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OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATIONS STAFF

MEMORANDUM TO: G. Paul Bollwerk, III, Acting  
Chief Administrative Judge  
Atomic Safety and Licensing Board Panel

FROM: Annette L. Vietti-Cook, Secretary *Annette Vietti-Cook*

SUBJECT: REQUEST FOR HEARING OF THE GRAND  
CANYON TRUST, ET AL.

Attached is a petition for leave to intervene submitted on January 27, 1999, by the Grand Canyon Trust and a number of other organizations and individuals, collectively identified as the Grand Canyon Trust. The petitioners are requesting a hearing with respect to NRC's approval of the reclamation plan of The Atlas Corporation (Docket No. 40-3453) for its site near Moab, Utah. Of particular concern to the petitioners is the effect of the plan on the environment surrounding the Atlas site, including ground water and wildlife.

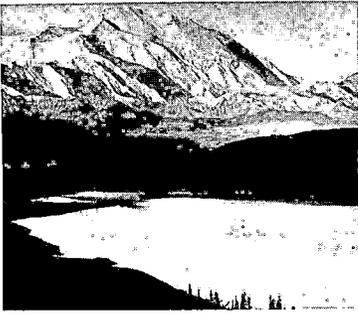
The request for hearing, is being referred to you for appropriate action in accordance with 10 C.F.R. Sec. 2.1261.

Attachment: As stated

- cc: Commission Legal Assistants
- OGC
- CAA
- OPA
- EDO
- NMSS
- Richard Blubaugh
- Atlas Corporation
- Anthony J. Thompson, Esquire
- Marie Kirk, Esquire
- Cullen Battle, Esquire
- Gabrielle Sigel, Esquire

SECY-EHD-007

19973



Sunrise, Mt. McKinley

Ansel Adams

**SIERRA CLUB LEGAL DEFENSE FUND, INC.**

*The Law Firm for the Environmental Movement*

*(On August 1, 1997, we will officially become Earthjustice Legal Defense Fund!)*

1631 Glenarm Place, Suite 300, Denver, CO 80202

(303) 623-9466 FAX (303) 623-8083

January 20, 1999

File: 812

U.S. Nuclear Regulatory Commission  
~~Executive Director for Operations~~ *E. Julian, SECY*  
One White Flint North Building  
11555 Rockville Pike  
Rockville, MD 20852-2738

Re: Atlas Corporation, Docket No. 40-3453

Dear Sir/Madam:

Enclosing please find an original and <sup>*three*</sup> ~~two~~ copies of the for filing in the above-referenced matter.

At your convenience, we would appreciate receiving from you, a file-stamped copy in the enclosed self-addressed stamped envelope.

My **thanks** in advance for your prompt attention and understanding.

Sincerely,

Lynda Lovett  
Legal Secretary  
to  
Marie A. Kirk

LL/s



DOCKETED  
USNRC

'99 FEB -1 P3:28

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATION STAFF

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In the Matter of: )  
ATLAS CORPORATION ) Docket No. 40-3453  
(source material license amendment) ) January 27, 1999

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**GRAND CANYON TRUST, ET AL., REQUEST FOR HEARING AND PETITION  
FOR LEAVE TO INTERVENE**

**I. INTRODUCTION**

The Grand Canyon Trust and the parties described below (collectively "Grand Canyon Trust") respectfully request a hearing and permission to intervene as parties in the licensing proceeding governing reclamation of the uranium tailings site in Moab, Utah. As set forth below, petitioners have standing to intervene in this action and seek a hearing in order to ensure the NRC's compliance with the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq.<sup>1</sup>

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<sup>1</sup> The Grand Canyon Trust also submitted a section 2.206 petition covering very similar issues on January 11, 1999. In the January 11 petition, the Trust requested that the NRC take a number of actions to protect endangered species. The actions included, among other things, requests that the NRC amend the Atlas license to incorporate water quality standards that are protective of endangered fish; that the NRC act immediately to eliminate the take of and jeopardy to endangered fish from the Atlas site; and, that the NRC order the removal of the Atlas tailings pile out of the Colorado River floodplain. Because the January 11 petition raises essentially the same issues as this petition, in the event that this petition is denied the Grand Canyon Trust requests that the NRC consider it as part of its pending section 2.206 petition.

The Atlas tailings pile is perched on the banks of the Colorado River near Moab, Utah. This enormous, radioactive dump sits in the heart of Utah's red rock country, just across the highway from Arches National Park, across the river from the Scott M. Matheson Wildlife Preserve, and upstream of Canyonlands National Park and the Glen Canyon National Recreation Area. The pile is unlined, is filled with process water and materials, and is periodically soaked with additional rain and river water. Consequently, massive amounts of toxic chemicals, heavy metals, and radioactive contamination are leaching into the groundwater and, ultimately, directly into the Colorado River, imperiling public health, downstream drinking water, and endangered native fish, such as the Colorado squawfish and razorback sucker.

Despite the massive contamination to the Colorado River, the NRC intends to approve an amendment to the Atlas Materials License authorizing Atlas to permanently cap the pile and leave it in the Colorado River floodplain. This amendment would allow permanent disposal of the tailings in the river floodplain without providing for a cleanup of the groundwater and without ensuring protection of endangered fish. Pursuant to the ESA, the U.S. Fish and Wildlife Service in July of 1998 issued a Biological Opinion and concluded that any permanent reclamation of the Atlas site must provide for groundwater cleanup that protects endangered fish and meets water quality standards sufficient to ensure their conservation and continued survival.

So far, the proposed Materials License amendment does not include provisions for groundwater cleanup. The NRC's failure to adequately address issues associated with the

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protection of endangered fish, including the need for groundwater cleanup in this licensing action, violates the ESA. Therefore, the Grand Canyon Trust now requests a hearing and seeks to intervene in this action to ensure that any approval of the license amendment complies with the ESA.

Because the Grand Canyon Trust easily satisfies the requirements of standing and submits valid areas of concern about the license amendment at issue in this proceeding, the only significant issue with respect to this petition is its timeliness. As the Grand Canyon Trust will show, this petition is timely in light of the circumstances of this case. Although the original notice of this proposed licensing action occurred on April 7, 1994<sup>2</sup>, the Grand Canyon Trust should be permitted to intervene now to enable it to enforce the substantive and procedural obligations imposed by the ESA on the NRC.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### **A. The Atlas Site**

The NRC has issued a Materials License to the Atlas Corporation to operate a disposal site for uranium mill tailings about two miles northwest of Moab, Utah on the west bank of the Colorado River. Containing more than 10 million tons of radioactive waste, the Atlas dump is the fifth largest tailings pile in the country and by far the largest situated next to a river. Although uranium mills and associated waste dumps were historically located near rivers to take advantage of the water source, most if not all

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<sup>2</sup> The original notice of the proposed licensing action occurred nearly seven years ago and an additional notice of the action and an opportunity for a hearing was published nearly five years ago. See 59 Fed. Reg. 16,665 (April 7, 1994); 57 Fed. Reg. 29,541 (July 2, 1992)

radioactive tailings piles on Western rivers have been moved away from their original locations to a safe, dry, upland disposal site away from the hazards associated with flooding and away from important groundwater and surface water resources.

Because of the pile's proximity to the river, massive amounts of toxic pollutants, including ammonia, molybdenum, selenium, sulfate, nitrate, and uranium, are leaching from the pile through the groundwater into the Colorado River. A toxic tide of ammonia and other pollutants extends more than one mile downstream and reaches some 40 feet into the Colorado River channel. The levels of ammonia measured in the Colorado River near the tailings pile exceed the acute lethal dose (the amount that causes immediate death to fish) by a factor of eight, and the ammonia levels still exceed state surface water quality standards one and a half miles downstream -- the most remote point that has been tested. Within the groundwater plume immediately next to the river on the northeast end of the pile, beside a former Atlas "catch pit" for mill waste, uranium levels are 568 times greater than the maximum level allowed by NRC standards.

The plume is mature as to many of the contaminants, such as ammonia and uranium, and has been discharging to the river for many years. However, other toxic elements in the pile, such as selenium, mobilize more slowly and are just beginning to reach the river. Because of the varying rates at which contaminants move, it is expected that water quality in the river will get worse before it begins to get better. Without active treatment to clean up the groundwater, the site will continue to degrade water quality in the Colorado River for decades, with significant impacts to the Colorado squawfish and razorback sucker and their habitat.

