 10 C.F.R. §§ 20.1401(d) and 20.1403(b), and thus there is no harm that can be meaningfully litigated. SFC Response at 7-8, 35-36 and n.2. The rules on decommissioning for restricted release do require that licensees demonstrate that for 1000 years after termination, the TEDE be within certain limits, and the Staff Technical Review will evaluate the SDP for compliance with those requirements. The Staff will also conduct an environmental review under 10 C.F.R. Part 51 in accordance with NRC's responsibilities under the NEPA. *There is no specific time limit for considering impacts under the NEPA.*^{1/}

As the Staff admits, however, the regulations specify a 1,000-year limit. 10 CFR §20.1401(d). These regulations were developed as part of an extensive rulemaking to establish requirements pertinent to the precise matter properly the subject proceeding: the appropriate radiological criteria to be applied for license termination. Where, as here, the Commission has specifically addressed a matter and delimited regulatory requirements, it has long been established that NEPA can "not logically require more than the safety provisions of the Atomic Energy Act" See *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 631, 696 n.10 (1985), citing, *Public Service Electric and Gas Co.* (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 39 (1979). This conclusion is

^{1/} Staff Answer, pp. 9 (n.6), 11 (n.8), 30 (n.24), 32 (n.26) (emphasis added).

based upon a proper recognition of the inherent interrelationship of the two statutes and the issues arising under each. 22 NRC at 696 n.10. Accordingly, the Staff's position is incorrect and SFC's objection to the alleged area of concern should be sustained.

Second, with respect to nitrates, the Staff adopts the position that, while "NRC does not regulate nitrates *per se*," the "Staff Technical Review and the environmental review under 10 C.F.R. Part 51 will evaluate nitrate levels in accordance with NRC's NEPA obligations." Staff Answer, pp. 10, 21. On this basis, the Staff concludes that alleged misgivings concerning SFC's proposal for natural attenuation of nitrates both constitute an interest sufficient to support standing, and raise a proper area of concern. *Id.*, pp. 10, and 21, respectively.

The nitrates, however, are already in the ground. There is no allegation that the proposed decommissioning activities associated with NRC-regulated materials will affect the nitrate levels in any way. Since the nitrates are not affected by the proposed action, they are beyond the scope of the instant proceeding and not cognizable by NRC, even under NEPA. *See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, LBP-92-23, 36 NRC 120, 134-35 (1992) (environmental review of the decommissioning of a nuclear facility is limited to the impacts associated with decommissioning).

Perhaps more significantly, remediation at the SFC Site also is being conducted pursuant to an Administrative Order on Consent issued by the U.S. Environmental Protection Agency (EPA) to resolve issues involving non-radioactive contamination at the SFC Site through proceedings under Section 3008(h) of the Resource Conservation and Recovery Act.^{2/} Further,

^{2/} Administrative Order on Consent, USEPA Docket No. VI-005-(h)93-H (August 3, 1993).

as the NRC Staff admits, calculated nitrate levels in-stream meet EPA Maximum Contaminant Level Goals (MCLGs) for drinking water.^{3/} Consideration of environmental impacts beyond those associated with complying with regulatory limits is clearly inappropriate. *Cf.*, *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 696 n.10 (1985), *citing*, *Public Service Electric and Gas Co.* (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 39 (1979) (NEPA cannot logically impose requirements more stringent than those contained in the safety provisions of the Atomic Energy Act).

C. Section 20.1403(c) Does Not Require SFC to Identify a Specific Long-term Custodian

The Staff's Answer also asserts, at page 23 (and footnote 18), that 10 CFR 20.1403(c) requires that SFC provide a contract with a long term custodian. Section 20.1403(c) is a provision about financial assurance; it does not require that a custodian be identified in the Decommissioning Plan, but only that sufficient funds be set aside to enable some third-party to assume responsibility for control and maintenance of the site, if that becomes necessary. If the Commission had intended to require that a specific custodian be under contract, it would have been more explicit. Moreover, it would have referred to "the custodian" or "the third party" rather than "a third party."

The position in the Staff Answer is also at odds with its own draft regulatory guide, in which the NRC Staff states:

^{3/} Staff Answer, p. 10 n. 7. The Staff reference to "10 C.F.R." should be to "40 C.F.R." In addition, although the Staff refers to "applicable limits," the cited section of 40 CFR is for MCLGs, which are defined as nonenforceable health goals, not requirements. *See* 40 CFR §141.2.

The purpose of the requirement in 10 CFR 20.1403(c) is to provide sufficient funds to carry out any necessary control and maintenance of the site so that the work could be performed by the independent third party if necessary (e.g., if the site landowner is unwilling or unable to perform such activities). Control and maintenance of a site does not necessarily have to be carried out by an independent third party. For example, the site landowner (who may be the former licensee), if capable, may carry out such activities.

