UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Presiding Officer
Frederick J. Shon, Special Assistant

In the Matter of:	)	Docket No. 40-3453-MLA-3
ATLAS CORPORATION	)	
(Moab, Utah)	)	ASLBP No. 99-761-04-MLA
	)	
	)	May 28, 1999

GRAND CANYON TRUST'S ANSWERS TO QUESTIONS PRESENTED IN THE PRESIDING OFFICER'S MAY 14, 1999 ORDER

Grand Canyon Trust, et al., respectfully submits the following answers to questions presented to Petitioners by the Presiding Officer in the Order of May 14, 1999.

Petitioners:

Question 12

Assuming that the Commission's April 7, 1994 notice of opportunity for hearing included within its scope groundwater remediation matters and the Petitioners had notice of the contents of the July 1998 final biological opinion of the United States Fish and Wildlife Service, why is the position in the NRC Staff's response (at 12, 15) incorrect that the latest excusable time limit for filing the Petitioners' late-filed intervention petition in this materials license amendment action was sometime immediately after the issuance of the final biological opinion and not six months later?

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Even assuming that the April 1994 notice was broad enough to include groundwater remediation, as we must under the terms of the question, it is clear that under the circumstances of this case the Grand Canyon Trust had good cause to file its intervention petition in January 1999, rather than in earlier in 1998. See generally Trust's Reply Brief. Petitioners had good cause for this delay, even assuming that the April 7, 1994 notice included groundwater, for the following reasons: (1) after the issuance of the BO the NRC continued to claim publicly that groundwater cleanup would not be addressed in this licensing action; (2) the Trust needed several months time to sort through the complex issues of law and fact, including the interactions of numerous parties and jurisdictional issues; and (3) the public interest as well as the intent of Congress as expressed in the ESA supports the Trust's intervention.

1. Even if the April 1994 notice included groundwater remediation, the NRC continued to state in public and in official documents that groundwater would be addressed in a separate licensing action.

The Grand Canyon Trust's interest in this proceeding is and always has been cleanup of the groundwater and the protection of endangered fish. Even assuming that groundwater remediation was included within the NRC's original notice of the proposed license amendment, the NRC consistently and repeatedly denied over the years that the Atlas site was causing serious impacts to the groundwater and that groundwater needed to be addressed in this license amendment. See generally Trust's Reply Brief at 7-9 and accompanying Exhibits. Although conceivable that the NRC was trying to sandbag the public or otherwise obscure the nature of the licensing action in order to limit public involvement, the Grand Canyon Trust has never until recently had reason to disbelieve the NRC's assertions that groundwater remediation was not going to be considered as part of this proposed license amendment.

When the BO was published in July 1998, the NRC gave no indication that as a result of the BO, it would consider groundwater as part of the instant licensing action, and there was no reason for the Trust to immediately assume that groundwater remediation would be addressed based on the BO. First, the NRC has independent decision-making authority under the ESA and may have chosen to reject the opinion and recommendations of the FWS. See Resources Ltd. v. Robertson, 35 F.3d 1300, 1304 (9th Cir. 1993). In that case, the appropriate venue to file any claim relating to groundwater was clearly not in this proceeding.

Moreover, the NRC confirmed for the umpteenth time at a public meeting in Moab on September 16, 1998 – 6 weeks *after* the BO was issued -- that groundwater would be dealt with in a separate licensing action. See Exhibit A. The publication of the BO, therefore, was not sufficient to put the Trust on notice that it should intervene in *this* licensing action to address groundwater cleanup as opposed to taking some other action. This is true even if the original notice were somehow read broadly enough to encompass groundwater cleanup.

Indeed, the NRC made it known only in January that this license amendment would include groundwater cleanup provisions. First, in a January 13, 1999 letter from the NRC to Congressman George Miller, the NRC indicated that it planned to condition the license amendment on new requirements related to groundwater cleanup. See Exhibit J to Trust's Reply Brief. Second, the NRC sent a letter on March 2, 1999 to Atlas detailing the new license amendments that would be issued as part of this proceeding.[1] See Exhibit K to Trust's Reply Brief.

Given the NRC's insistence that groundwater would be handled in a separate licensing action, it is hardly reasonable to expect that the Grand Canyon Trust would intervene in *this*

proceeding to address groundwater cleanup. Had the NRC, as a result of the BO, informed the public that groundwater would become a part of this licensing action, published notice in the Federal Register, and provided an opportunity for a hearing, the Trust would have no excuse for its failure to intervene. However, in this case, the NRC never provided public notice about the BO or the groundwater remediation license amendments and continued to assert that groundwater would not be addressed in this licensing proceeding.[2] Under these circumstances it is unreasonable to expect that the Trust should have intervened in this licensing action within weeks or even months after the BO was issued. In fact, once the Trust learned that the NRC planned to include groundwater amendments in this licensing action, it intervened within days.