### **B. The Proposed License Amendment**

Because Atlas would like to terminate its license and turn over the property to the United States, Atlas has requested a License Amendment from the NRC and has proposed a "reclamation plan" to stabilize the tailings impoundment in place by covering it with clay and rock. Atlas has an existing groundwater corrective action plan in place that entails pumping liquid from within the pile to a pond on top of the pile in order to promote evaporation. The principal purpose of the plan is to dry out the pile enough to cover it with a clay cap. According to the Oak Ridge National Laboratory, this pumping effort is not having any effect on the amount of contamination being discharged from the pile into the Colorado River. The proposed license amendment does not include any plan to clean up the existing groundwater contamination.

### **C. The Endangered Fish**

The Colorado squawfish and razorback sucker were once abundant throughout warm water reaches of the entire Colorado River Basin. The squawfish evolved as the main predator of the Colorado River system, growing as large as 6 feet in length and weighing nearly 100 pounds. It currently occupies only 25% of its native range and survives only in the Upper Basin above Glen Canyon Dam. The razorback sucker, once so numerous that it was commercially marketed, is now in danger of extirpation in the wild.

The Colorado River at the Atlas site is designated critical habitat for both the Colorado squawfish and the razorback sucker, and in particular constitutes the most important rearing area in the Colorado River for young-of-the-year Colorado squawfish.

According to the U.S. Fish and Wildlife Service (“FWS” or “Service”), the massive water pollution caused by the Atlas site jeopardizes the survival of both species and has adversely modified designated critical habitat. The Service has determined that pollution at the site harms these species by directly killing young fish carried with the river current through the pollution, by forcing other fish to move to escape the pollution, and potentially by causing long-term impacts from bioaccumulation of toxics.

#### **D. Consideration of Environmental Impacts**

The impacts of the Atlas site and the proposed licensing action and the magnitude of the problem have only recently become publicly known and fully appreciated, despite the fact that this licensing action was proposed nearly seven years ago. The NRC first published a notice of intent to amend Atlas’ Source Materials License to allow reclamation of the tailings on July 2, 1992. See 57 Fed. Reg. 29,541. Several months later, the NRC determined that the proposed reclamation of the Atlas site would not significantly impact the local environment. See 57 Fed. Reg. 47,677 (October 19, 1992) (notice of a Finding of No Significant Impact (“FONSI”) regarding the proposed license amendment). Consequently, the NRC published a notice of intent to amend the Atlas license supported by the FONSI finding on July 20, 1993. See 58 Fed. Reg. 38,796. Shortly thereafter, on Oct. 8, 1993, in response to public comments on the proposed action, the agency published a notice of withdrawal of intent to amend the source material license and a withdrawal of the FONSI finding. See 58 Fed. Reg. 52,516.

On March 30, 1994, acknowledging the need for environmental studies, the NRC published a notice of intent to prepare an Environmental Impact Statement and conduct a

scoping process. See 59 Fed. Reg. 14,912. On April 7, 1994, the agency published notice of a proposed plan to reclaim the tailings pile in place, describing, in particular, proposed modifications to the physical configuration of the pile.<sup>3</sup> See 59 Fed. Reg. 16,665. At that time, the NRC offered an “Opportunity for Hearing” for any person whose interest may be affected by the issuance of the license amendment. See id. The notice provided that any request for hearing must be filed within 30 days of the publication of the notice. See id. This notice was the first and only time the NRC has offered an opportunity for hearing related to the license amendment at issue with one exception: the NRC gave notice and opportunity for a hearing on the applicant’s request to change the completion date for retrieval and placement of windblown tailings by two years. See 61 Fed. Reg. (February 6, 1996).

#### **E. Endangered Species Act Consultation**

Because the federal action of approving the license amendment “may affect” endangered species, the NRC entered into mandatory consultation with the U.S. Fish and Wildlife Service (“FWS”) concerning the impact of the reclamation plan on several species, including the Colorado squawfish and razorback sucker. As a result of consultation with the Commission, on July 28, 1998 the Service issued a Biological Opinion (“July 1998 BO”) concerning the impacts of the proposed reclamation plan on endangered species. That BO concluded that the existing pollution from the Atlas site

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<sup>3</sup> The notice explained that “the proposed plan calls for reclamation of the tailings impoundment in place, covering the tailings with a soil cover to reduce radon emanation, and flattening the embankment side slopes to 10 horizontal to 3 vertical (10H:3V) or less.” In addition the notice stated that the license amendment application proposed modifications of the previous plan including a new configuration to promote surface water drainage, a reduction in soil cover thickness, a modification in erosion protection design, and a reconfiguration of Moab Wash. See 59 Fed. Reg. 16,665.

jeopardizes the squawfish and the razorback sucker, and found that the proposed reclamation plan, which would simply cap the pile and leave it in the Colorado River floodplain, will continue to jeopardize the fish.

The BO concluded that implementation of any reclamation plan was integrally related to cleanup of the groundwater at the site. See 50 C.F.R. § 402.02. As a result, the BO requires the development of a groundwater corrective action plan that would reduce discharges to a level meeting state water quality standards over a 10-year period. The BO also concluded that continued harm to individual fish would be allowed during the implementation of the groundwater remediation plan. No biological or other scientific information was included to substantiate the Service's apparent finding that the species could survive this additional injury. The NRC provided no public notice or opportunity for a hearing in connection with the FWS conclusions concerning the threat to endangered species posed by the licensing action.

#### **F. Groundwater Cleanup**

As a result of the July 1998 BO, the NRC is required to implement groundwater cleanup as part of reclamation of the site. At the present time, however, the pending license amendment does not require Atlas to develop or propose a specific groundwater corrective action plan protective of the Colorado squawfish and the razorback sucker. The NRC and FWS have not consulted on such a plan. If the licensing amendment is approved as currently proposed, the factual and scientific determinations necessary to ensure protection of the squawfish and razorback sucker apparently would be made after

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Atlas and the NRC have irreversibly committed themselves to a reclamation plan based on stabilizing and capping the pile in place.

Although the license amendment under consideration does not include a groundwater cleanup component, the Grand Canyon Trust has reason to believe that consideration of groundwater issues is going to become a part of this licensing proceeding. The Grand Canyon Trust recently obtained a letter written by the NRC stating that the agency plans to include an evaluation of groundwater issues in the proposed licensing action. See letter from NRC Chair Shirley Ann Jackson to Congressman George Miller (January 13, 1999) (Attached as Exhibit A). Moreover, the NRC stated, for the first time, that it intends to condition the current license amendment on Atlas' implementation of a new groundwater corrective action plan. See id.

According to NRC Chair Shirley Ann Jackson,

If the NRC issues a license amendment to Atlas, the staff plans to require by license condition that Atlas revise the CAP [groundwater corrective action plan] and expedite groundwater cleanup in conformance with timeframes identified in the FWS opinion. This would include accelerated dewatering of the tailings, groundwater cleanup within 7 years of approval of a revised CAP, and monitoring of the groundwater and the Colorado River.

Id. at 2-3. In this letter, the NRC also stated that it intends to respond to the FWS' findings by incorporating groundwater issues in the Final EIS and stated that it has commissioned a new study to investigate groundwater issues that are critical to the Colorado squawfish and razorback sucker. See id. The Final EIS and an NRC order authorizing the proposed amendment are expected to be released in the next few months.

### III. LEGAL BACKGROUND

Congress in the Atomic Energy Act has specifically afforded citizens the right to intervene in licensing proceedings administered by the Nuclear Regulatory Commission.

The Act provides that:

In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

42 U.S.C. § 2239. The NRC has implemented this provision with respect to materials and operator licensing proceedings by providing guidelines for informal hearing procedures in Subpart L of its regulations. See 10 C.F.R. § 2.1205. According to section 2.1205, a person who wishes to intervene in a licensing proceeding must demonstrate: (1) standing to intervene; (2) “areas of concern” about the licensing activity; and, (3) the timeliness of the hearing request. See 10 C.F.R. § 2.1205(e); In the Matter of Babcock and Wilcox Co., (Pennsylvania Nuclear Services Operations), 41 NRC 1, 1995 NRC LEXIS 1 (1995).