Draft Regulatory Guide DG-4006 at 43-44. The Guide goes on to state that there should be a mechanism to replace the responsible party, and that the government or the courts should be given the authority to make such a replacement. SFC has proposed to accomplish this through a deed restriction on use of the restricted area.

The regulations clearly create two classes of restricted release, depending on the anticipated radiological dose in the event that the institutional controls fail. One class consists of the licensees that seek approval of a plan that would result in a maximum estimated dose in the range 25 mrem/yr to 100 mrem/yr, in the event of failure of the institutional controls (10 CFR 20.1403(e)(1)). The second class consists of those licensees with plans that provide for maximum dose levels that exceed 100 mrem/yr but will not exceed 500 mrem/yr. (10 CFR 20.1403(e)(2)). Only in the latter case are "durable institutional controls" required, and it is the concept of durability that apparently gives rise to the issue of identifying a long-term custodian. SFC is seeking approval of a Decommissioning Plan that will result in a maximum dose that does not exceed 100 mrem/yr in the event institutional controls fail. Therefore, the regulations do not require "durable institutional controls," which might entail a third party custodian.

Although durable institutional controls are not required by the regulations, SFC has indicated in the Decommissioning Plan its intent to create institutional controls that will be at least as durable as the regulations require. See Decommissioning Plan at 3-6. The

Decommissioning Plan discusses the status of SFC's efforts to identify a government entity that will agree to become the long-term custodian. See Decommissioning Plan at 3-6 and Appendix F. That discussion provides a clear indication that potential custodians or third parties are unwilling to make a commitment to accept such a role before the NRC has approved a decommissioning plan and the duties and potential risks of becoming the custodian are more clearly defined. In short, not only is there no regulatory requirement to have such a custodian, but it is simply not practical to expect one to commit to such a role at this stage.

Even if the NRC had adopted a regulation requiring SFC to provide a contract with a custodian or other third party before license termination, an asserted area of concern regarding the failure to provide a contract or identify a firmly committed custodian at this point in time would not constitute an issue that is germane to this proceeding. NRC's review of the Decommissioning Plan is in its early stages and it would be premature to enter an agreement with a third party custodian before the NRC even approves that Plan. Because of the stage of the proceeding, there would be no issue for the Presiding Officer to decide. The Decommissioning Plan says all there is to say about this subject and neither the Attorney General nor the NRC Answer identifies an issue that could be decided in a hearing.

In light of this circumstance, the assertions that "SFC has yet to identify a long-term custodian" or that SFC "failed to adequately map out long-term custodial care" (Oklahoma Supplemental Request at 36) cannot provide a basis for any hearing because they do not identify any issues to be considered in a hearing.

Although the Staff Answer appears to assume that every statement that is labeled as an area of concern should be accepted as such if it appears to relate to a matter that will be

considered during the NRC review of the application, that is not enough to meet 10 CFR 2.1205. That interpretation reads out of the regulation the requirement to “describe in detail” each area of concern, and similarly ignores the Commission’s explanation that the area of concern must identify an issue germane to the proceeding. 54 Fed. Reg 8269, 8272 (Feb. 28, 1989). The Commission clearly intended that a person requesting a hearing identify issues, not just generalized subject matters within the scope of the NRC Staff review.

The regulation states that the petition must describe the areas of concern in detail, but does not explain how much detail is enough. In SFC’s view, the required level of detail must be judged against the level of detail about the application that is available to the petitioner . In this instance, SFC has provided a detailed discussion of the requirements and the status of its efforts to identify a long-term custodian.^{4/} The Supplemental Request does not make any reference to this information, and does nothing more than deny that the application is adequate. That does not provide enough detail for the Presiding Officer to determine whether there is a genuine issue that merits a hearing.

SFC’s intent to establish more durable institutional controls than the bare minimum required by the regulations does not create an issue for hearing. Even if the regulations were to require SFC to identify a custodian, the fact that it has not yet done so cannot provide a basis for hearing because there is no issue of fact. Nothing that has been said by any party suggests that the Attorney General may have evidence to present on this subject.

^{4/} SFC’s Response of September 24, 1999 discusses other areas of concern that do not provide a level of detail that is commensurate with the detailed information SFC has already made available to the State. For example, see the discussion of radiological dose models at pages 25-26 of that Response.

III. CONCLUSION

SFC's Response to the Attorney General's Supplemental Request For Hearing contains a detailed statement of SFC's views regarding that request. The NRC Answer agrees with some of SFC's positions and disagrees with others. SFC has carefully reviewed the NRC Answer and has not identified any point on which SFC believes its Response should be revised. Rather, SFC continues to believe that the positions urged in its Response are correct. This SFC Reply focuses on a few points of disagreement in which SFC believes that the NRC Answer errs in its statement of the law in ways that SFC did not and could not have anticipated. SFC urges the Presiding Officer to consider fully the arguments of the Attorney General, the NRC Staff and both SFC's Response and this Reply, and based on those pleadings deny the request for hearing.