2. Six months was a reasonable time for the Trust to sort through the complex issues of law and fact, including the conflicting positions of the NRC and multi-faceted jurisdictional issues.

The Grand Canyon Trust's primary goal is to ensure a groundwater cleanup at the Atlas site that protects endangered fish. The July 1998 BO was the first document to fully consider the impacts of degraded groundwater and surface water at the site on endangered fish and to explain that the severity of those harms rose to the level of "jeopardy."[3] Since the publication of the final BO, the Trust has made every effort to utilize the appropriate procedures to enforce the ESA.

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[1] Still, the NRC has continued to claim as recently as this intervention proceeding that groundwater is not a part of this licensing action, which simply further confuses the question. See NRC Staff's Response Brief at 2, 6, 9 n. 4, 13 n. 7.

[2] It should be noted that while the Grand Canyon Trust had actual notice that the BO was published because of its long-time interest and close involvement in this issue, other members of the public and citizen groups interested in groundwater remediation would have had no notice – legal or actual – that the BO was issued – much less that groundwater remediation was likely to be taken up as a new issue in the licensing action.

[3] To be sure, draft versions of the BO supported the hypothesis that impacts to the fish might be significant; however, those drafts were roundly criticized by Atlas and the NRC as insufficiently supported by factual information regarding the impacts of the site, and those criticisms resulted in additional studies being conducted during the early part of 1998. Before the Oak Ridge report on groundwater contamination was complete and the FWS opinion finalized, it would have been premature for the Trust to intervene in the licensing action or to bring

Soon after the BO was published, the Grand Canyon Trust filed suit in Federal District Court.[4] Grand Canyon Trust v. Babbitt, No. 2:98CV0803S (D. Utah, filed November 10, 1998) ("District Court case"). That lawsuit was filed for a couple of reasons that still hold today: first, to challenge portions of the U.S. Fish and Wildlife Service's Biological Opinion, and second, to challenge the NRC's ongoing failure to address groundwater contamination and its impacts to the fish and its resulting failure to comply with the ESA in its administration of the Atlas license. The District Court lawsuit, which is still ongoing against both the FWS and the NRC, involves thirteen separate claims for relief and has generated thousands of pages of factual and legal briefing and exhibits. Simultaneously with the filing of its Amended Complaint against the NRC, the Trust filed a 35-page Motion for Preliminary Injunction, complete with 15 exhibits. In preparing that litigation, it was necessary to research the substantive legal claims, to locate, educate, and work with experts to fully understand the factual bases for those claims, and to become familiar with a voluminous record. In the midst of it all, Atlas filed for bankruptcy, which meant that one of the most obvious defendants in the case was immune from suit and which created additional legal complications that had to be researched and understood before filing the litigation. The immensity and complexity of the District Court lawsuit alone was enough reason to take six months to prepare and file that lawsuit as well as this intervention petition.

More important, however, it was the filing of the District Court suit that clarified the jurisdictional issues by forcing the NRC to acknowledge that it planned to include groundwater

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ESA claims in other fora based on these predecisional, draft documents. There simply was not yet enough support in the record to support those claims.

[4] This suit was originally filed against the FWS to challenge portions of the BO. In order to file suit against the NRC, the Trust had to comply with the 60-day notice provisions of the ESA, see 16 U.S.C. § 1540(g), and the Trust sent its first notice letter on October 12, 1998. The Trust sent a second notice letter on November 13, 1998 to

cleanup provisions in the instant licensing proceeding. It was only *after* the Grand Canyon Trust filed its December complaint and Preliminary Injunction motion against the NRC regarding its obligation to address groundwater remediation that the NRC announced that groundwater cleanup requirements would be included in its license amendment. Then, the NRC relied on this decision in support of its argument that jurisdiction was improper in the district court under the Hobbes Act claiming that the issues of concern (groundwater remediation) were going to be included in the NRC's license amendment. See NRC's Reply Memorandum in Support of Defendant Nuclear Regulatory Commission's Motion to Dismiss ("Federal Court Reply to Motion to Dismiss") (attached as Exhibit B). This Reply Brief, filed on February 9, 1999, was the first time that the NRC took the position in federal court that the Trust's groundwater remediation claims would be addressed in this administrative licensing proceeding.[5] See id. at 13 ("The NRC intends to include these groundwater cleanup requirements as part of any license amendment it issues to Atlas, as the plaintiffs know.").