According to NRC regulations, a request for a hearing is timely filed if it is filed within thirty days of the agency’s publication in the Federal Register of notice of a licensing action and notice of an opportunity for a hearing. See 10 C.F.R. § 2.1205(d)(1). When a licensing action involves significant hazards, no license amendment will be issued until after any hearings are completed. See id. A petition for leave to intervene must be filed within thirty days of the publication of notice of any hearing. See 10 C.F.R. § 2.1205(k). Although the regulations allow intervention as a matter of right only if the

request is timely, an untimely request for a hearing or petition for leave to intervene may be granted if

(i) The delay in filing the request for a hearing or the petition for leave to intervene was excusable; and,

(ii) The grant of the request for a hearing or the petition for leave to intervene will not result in undue prejudice or undue injury to any other participant in the proceeding . . . .

10 C.F.R. § 2.1205(l)(1). If a request or petition is untimely and the petitioner fails to establish that it otherwise should be entertained, the request or petition will be treated as a petition under 10 C.F.R. § 2.206 and referred for appropriate disposition. See 10 C.F.R. § 2.1205(l)(2).

#### IV. ARGUMENT

As will be demonstrated, the Grand Canyon Trust should be permitted to intervene in this proceeding because: (1) it has standing; (2) its concerns clearly will be affected by the licensing proceeding, and (3) under the circumstances this petition is timely.

##### **A. The Grand Canyon Trust and Associated Parties Have Standing to Intervene in this Action**

Current judicial concepts of standing require an intervenor to show: (1) “injury in fact;” (2) that the injury can be fairly traced to the proposed action; (3) that the injury is likely to be redressed by a favorable ruling; and (4) the intervenor’s interest is “arguably within the zone of interests” protected by the statute. See In the Matter of Hydro Resources, Inc., 47 NRC 261, 1998 NRC LEXIS 40, \*17-20 (1998). In NRC licensing

cases, petitioners have made the requisite showing by alleging some risk of harm to themselves or by alleging harm to the local environment near the site, which they use for recreation, aesthetic appreciation, drinking water, or other purposes. See, e.g., In the Matter of Philadelphia Electric Co. (Limerick Generating Station), 15 NRC 1423, 1982 NRC LEXIS 164 (1982).

For example, in a case involving proposed leach mining under the Subpart L regulations, the petitioners successfully achieved standing by alleging that they used water near the proposed site and that the potential impacts of the project on the water would pose a health risk to those individuals. See Hydro Resources, 47 NRC 261, 1998 NRC LEXIS 40 at \*39. In ESA cases, standing is established when a plaintiff alleges an interest in endangered species or that some injury will occur from the proposed action adversely affecting a plaintiff's recreational, aesthetic, or commercial interests. See Bennett v. Spear, 520 U.S. 154 (1997).

The Grand Canyon Trust obviously satisfies the requirements of standing through its allegations of injury to interests in endangered species and the ecosystems in which they live as well as injury to recreational, economic, health, aesthetic, and other interests in the area affected by the Atlas site. Following is a description of the parties and their interests in this proceeding.

### ***1. Grand Canyon Trust***

The Grand Canyon Trust, based in Flagstaff, Arizona, is a non-profit organization with approximately 4,000 members. Its mission is to protect and restore the canyon country of the Colorado Plateau, including its spectacular landscapes, flowing rivers,

clean air, diversity of plants and animals, and areas of beauty and solitude. Grand Canyon Trust members and staff work to protect ecosystems in the Colorado Plateau, including the area of the Atlas tailing pile. Members of the Grand Canyon Trust raft, canoe, and fish the stretch of river adjacent to the Atlas site and also hike on the riverbanks, view wildlife, and seek solitude in the area immediately adjacent to the tailings pile. Some members of the Grand Canyon Trust are wildlife and fisheries biologists who study Colorado Plateau wildlife, fishes, and the Colorado River ecosystem, and who have professional and personal interests in the health of important habitats and ecosystems in and around Moab. Members' enjoyment of the Moab Valley is dependent in part on the continued existence of native Colorado Plateau species, such as the Colorado squawfish and razorback sucker, which are prime indicators of ecosystem function. The spiritual, recreational, scientific, and health benefits that Grand Canyon Trust members derive from their use and enjoyment of the river, its ecosystem, and its native fisheries have been and will continue to be adversely affected by the Atlas site and by the remedial action plan approved by the Service's BO, which authorizes massive levels of contamination in the river and causes jeopardy to the endangered fish over an extended time period.

## ***2. Grand County, Utah***

Grand County, Utah is a political subdivision of the State of Utah. The Atlas tailings pile is located wholly within Grand County, and contaminants from the pile are discharged into the Colorado River as it flows through Grand County. As a governmental body, Grand County has responsibilities to protect public health and the

environment within its political borders. Grand County also has a responsibility to protect local industry and the local economy. Approximately 94% of the land in Grand County consists of Indian reservations and public lands, including national parks and other recreational areas, and Moab is the only Utah town located on the Colorado River. Grand County's economy is largely tourism- and recreation-based, with more than 100 private companies providing outfitting and other recreational services and accommodations for those services. In fact, approximately three-fourths of the County's economy is based on tourism-related industries. Because a substantial amount of that recreation and tourism is centered around the Colorado River, the contamination from the Atlas site poses substantial threats to Grand County citizens and visitors, who rely on the Colorado River and its environs for recreation and employment. The contamination also threatens Grand County's economy, which is heavily dependent upon tourism and recreation.

### ***3. Dave Bodner***

Dave Bodner is a manager of North American River Expeditions and Canyonlands Tours, and he works as a river guide. His company conducts rafting, rowing, and jet boat tours in the area just downstream of the Atlas pile. He and his clients observe wildlife as well as swim in and drink the river water downstream of the pile. Mr. Bodner has personally seen dead fish, including Colorado squawfish, in the water downstream of the pile. The sight of dead fish, knowledge of the loss of wildlife, and fear of water contamination diminish Mr. Bodner's enjoyment of areas downstream

of the pile while traveling the river and adversely affect his aesthetic, spiritual, recreational, scientific, and historical interests in the river ecosystem.

#### ***4. Ken Sleight***

Ken Sleight is a resident of Moab and has been operating river trips since 1951. He is part-owner of High Desert Adventures, now managed by his son, which runs river trips along the Colorado River in and around Lake Powell. Mr. Sleight's business used to operate tours that traveled past the Atlas tailings pile, but now operates tours only in the Lake Powell area. Mr. Sleight allowed his permits to lapse because of the increasing pollution from the pile and the adverse effects on the future his business. Mr. Sleight cares deeply about the water quality in the Colorado River in and around Moab, and he has spoken out on issues of river health for many years. His ongoing concern for the river and the ecosystem means that he will continue to speak out on the quality of the river water and his concern for its effects on the people, wildlife, and the local ecosystem. He and his family once drank from the river and swam in it, but are now afraid to do so; Mr. Sleight looks forward to a time when the contamination is removed and he and his family can use the river as they once did.

#### ***5. 3-D River Visions***

3-D River Visions, Inc., is a canoe outfitting business owned and operated by three brothers, Darren Vaughan, Dirk Vaughan, and Devin Vaughan, and is based in Moab, Utah. 3-D River Visions outfits and provides transportation to about 2,500 people per year for canoe trips down the Colorado River near Moab. About 300-400 of their clients each year put in at the Moab ramp, approximately one mile up-river from the

Atlas tailings pile, and canoe down the river past the pile; other clients put in about 15 miles below the Atlas site and canoe down the river from there. 3-D River Visions' clients' use and enjoyment of the area depends upon a natural, living, healthy ecosystem in the area affected by the Atlas tailings pile for a unique recreational, historical, cultural, and naturalistic experience. The quality of the Vaughan brothers' and their clients' experience is being diminished and will be further diminished and/or curtailed by continued, chronic high levels of toxic pollutants leaching into the river. The diminishment in value of the clients' experience and/or diminishment in the numbers of people interested in their canoe trips threaten the economic and commercial interests and livelihood of the Vaughan brothers and 3-D River Visions.