Respectfully submitted,



Alvin H. Gutterman
Donald J. Silverman
Goran P. Stojkovich
Morgan, Lewis & Bockius, LLP
1800 M Street, NW
Washington, DC 20036
(202) 467-7468
facsimile: (202) 467-7176
e-mail: gutt7468@mlb.com
Counsel for Sequoyah Fuels Corporation

Dated: October 15, 1999

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Sequoyah Fuels Corporation's Motion for P 3 :24
Leave to Reply to the NRC Staff's Answer and Sequoyah Fuels Corporation's Reply to the NRC
Staff's Answer have been served upon the persons listed below by U.S. mail, first class, postage
prepaid, this 15th day of October, 1999.

OFFICE OF THE
GENERAL COUNSEL
ADJUDICATIONS
FF

Office of the Secretary
U.S. Nuclear Regulatory Commission
Attn: Rulemakings and Adjudications Staff
Washington, D.C. 20555-0001

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

*Administrative Judge Charles Bechhoefer
Presiding Officer
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Facsimile No. 301-415-5599

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

*Administrative Judge Thomas D. Murphy
Special Assistant
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Facsimile No. 301-415-5599

Executive Director for Operations
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Mr. James C. Shepherd
U.S. Nuclear Regulatory Commission
Two White Flint North
Mail Stop 7F27, Room 7C7
11545 Rockville Pike
Rockville, MD 20852-2738

*Ms. Giovanna M. Longo, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
One White Flint North
Mail Stop 15B18, Room 15 D9
11555 Rockville Pike
Rockville, MD 20852-2738
Facsimile No. 301-415-3725

*Mr. W.A. Drew Edmondson, Esq.
Attorney General of Oklahoma
2300 N. Lincoln Boulevard, Suite 112
Oklahoma City, OK 73105
Facsimile No. 405-521-6246

*Mr. Stephen L. Jantzen, Esq.
Assistant Attorney General
Environmental Protection Unit
2300 N. Lincoln Boulevard, Suite 112
Oklahoma City, OK 73105
Facsimile No. 405-521-6246


Alvin H. Gutterman

* Addressees designated by an asterisk also were served by facsimile.

1800 M Street, N W
Washington, D.C. 20036-5869
202-467-7000
Fax: 202-467-7176

DOCKETED
USNRC

**Morgan, Lewis
& Bockius LLP**

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C O U N S E L O R S A T L A W

Alvin H. Gutterman

OFFICE
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ADMINISTRATIVE

October 25, 1999

Administrative Judge Charles Bechhoefer
Presiding Officer
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Dear Judge Bechhoefer:

Page 2 of the Sequoyah Fuels Corporation's October 15, 1999, reply to the NRC Staff's Answer omitted a citation to the source of a quotation. The attached replacement page contains the omitted citation. I apologize for the inconvenience caused by this error.

Sincerely,



Alvin H. Gutterman

AHG/ar

Encl: a/s

cc: Certificate of Service

20932

CERTIFICATE OF SERVICE

I hereby certify that copies of a replacement for page 2 of Sequoyah Fuels Corporation's October 15, 1999, Reply to the NRC Staff's Answer have been served upon the persons listed below by U.S. mail, first class, postage prepaid, this 25th day of October, 1999.

Office of the Secretary
U.S. Nuclear Regulatory Commission
Attn: Rulemakings and Adjudications Staff
Washington, D.C. 20555-0001

Administrative Judge Charles Bechhoefer
Presiding Officer
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Facsimile No. 301-415-5599

Executive Director for Operations
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Ms. Giovanna M. Longo, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
One White Flint North
Mail Stop 15B18, Room 15 D9
11555 Rockville Pike
Rockville, MD 20852-2738
Facsimile No. 301-415-3725

Mr. Stephen L. Jantzen, Esq.
Assistant Attorney General
Environmental Protection Unit
2300 N. Lincoln Boulevard, Suite 112
Oklahoma City, OK 73105
Facsimile No. 405-521-6246

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge Thomas D. Murphy
Special Assistant
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Facsimile No. 301-415-5599

Mr. James C. Shepherd
U.S. Nuclear Regulatory Commission
Two White Flint North
Mail Stop 7F27, Room 7C7
11545 Rockville Pike
Rockville, MD 20852-2738

Mr. W.A. Drew Edmondson, Esq.
Attorney General of Oklahoma
2300 N. Lincoln Boulevard, Suite 112
Oklahoma City, OK 73105
Facsimile No. 405-521-6246


Alvin H. Gutterman