#### ***6. Joseph Knighton***

Joseph Knighton has been a resident of Moab for nine years and hikes beside the tributaries of the Colorado River nearly every weekend. He also canoes the Colorado River downstream of the Atlas pile four to five times a year and occasionally canoes past the pile. Mr. Knighton hikes along the tributaries that are important rearing grounds for Colorado squawfish and other species. He hikes beside and canoes in the river to experience the natural beauty and the magnificent ecosystem supported by the river. Mr. Knighton derives recreational, aesthetic, and spiritual benefits from knowing that the Colorado squawfish and other species inhabit the areas he visits and knowing that they form a part of a healthy, clean, living ecosystem. His enjoyment of the areas depends on the health of the ecosystem and the continued existence of native, ancient species such as the Colorado squawfish and the razorback sucker.

### ***7. Sierra Club***

The Sierra Club is a national, non-profit organization with approximately 3,710 members in the State of Utah and approximately 70 members who live in and around Moab, Utah. The Utah Chapter is dedicated to protecting Utah's environmental quality and ecosystems, including the wetland, aquatic, and riparian systems of the Colorado River basin. Members of the Utah Chapter engage in outdoor recreation and other activities in the Colorado River basin near Moab. Such activities include rafting, hiking, wildlife viewing, nature study, nature appreciation, and photography. Sierra Club members' use and enjoyment of the area is dependent, in part, on the existence of a functioning ecosystem and the presence of a full range of native species, including the Colorado squawfish and razorback sucker. Their aesthetic and recreational interests in the area are diminished by contamination of the river and impacts to the ecosystem and fisheries caused by the Atlas pile.

### ***8. Colorado Plateau River Guides***

Colorado Plateau River Guides is an association of more than 200 professional licensed river guides who work on the Colorado Plateau. The association was organized to protect the interests of river guides and to promote the safety, training, and professional development of the guides. Many of the members guide river trips beside and immediately downstream from the Atlas pile where they travel in canoes, kayaks, rafts, and other boats. The damaging effects of the contamination on water quality and wildlife threaten the quality of the recreational experience and imperil the health of the guides and their clients who swim, wash in, and drink the water from the river.

Continued contamination and public concern over its impacts threatens the livelihood of the guides by reducing customer interest in their tours and by reducing the quality of the river trips in the wild areas around Moab, adversely affecting wildlife, including native species such as the Colorado squawfish and razorback sucker, and the entire ecosystem that supports the work of the river guides.

**B. The Grand Canyon Trust Sets Forth Areas of Concern Sufficient for Intervention in this Proceeding**

A person requesting a hearing pursuant to section 2.1205 must “identify the areas of concerns they wish to raise.” See In the Matter of Babcock and Wilcox Co., (Pennsylvania Nuclear Services Operations), 39 NRC 215, 1994 LEXIS 16, \*3 (1994). To satisfy this requirement, a requestor “need only provide minimal information to assure that the areas of concern are germane to the proceeding.” Id. The Grand Canyon Trust satisfies this requirement by advancing the concerns that any amendment to Atlas’ Materials License approving reclamation of the Atlas site without ensuring a level of water quality protective of endangered fish would violate ESA sections 7(a)(1), 7(a)(2), 7(d), and 9.

Congress passed the ESA in 1973 “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531. To that end, Congress established a variety of statutory requirements – both substantive and procedural – that, together, are designed to protect and recover threatened and endangered species. Five provisions are at issue here: (1) the affirmative duty to conserve endangered species; (2) the substantive duty to insure that federal action does not jeopardize protected species or adversely modify critical habitat; (3) the

procedural duty to consult with the FWS before approving a groundwater remediation plan; (4) the duty to avoid an irretrievable commitment of resources before consultation is complete; and (5) the absolute prohibition on unpermitted “takings” of listed species.

***1. The NRC Has Violated its Duty to Conserve Endangered Species in this Licensing Action***

The NRC’s proposed license amendment is in violation of the duty to conserve the Colorado squawfish and razorback sucker under section 7(a)(1) of the ESA, 16 U.S.C. § 1536(a)(1), because it fails to protect listed fish. Federal agencies, in addition to their other duties under the ESA, have an independent, affirmative duty to conserve endangered species. See 16 U.S.C. § 1536(a)(1); Sierra Club v. Glickman, 156 F.3d 601 (5<sup>th</sup> Cir. 1998). ESA section 7(a)(1) provides that “[a]ll other federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.” 16 U.S.C. § 1536(a)(1). “Conserve” means to use “all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” 16 U.S.C. § 1532(2).

The duty to conserve is “specific and particular,” and agencies must take concrete steps to ensure the survival of endangered species. See Glickman, 156 F.3d at 615-16. The NRC is in violation of section 7(a)(1) in two ways. First, the NRC in its continuing administration of the Atlas materials license has failed to implement any kind of program or plan to protect or conserve the Colorado squawfish and razorback sucker. Under

section 7(a)(1), the NRC's administration of the Materials License triggers its affirmative duty to consult with FWS and develop a specific plan to conserve the endangered Colorado squawfish and razorback sucker populations in the stretch of river affected by continuing contamination from the Atlas site. The NRC, in particular, has a responsibility to develop and carry out a program to ensure that its administration of Atlas' license and the approval of any reclamation plan will: (1) provide for a level of water quality that assures the continued survival of adult endangered Colorado squawfish and razorback suckers; (2) protect the numerous Colorado squawfish nursery areas confirmed in the immediate vicinity of the Atlas pile; and (3) assure the implementation of any other measures necessary to protect the Colorado squawfish and the razorback sucker and the designated critical habitat upon which these species depend for survival.

To date, the NRC has failed to develop any such program or take any "specific and particular" action in fulfillment of its duty to conserve under section 7(a)(1). The proposed license amendment does not require Atlas to take any affirmative action for the conservation of the fish. Nor has the NRC developed any kind of program to create habitat for the fish, to restore habitat lost or degraded by its regulation of the Atlas site, or to limit the impacts of the Atlas site on the endangered fish.

In addition, the proposed reclamation plan and license amendment fail to incorporate a specific comprehensive groundwater cleanup protection plan as a pre-requisite to the overall reclamation plan. To date, the reclamation plan and proposed license amendment contain only the promise that such a plan will be developed and implemented in the future. In order to satisfy the NRC's duty to conserve, the NRC

must, at a minimum, ensure that a specific groundwater cleanup plan has been proposed, is feasible at the site, and will meet the standards set by the FWS in its BO before it approves the Atlas Corporation's reclamation plan and license amendment.

***2. NRC Approval of the Proposed License Amendment Would Violate § 7(a)(2) Because It Would Cause Jeopardy and Adverse Modification of Critical Habitat***

Section 7(a)(2) of the ESA requires that “[e]ach federal agency shall . . . insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an ‘agency action’) is not likely to jeopardize the continued existence of any endangered species or threatened species . . .” 16 U.S.C. § 1536(a)(2). Similarly, each agency is supposed to insure that any such action is not likely to result in the “destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical.” Id. Federal agencies have an independent duty to prevent jeopardy and adverse modification of critical habitat. See Resources Ltd. v. Robertson, 35 F.3d 1300, 1304 (9<sup>th</sup> Cir. 1993). Agency action in this context is construed broadly. See Conner v. Burford, 848 F.2d 1441 (9<sup>th</sup> Cir. 1988), cert. denied 489 U.S. 1012 (1989). In fulfilling these requirements, the ESA directs federal agencies to “use the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2). “[C]aution can only be exercised if the agency takes a look at all the possible ramifications of the agency action.” See Conner, 848 F.2d at 1453.

The NRC's issuance of a license amendment to the Atlas Corporation constitutes federal action subject to the mandates of the ESA. In authorizing storage of uranium and its byproducts at the Atlas site, the NRC must insure that the license and reclamation plan do not cause jeopardy to the Colorado squawfish and razorback sucker and do not destroy

or adversely modify designated critical habitat. The duty to prevent jeopardy to listed species and adverse modification of critical habit is an independent statutory duty of the NRC, and that duty is not satisfied by reliance on the Service's July 1998 BO and the unsupported reasonable and prudent alternative described therein.

In the July 1998 BO, the FWS approved a Reasonable and Prudent Alternative ("RPA") requiring cleanup of the groundwater over a 7-10 year period and an incidental take statement authorizing unspecified numbers of takings of the Colorado squawfish and the razorback sucker for up to ten years. These provisions are invalid as a matter of law because they allow takings of the Colorado squawfish and razorback sucker at levels that will jeopardize the fish. Neither an RPA nor an incidental take statement may lawfully authorize takings of fish at levels that constitute jeopardy. See 16 U.S.C. §1536(b)(3)(A) (Secretary shall suggest reasonable and prudent alternatives "which he believes do not violate subsection (a)(2) of this section."); 16 U.S.C. § 1536(b)(4) (incidental take statement is only permissible if the agency action will not cause jeopardy). In addition, the RPA arbitrarily assumes, without any factual or scientific basis, that a groundwater remediation plan protective of the fish can and will be implemented. Accordingly, the NRC cannot rely upon the RPA or the incidental take statement to satisfy its duty to prevent jeopardy.

***3. The NRC's Approval of a Groundwater Remediation Plan Would Violate Section 7(a)(2) of the Endangered Species Act and NEPA***

The NRC has indicated recently that it may include a groundwater remediation plan in its Final EIS and as a condition of the Atlas license amendment. See Jan. 13, 1998 NRC Letter (Exh. A). Because such a plan has never before been part of the

licensing process or put forward for any environmental analysis, it constitutes significant new information that must be considered under the ESA and NEPA prior to final approval.

The ESA requires that all federal agencies “shall, in consultation with and with the assistance of the [FWS], insure that any action” carried out by those agencies “is not likely to jeopardize the continued existence of any endangered or threatened species.” 16 U.S.C. § 1536(a)(2). Reinitiation of consultation is required “[i]f the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion.” 50 C.F.R. § 402.16.

Similarly, the National Environmental Policy Act (“NEPA”) regulations require that the NRC prepare a supplement to a draft EIS when there are “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii). Supplementation is required so that “the agency has the best possible information to make any necessary substantive changes in its decision regarding the proposal.” *Id.*

In this case, both the BO and the draft EIS are premised on the assumption that no groundwater remediation plan has been proposed and that, in fact, groundwater cleanup will be considered as part of a separate, later license amendment. If those assumptions have changed and the NRC is planning to include a groundwater remediation component in its final EIS and license amendment, both the ESA and NEPA require additional analysis of whether the proposed groundwater plan will protect fish or result in additional, unforeseen environmental impacts. Under the well-established principles that

the government must look before it leaps, the NRC may not simply include a groundwater plan in its final decision without an opportunity for analysis and public comment.

***4. The NRC's Approval of the License Amendment Would Violate Section 9(a)(1)(B) which Flatly Prohibits Any "Takings" of Endangered Species***

Section 9(a)(1)(B) of the ESA provides that "it is unlawful for any person subject to the jurisdiction of the United States to take any such species within the United States." 16 U.S.C. § 1538(a)(1)(B). "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). "Harm" has been defined as "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3. This general prohibition against taking individual members of a listed species may be excused only by an incidental take statement issued with a valid biological opinion, 16 U.S.C. § 1539.

As indicated by the FWS, the Materials License issued by the NRC is resulting in direct take of the squawfish and razorback sucker. By permitting substantial degradation of the Colorado River, the Materials License is also causing habitat modification sufficient to kill or injure the fish and to impair essential behavioral patterns. According to the FWS, the proposed reclamation plan and license amendment will not halt these effects to the fish. Of particular concern are direct impacts to young squawfish, which during a critical life stage rely heavily on the stretch of river at and below the Atlas site.

The impacts of the leachate from the site clearly kill, wound, harm, and harass the fish and therefore constitute a “take” as defined by the ESA. See 16 U.S.C. § 1532(19), 50 C.F.R. § 17.3.

A federal agency’s reliance on a Biological Opinion must be “reasonable” to satisfy the Act’s substantive obligations. See Resources Ltd. v. Robertson, 35 F.3d 1300, 1304 (9<sup>th</sup> Cir. 1993). Because the contamination under the existing license, even with the proposed amendments, results in jeopardy to the fish as well as adverse modification of critical habitat, the FWS cannot lawfully issue an incident take statement that permits the same level of take that presently is occurring. In addition, the Service’s conclusion that this level of incidental take is permissible is arbitrary and capricious, and is not based on the best available scientific and commercial data. Thus, the NRC’s reliance on the incidental take statement is not reasonable, and reliance upon it cannot excuse the Commission’s actions or insulate the Commission from liability under section 9(a)(1)(B).

***5. The NRC’s Approval of the License Amendment Prior to Completion of Consultation on a Groundwater Plan Would Result in an Irreversible and Irretrievable Commitment of Resources in Violation of Section 7(d)***

In the July 1998 BO, the Service specifically found that the as-yet-unformulated groundwater corrective action plan is an interrelated action with, and an indirect effect of, the remediation plan on which consultation was initiated. Under the regulations implementing the ESA, interrelated actions and indirect effects must be considered in the consultation. See 50 C.F.R. § 402.02. Thus, consultation on the proposed remediation process cannot be completed until such time as the groundwater corrective action plan is proposed and fully evaluated.

ESA section 7(d) provides that “[a]fter initiation of consultation . . . the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.” 16 U.S.C. § 1536(d); see Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1056 (9<sup>th</sup> Cir. 1994). The NRC’s plan to approve capping in place prior to completing consultation on the entire remediation plan constitutes an irreversible and irretrievable commitment of resources (1) because as currently proposed it violates § 7(a)(2) and (2) because the license amendment would effectively preclude other reclamation alternatives. Capping the pile in place would involve a per se irreversible and irretrievable commitment of resources. According to the draft EIS, the capping plan would cost both Atlas and the United States millions of dollars and would result in the additional contamination of more than a million tons of capping materials. Removal of the contaminated materials at a later date would likely cost many more millions of dollars. This is precisely the sort of commitment of resources that would make alternatives based on moving the pile or redesigning the cap virtually impossible; therefore, this is precisely the sort of commitment of resources that section 7(d) prohibits without a full understanding and analysis of the consequences of that commitment. The Service’s apparent conclusion that a separate consultation could be initiated with respect to the groundwater corrective action plan is in violation of its own regulations and section 7(d).

To the extent that the NRC contends it is engaging in “incremental step” consultation with respect to the remediation plan, its actions also violate the ESA’s implementing regulations. An agency may proceed with or authorize incremental steps in an action under consultation only if:

- (1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2) [prohibiting jeopardy];
- (2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;
- (3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;
- (4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and
- (5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

50 C.F.R. § 402.14(k).

In this case, the first step of the clean-up program (capping the pile) will cause jeopardy to the squawfish and razorback sucker, and the capping will constitute an irreversible and irretrievable commitment of resources that will violate section 7(d). Furthermore, because the feasibility of any groundwater corrective action plan is unknown, there is no reasonable likelihood that the entire action will not violate Section 7(a)(2). Consequently, the incremental step regulations may not be used to allow this action to go forward without completion of consultation.

**C. The Grand Canyon Trust Has a Right to Intervene in the Licensing Action at this Time**

The Grand Canyon Trust’s petition should be considered timely even though it is being filed several years after the initial notice of the licensing action. First, new information – including formal legal documents and scientific studies – warrant the

Grand Canyon Trust's intervention. The July 1998 BO, which became available well after the original notice was published in 1994, indicates that the discharges from the pile are causing jeopardy to the fish and that the proposed license amendment will not remove jeopardy. Second, the original notice of the licensing action in this case was insufficient. This licensing proceeding, which by the NRC's own admission now includes issues of groundwater cleanup, is significantly broader than the original notice indicated. Third, an inflexible view of intervention deadlines under the NRC regulations would deny the Grand Canyon Trust its hearing rights under the Atomic Energy Act and frustrate the purposes of the ESA.

Although the Trust's hearing request and petition should be considered timely, even if deemed untimely it should nevertheless be granted. The Trust easily satisfies the standards for late intervention because any delay in filing its requests was excusable, and because the granting of these requests will not result in undue prejudice or undue injury to any other participant in the proceeding.

***1. The Availability of New Information Concerning Violations of the ESA Entitles the Trust to Intervene in this Action***

The availability of new documents critical to one's claims is sufficient grounds for the intervention of a new party in a licensing proceeding. See In the Matter of Cincinnati Gas and Electric Co., (William H. Zimmer Nuclear Station), 11 NRC 570, 1980 NRC LEXIS 105, \*10 (1980). "The availability of new information appearing in previously unavailable documents has long been recognized as a valid reason for accepting new contentions or for admitting new intervenors." Id.

The Grand Canyon Trust's areas of concern are based on information derived from the Service's July 1998 BO. The BO made critical findings of law and fact that support the Trust's contention that the proposed licensing action would violate the ESA. Specifically, the BO determined that the NRC has failed to prevent "jeopardy" to the Colorado squawfish and razorback sucker and adverse modification of critical habitat and that the proposed license amendment would continue to jeopardize the fish for up to ten years. In addition, the July 1998 BO determined that a groundwater cleanup plan protective of endangered fish would be a necessary component of the proposed license amendment. Thus, the July 1998 BO was a necessary precursor to the Trust's claim that the NRC's failure to implement a groundwater cleanup as part of the proposed license amendment would violate the ESA.

***2. The Original Notice Was Insufficient Because It Did Not  
Cover Groundwater Cleanup***

The July 1998 BO made clear that groundwater issues and the protection of endangered species are an integral part of this licensing action. However, the NRC has never provided public notice of these issues or provided any opportunity for a hearing even though they arose more than four years after the notice of licensing action and opportunity for a hearing. The Grand Canyon Trust could not reasonably have anticipated that the NRC's failure to include groundwater cleanup in the licensing action and failure to protect endangered species at the site would violate the ESA at the time of the original notice. Indeed, it would have been nearly impossible to make such allegations before the July 1998 BO was issued.

The Trust has recently learned that the NRC intends to address groundwater cleanup issues in the proposed license amendment. The NRC indicated in a recent letter that it intends to respond to the FWS' findings in the July 1998 BO by incorporating groundwater issues in the Final EIS and has commissioned a new study to investigate groundwater issues that are critical to the Colorado squawfish and razorback sucker. See Exhibit A at 1. In addition, the NRC apparently plans to condition issuance of the license amendment on an expedited groundwater cleanup.<sup>4</sup> See id. at 2-3. If a license amendment concerning groundwater cleanup becomes part of the licensing action, the Trust is entitled to notice in the Federal Register and an opportunity for a hearing. See 42 U.S.C. § 2239 (a)(2) (Commission shall publish notice of any amendments proposed to be issued and provide an opportunity for a hearing if significant hazards are involved.)

The Grand Canyon Trust has an interest in the effects of any reclamation plan on the endangered fish, and, as is now clear, a license amendment approving reclamation of the site will include a groundwater cleanup plan. Although the NRC's draft EIS did not address groundwater cleanup issues, the forthcoming final EIS apparently will include analysis of groundwater cleanup. Because the original notice did not cover groundwater cleanup, and because the implementation of an adequate groundwater cleanup plan is the

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<sup>4</sup> According to NRC chair Shirley Ann Jackson,

If NRC issues a license amendment to Atlas, the staff plans to require by license condition that Atlas revise the CAP [groundwater corrective action plan] and expedite groundwater cleanup in conformance with timeframes identified in the FWS opinion. This would include accelerated dewatering of the tailings, groundwater cleanup within 7 years of approval of a revised CAP, and monitoring of the groundwater and the Colorado River.

See Exhibit A at 2-3 (emphasis added). Thus, NRC has indicated for the first time, that it will condition any license amendment on implementation of a new groundwater corrective action plan.

basis of the Trust's concerns under the ESA, the Trust is entitled to intervene in the action at this time.

***3. An Inflexible View of Timeliness in this Action Based on NRC Implementing Regulations Would Unfairly Deny the Grand Canyon Trust its Opportunity to be Heard***

Section 2239 of the Atomic Energy Act ("AEA") provides a broad right for persons affected by NRC licensing proceedings to intervene and receive an opportunity to be heard. See 42 U.S.C. § 2239. The NRC regulations implementing section 2239 nevertheless impose strict time limits on hearing requests, requiring in most cases that an interested party request a hearing within 30 days of publication of notice of a licensing action in the Federal Register. See 10 C.F.R. § 2.1205(c) (informal Subpart L proceedings); see also 10 C.F.R. § 2.714, 2.102(d)(3) (formal Subpart G proceedings).

The court of appeals has expressly held that the NRC may not deprive an interested person of his or her section 2239 hearing rights by refusing to afford a hearing on a material – or outcome determinative – issue. See Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1451 (D.C. Cir. 1984). An individual's right to be heard includes the right to a hearing on issues based on new information even when those issues arise *after* the initial notice of an opportunity for a hearing. See Nuclear Info. & Resource Serv. v. NRC, 918 F.2d 189, 197 (D.C. Cir. 1990).

The NRC itself has recognized that its procedural rules sometimes create problems for litigants because the strict timing requirements could be read to bar valid claims that arise after the notice period. This is particularly problematic with regard to environmental matters, which often are fully developed and explored some time after a

licensing proceeding begins. For example, NRC decisions have recognized that intervenors who lack critical information at the initial notice stage of a licensing proceeding may be placed in an untenable “Catch 22” situation by a literal interpretation of the NRC’s procedural rules. See In the Matter of Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency, (Shearon Harris Nuclear Power Plant) 16 NRC 2069, 1982 LEXIS 79 (1982); In the Matter of Duke Power Co., (Catawba Nuclear Station), 16 NRC 460, 1982 NRC LEXIS 105 (1982) (“Catawba”). Under a strict reading of the timeliness requirements, a would-be intervenor may be placed in a procedural quandary.

In Catawba, the NRC described this procedural quandary in the context of a section 2.714 intervention proceeding.<sup>5</sup> In that case, a citizen group had intervened in a licensing proceeding and sought to file new contentions after the deadline based upon information in an emergency plan and an EIS which were issued after the scheduled date for contentions to be filed. See id. at \*18. In criticizing the NRC regulations, the court observed that, “A petitioner can scarcely be expected to forecast the content of documents that it has not examined and cannot examine because they have not yet surfaced.” Id. at \*17-18. The Catawba case made clear that a rejection of a valid contention as untimely under such circumstances would be unlawful because it would violate a petitioner’s hearing rights under section 2239 of the AEA. In a similar case, Carolina Power, the court cited Catawba and held that new claims must be considered

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<sup>5</sup> Section 2.714 requires intervenors to file contentions at least 15 days before a special prehearing conference. See 10 C.F.R. § 2.714; Catawba, 1982 NRC LEXIS 105 at \*13.

timely *as a matter of law* if they are based on new information. See Carolina Power, 16 NRC 2029, 1982 NRC LEXIS 79 at \*6.

The facts here are analogous to the factual circumstances in Catawba and Carolina Power. Although the Grand Canyon Trust seeks to intervene under section 2.1205, not section 2.714, the procedural dilemma is the same.<sup>6</sup> In section 2.1205 proceedings, an intervenor generally cannot add new claims after the deadline except in the discretion of the presiding officer. See In the Matter of Babcock and Wilcox Co., (Pennsylvania Nuclear Services Operation), 41 NRC 1, 1995 NRC LEXIS 1, \*9 (holding that intervenors may not present concerns which fall outside of the areas of concern set out in the original request for hearing except in the discretion of the presiding officer). Thus, section 2.1205, like section 2.714, may force litigants to set forth legal claims before the requisite legal documents are available.<sup>7</sup> In either case, when the document forming the basis of a person's claim becomes available after the initial notice, section 2239 hearing rights require a reading of the rules to permit intervention. See Carolina Power, 16 NRC 2069, 1982 LEXIS 79.; Catawba, 16 NRC 460, 1982 NRC LEXIS 105. See also Nuclear Info. & Resource Serv., 918 F.2d at 197; Union of Concerned Scientists, 735 F.2d at 1451.

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<sup>6</sup> In the context of section 2.1205 hearings, intervenors are required to advance concerns at the very outset of the intervention, even earlier than in §2.714 proceedings. See In the Matter of Babcock and Wilcox, (Apollo, Pennsylvania facility), 36 NRC 149, 1992 LEXIS 43, \*2-3 (1992). In section 2.714 hearings an intervenor can amend or add new contentions until 15 days before a hearing as a matter of right. See 10 C.F.R. § 2.714.

<sup>7</sup> A late intervention is treated much like a late contention when it involves claims based upon new information not previously available. See In the Matter of Cincinnati Gas and Electric Co., (William H. Zimmer Nuclear Station), 11 NRC 570, 1980 NRC LEXIS 105, \*10 (1980).

Before the issuance of the BO, the Grand Canyon Trust did not have the factual basis for its claims under the ESA. The ESA concerns advanced by the Grand Canyon Trust clearly constitute material issues because, if true, they would legally prevent the NRC from moving forward with licensing approval. Moreover, the final EIS is expected to raise new issues of compliance with the ESA related to groundwater cleanup not within the original notice of the license amendment. The Grand Canyon Trust has acted promptly on the basis of new information in the BO in light of the complex issues of law and fact and the seriousness of the violations. As Carolina Power and Catawba indicate, the Grand Canyon Trust's request for a hearing and petition to intervene, though tendered after the original notice period, are timely as a matter of law. Denial of intervention in this case would "render nugatory" the Grand Canyon Trust's section 2239 hearing rights. Catawba, 16 NRC 460, 1982 NRC LEXIS 105 at \*21.

#### ***4. Denial of Intervention Would Frustrate the Purposes of the ESA***

Congress in passing the ESA intended "beyond a doubt" to afford endangered species "the highest of priorities." Tennessee Valley Auth. v. Hill, 437 U.S. 153, 180 (1978). As the Supreme Court has found, "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." Id. at 184. To that end, Congress gave citizens the right to bring suits as "private attorneys general" directly against violators. See 16 U.S.C. § 1540(g)(1)(A); Bennett v. Spear, 137 L.Ed. at 297.

When an ESA violation is shown, injunctive relief is appropriate. See Strahan v. Coxe, 127 F.3d , 155, 171 (1<sup>st</sup> Cir. 1997) cert. denied, 119 S.Ct. 81 (1998). The

irreparable nature of the injury to protected endangered species is presumed. See Sierra Club v. Marsh, 816 F.2d 1376, 1383 (9<sup>th</sup> Cir. 1987). Only after a federal agency complies with the ESA can any activity that may affect the protected species go forward. See Pacific Rivers Council, 30 F.3d at 1056-57.

The ESA clearly contemplates that citizen organizations such as the Grand Canyon Trust will be able to challenge agency action deemed to be in violation of the ESA. The NRC regulations should not be read unreasonably to limit the enforcement of the ESA through citizen suits. To hold that the Grand Canyon Trust's petition is untimely in the circumstances here would place an undue burden on the bringing of ESA claims and would defeat the purpose of ESA to conserve endangered species.<sup>8</sup> Given the complex issues involved, the interactions of numerous statutes and federal agencies, and the fact that these claims reach beyond the Atomic Energy Act, the Grand Canyon Trust's filing of this action less than 6 months after the July 1998 BO clearly is reasonable.

***5. Even if the Grand Canyon Trust's Petition is Deemed Untimely, Intervention is Appropriate Under the Circumstances***

Although the NRC should accept this petition as timely, even if the Grand Canyon Trust's petition were deemed untimely, discretionary intervention is appropriate in this case. Any delay in filing these requests was excusable. See discussion, supra sections C.1. to C.4. Moreover, the grant of the request for a hearing and the petition for leave to intervene will not result in undue prejudice or undue injury to any other participant in the

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<sup>8</sup> In an existing ESA lawsuit brought by the Grand Canyon Trust against the NRC, the NRC has taken the position that ESA claims may not be brought in District Court, but rather must be brought first in an administrative petition before the NRC. To deny review of the Grand Canyon Trust's administrative petition would thwart enforcement of the ESA.

proceeding. In addition, the petitioners will significantly contribute to substantial issues in the proceeding, assist in the formation of a sound administration record, and advance interests and concerns not represented by any other party in the proceeding.

As set forth in the discussion in sections C.1. to C.4. supra, the Grand Canyon Trust has good cause for filing at this time, and any delay is excusable. The availability of the July 1998 BO was critical to the Grand Canyon Trust's case. As described above, the Grand Canyon Trust's delay is also excusable because the NRC's April 1994 notice was deficient. Although the NRC now acknowledges that endangered species concerns and groundwater cleanup are an integral part of this licensing action, the NRC did not cover issues related to endangered species or groundwater in its April 1994 notice.

The Grand Canyon Trust's intervention in this matter would not cause undue prejudice or undue delay to any party in the proceeding. In NRC licensing cases, environmental hearings generally occur after a final EIS is issued. See, e.g. In the Matter of Philadelphia Electric Co., (Limerick Generating Station), 1984 NRC LEXIS 37 (1984). In this case, no license has been issued; no environmental hearings have been held; a final EIS is still forthcoming. Moreover, the NRC and Atlas have been on notice of the ESA violations pursuant to two sixty-day notice letters since November and are aware of the Trust's claims. Although holding environmental hearings necessarily will delay the licensing action, such delay is not "undue" because it is necessarily contemplated in the right to a hearing under the Atomic Energy Act section 2239.<sup>9</sup>

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<sup>9</sup> If the Grand Canyon Trust were attempting to intervene after environmental hearings had been held or after a license amendment had been issued, "undue delay" would be a more salient issue.

In weighing discretionary intervention under the Act, an important factor is that the public interest, including interest in the protection of endangered species and in a cleanup of the Atlas site that meets health and environmental standards, would be well-served by the Grand Canyon Trust's intervention at this time. The Grand Canyon Trust will significantly assist in the development of a sound administrative record by fully addressing the issue of a groundwater cleanup adequate to protect endangered fish. The Grand Canyon Trust is prepared to offer expert testimony in the areas of groundwater cleanup, endangered fish, and hydrology to support its statement of concerns. Many of these areas are outside the normal expertise of the NRC.<sup>10</sup>

Also an important consideration is that the Grand Canyon Trust's participation in these issues can only meaningfully occur in the context of intervention in this licensing action. Although petitions for leave to intervene and requests for a hearing deemed untimely are generally referred for disposition as section 2.206 petitions, this process may be inadequate to address the Grand Canyon Trust's concerns because the NRC takes the position that denial of such petitions are not subject to judicial review. See, e.g., Massachusetts PIRG v. NRC, 852 F.2d 9, 10 (1<sup>st</sup> Cir. 1988) (denial of § 2.206 petition not reviewable); Safe Energy Coalition v. NRC, 866 F.2d 1473, 1476 (D.C. Cir. 1989) (presumption that § 2.206 petition denials are not reviewable). A denial of intervention would effectively deny the Grand Canyon Trust its right to administrative review of these issues even though the issues reasonably could not have been raised within 30 days of the

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<sup>10</sup> The FWS, which does have expertise in endangered species, is not a party to the proceeding. In any event, the FWS' July 1998 BO suggests that the FWS and its BO do not represent the Grand Canyon Trust's interests. The Grand Canyon Trust challenges the FWS's conclusions in the BO and alleges that the NRC and the FWS both are in violation of the ESA.

1994 notice of licensing action. See, e.g., Nuclear Info. & Resource Serv., 918 F.2d at 195 (holding that the availability of § 2.206 petitions does not meet section 2239(a)'s requirement of a right to a hearing on material issues).

## **VII. Conclusion**

The issuance of the July 1998 BO and the inclusion of groundwater issues in this proceeding compel a conclusion that the Grand Canyon Trust should be permitted to intervene in this action now. This is not a case where the Grand Canyon Trust has slept on its rights. Rather, the Trust has acted promptly to secure compliance with the ESA as the necessary information has become available. The NRC must not move forward with the proposed licensing action until after the Grand Canyon Trust has received an opportunity for a hearing on its concerns that the NRC action would violate the Endangered Species Act. In affording endangered species "the highest of priorities" the ESA demands no less.

Dated this 27<sup>th</sup> day of January, 1999.

Respectfully submitted,

Marie A. Kirk

Susan Daggett  
Robert B. Wiygul  
Marie Kirk  
Earthjustice Legal Defense Fund, Inc.  
1631 Glenarm Place, Suite 300  
Denver, CO 80202  
Telephone: (303) 623-9466

Cullen Battle by MK

Cullen Battle, # A0246  
Fabian & Clendenin  
215 S. State Street, Suite 1200  
Salt Lake City, UT 84111  
Telephone: (801) 531-8900

Gabrielle Sigel by MK

Gabrielle Sigel  
Jennifer A. Burke  
Jenner & Block  
One IBM Plaza  
330 N. Wabash  
Chicago, IL 60611  
Telephone: (312) 222-9350

Attorneys for  
Grand Canyon Trust, et al.

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USHRC

CERTIFICATE OF SERVICE

'99 FEB -1 P3:30

I certify that on the <sup>27<sup>th</sup></sup> day of January, 1999, I served a true and accurate copy of REQUEST FOR HEARING AND PETITION FOR LEAVE TO INTERVENE upon the following individuals by first class mail.

OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATIONS STAFF

U.S. Nuclear Regulatory Commission  
Executive Director for Operations  
One White Flint North Building  
11555 Rockville Pike  
Rockville, MD 20852-2738

Atlas Corporation  
370 Seventeenth St., Suite 3150  
Denver, CO, 80202

Anthony J. Thompson  
David C. Lashway  
Frederick S. Phillips  
Shaw, Pittman, Potts & Trowbridge  
2300 N St., N.W.  
Washington, D.C. 20037

Paul Boudreaux  
United States Department of Justice  
Environmental Division  
601 Pennsylvania Avenue, N.W.  
Room 5000  
Washington, D.C. 20004

Marjorie Nordlinger  
United States Nuclear Regulatory Commission  
Mailstop 015B18  
Washington, D.C. 20555

*Marie C. King*

cc:

Honorable Bruce Babbitt  
Secretary of the Interior  
18th & C Street, N.W.  
Washington, D.C. 20240

Joseph J. Holonich  
Chief, Uranium Recovery Branch  
Division of Waste Management  
Office of Nuclear Material Safety and Safeguards  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Mr. Robert M. Baker  
Regional Director  
National Park Service  
U.S. Department of Interior  
12795 Alameda Parkway  
P.O. Box 25287  
Denver, CO 80225-0287

Gina Guy  
Steven M. Hoffman  
Office of Regional Solicitor  
U.S. Department of Interior  
755 Parfet, # 151  
Lakewood, CO 80215

Ralph Morganweck  
Regional Director  
Region 6  
Box 25486  
Denver, CO 80225

William J. Sinclair  
Director  
Division of Radiation Control  
Department of Environmental Quality  
State of Utah  
168 North 1950 West  
P.O. Box 144850  
Salt Lake City, Utah 84114-4850

Kelly Janosec  
Grand Canyon Trust  
2601 North Fort Valley Road  
Flagstaff, AZ 86001



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

January 13, 1999

The Honorable George Miller  
United States House of Representatives  
Washington, D.C. 20515

Dear Congressman Miller:

I am responding to your letter dated November 23, 1998. In your letter, you requested that the U.S. Nuclear Regulatory Commission (NRC) refrain from "Rushing to the final approval" of the "Final Environmental Impact Statement (FEIS) Related to the Reclamation of the Uranium Mill Tailings at the Atlas Site, Moab, Utah."

When NRC agreed to reconsider its July 1993 decision to approve the Atlas proposal to revise its onsite reclamation plan, proponents of moving the tailings, along with the Governor of Utah, the two United States Senators from Utah, and other members of the public, requested that NRC provide a detailed review to establish the scientific basis for its decision. That review is comprised of two separate evaluations: one, to determine if the Atlas proposal for onsite reclamation meets the applicable NRC requirements (called a safety review); and, the other, to assess the environmental impacts from the proposal (called an environmental review and described in the FEIS). These comprehensive evaluations were initiated to determine whether the Atlas proposal for onsite reclamation was acceptable.

NRC is not rushing into an approval of the FEIS. We have been working on this detailed evaluation for nearly 5 years. Even with this extensive and lengthy analysis, NRC, as a regulatory agency, has ensured that any new information it has received throughout this process has been appropriately reviewed and considered in its regulatory decisions. For example, preparation of the FEIS was delayed while staff consulted with the U.S. Fish and Wildlife Service (FWS), in compliance with the Endangered Species Act. FWS issued its Final Biological Opinion (FBO) in July 1998. As that was the last required piece of information, NRC could have published the FEIS soon thereafter. However, because the analysis done in support of the FBO reached a different conclusion than NRC's analysis in the draft EIS, i.e., that the Atlas proposed reclamation plan would be less effective in reducing impacts to the ground water than what NRC had determined, NRC has delayed the issuance of the FEIS to further analyze, with contractor assistance, the expected performance of the tailings pile, and the impact of that performance on ground water, after reclamation.

Rather than discount the work relied on by the FWS and base the FEIS findings on NRC's own earlier analysis, NRC commissioned an additional analysis to ensure that the NRC decision is based on the best scientific information available. NRC specifically set up the contract in order to ensure the independence of the contractor from NRC influence. NRC has recently received the results of that analysis and, based on those results, is about to finalize the FEIS, and will provide you with a copy when it is issued.

EXHIBIT A

It appears that your request for NRC to refrain from approving the FEIS is based on two major concerns which I would like to address. The first concern you raise in your letter is that the tailings "... are leaking alpha radioactive material into the Colorado River at levels 1,300 times above the EPA Maximum Concentration Limit." This concern was raised in an earlier letter from you. The attachment to my July 2, 1997, response, a copy of which is enclosed, detailed the facts about the low level of radioactive material in the Colorado River, and in particular the minimal influence of the tailings seepage on the ambient levels in the river. Your second concern focuses on your perception that the Atlas proposal could endanger the drinking water of millions of people. With respect to this concern, it is noteworthy that the Colorado River is used currently as a source of safe drinking water by millions of people. The contribution by the tailings pile to the concentration of various constituents in Colorado River water only represents a small fraction of the actual concentrations of those constituents in the river. In addition, the reclamation plan proposed by Atlas, by all accounts, will reduce significantly the seepage from the tailings pile into the Colorado River.

The quality of the drinking water from the Colorado River was recently confirmed by the Southern Nevada Water Authority. A spokesperson for that organization, Ms. Kay Brothers, stated in an interview that the tailings have been located at the site for the past 40 years, and there is no radiation detected at levels to cause a problem with the drinking water supply. She also stated that the Water Authority routinely samples the drinking water, and has seen no change in the water quality in the past 10 to 20 years.

Furthermore, William P. Yellowtail, the U.S. Environmental Protection Agency Regional Administrator in Denver, Colorado, has indicated that based on available information, he does not believe the proposal for onsite reclamation would impact the potability of the Colorado River. In an April 10, 1998, letter from Mr. Yellowtail to Mr. James Thuesen of Moab, Mr. Yellowtail states the following:

"On-site reclamation/stabilization does not pose a threat to the Colorado River in terms of the river's capacity to serve as a water supply for the production of drinking water."

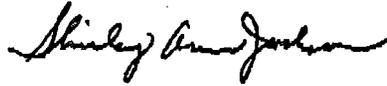
Also, in that letter, Mr. Yellowtail states that even if the site were reclaimed under Superfund, onsite reclamation "... would be equally, if not more, likely." A copy of Mr. Yellowtail's letter is enclosed for your information.

In addition, you note in your letter that the FWS has required in the FBO that a groundwater correction action plan (CAP) must be developed that would reduce discharges to the river to appropriate levels. Although there is a CAP in place at the Atlas site, the NRC staff previously has notified the licensee that it needs to be revised. If NRC issues a license amendment to Atlas, the staff plans to require by license condition that Atlas revise the CAP and expedite groundwater cleanup in conformance with timeframes identified in the FWS opinion. This would include accelerated dewatering of the tailings, groundwater cleanup within 7 years of

approval of a revised CAP, and monitoring of the groundwater and the Colorado River. The NRC is confident that its planned course of action will be a solution that is protective of the humans and wildlife that depend on the river.

I trust this letter responds to your concerns.

Sincerely,



Shirley Ann Jackson

Enclosures:

1. Ltr to Congressman Miller dtd 7/2/97
2. Ltr dtd 4/10/98 from EPA to Mr. Thuesen

cc: Representative Bob Filner