Although an intervention must be "prompt" after discovery of new information, see, e.g. In the Matter of Public Service Co. (Seabrook Station, Units 1 and 2), 18 NRC 168, 1983 NRC LEXIS 81 at *7, the NRC has never set a strict time limit proceeding for intervention in a proceeding, but rather looks at the circumstances of each case. See e.g., In the Matter of Private Fuel Storage (Independent Spent Fuel Storage Installation) 1999 NRC LEXIS 1 at *7 (looking at circumstances causing petitioner to file six weeks after discovery of new information); In the Matter of Louisiana Energy Services (Claiborne Enrichment Center) 39 NRC 205, 1994 LEXIS

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provide notice of an additional ESA claim. At the expiration of the initial 60-day period, on December 17, 1998, the Trust amended its complaint to add the NRC as a defendant and to add several ESA claims against the NRC.

[5] It is significant that in its opening brief on its Motion to Dismiss, filed on December 23, 1998, the NRC did *not* make point that groundwater remediation was going to be addressed in the license amendment or that this licensing action was the appropriate forum for resolution of the Trust's claims. That point was made only *after* the NRC Chairman wrote her January 13, 1999 letter.

15, * 18 (evaluating petitioner's circumstances); In the Matter of Florida Power & Light Co. (St. Lucie Plants, Units 1 and 2), 5 NRC 789, 1977 NRC LEXIS 141, *18-19 (examining entire situation and when petitioners became aware of the combined effects of the fossil fuel energy crisis and the Applicant's anticompetitive conduct). When notice and opportunity for a hearing are published in the Federal Register, an intervenor typically is on notice that it has 30 days to intervene, 10 C.F.R. 2.1205(k); however, it is not always as obvious, when, or at what specific point in time, recently discovered information will give rise to an opportunity to intervene. Intervenors may need time to assemble their case. See, e.g., In the Matter of Private Fuel Storage, 1999 NRC LEXIS 1 at *10-11. Petitioners may need time to assemble experts and prepare contentions. See In the Matter of Louisiana Energy Services 39 NRC 205, 1994 LEXIS 15 at *18. Petitioners may need to intervene at a later time when greater relief has become available. See In the Matter of Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), 11 NRC 570, 1980 NRC LEXIS 105 at *7. Or, petitioners may intervene after a long period of time during which a crisis or body of outside information gives rise to their cause of action. See In the Matter of Florida Power & Light Co. 1977 NRC LEXIS 141 at *17-19. At such times, the intervenor is not held to a strict timeframe judged in numbers of days, but rather the intervention petition is evaluated based on the circumstances of the case. See In the Matter of Private Fuel Storage, 1999 NRC LEXIS 1 at * 7.

That the issues of law and fact in the various proceedings related to the Atlas tailings pile, including the jurisdictional issues, are complex, is beyond dispute. In view of all the procedural and substantive issues of this case, six months was a reasonable time in which to file after the publication of the BO. In addition to the district court lawsuit, the Trust has filed a § 2.206 petition on January 11, 1999, this Petition to Intervene on January 27, 1999, and an additional §

2.206 petition on May 13, 1999. The Trust has used all of these regulatory and legal tools in order to ensure that the its procedural bases are covered and that groundwater remediation will be addressed promptly and effectively at this site. It is unreasonable to expect that the Trust could have untangled all of the issues related to these various claims "immediately," or even within one month of the publication of the BO, particularly considering the NRC's own claims that groundwater remediation would not be part of this licensing action. The Trust did not sit back and sleep on its rights for six months. Rather, the Trust was working actively to interpret the BO, understand its causes of action, and discern the appropriate parties and forums. If the NRC believed that the Trust should have filed within 30 days of the publication of the BO, it had a simple remedy: it could have provided official notice of these new issues with an explicit 30 day time limit for intervention. Instead, the NRC continued to assert long *after* the BO was issued that groundwater would be addressed in a *separate* proceeding. It is completely unreasonable to expect that the Trust knew or should have known to intervene in *this* licensing proceeding to protect endangered fish and ensure groundwater cleanup sometime "immediately" after the BO was issued, given the complicated circumstances of this case.

3. The public interest as well as the intent of the ESA support a finding of "good cause" to intervene in this case.

The NRC has always been mindful of the "important objective of permitting full public participation in the licensing process." See In the Matter of Duke Power Co. (Catawba Nuclear Station) 6 AEC 666, 675 (1973), *aff'd*, 6 AEC 811 (1973). Accordingly, the public interest is a factor in determining whether good cause exists for accepting a late-filed petition to intervene. See id.

In this case, the public interest obviously supports allowing the Grand Canyon Trust to intervene. In passing the ESA, Congress intended "beyond a doubt" to afford endangered

species "the highest of priorities." Tennessee Valley Auth. v. Hill, 437 U.S. 153, 180 (1978). "[T]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." Id. Congress has specifically vested the public with a role in enforcing protections on behalf of endangered species. See 16 U.S.C. § 1540(g). The Grand Canyon Trust seeks to protect the public's vital interest in endangered species in this action. No other petitioner in this action represents the public's interest in endangered species.

Actions under the ESA are subject to the general six-year federal statute of limitations. 28 U.S.C. § 2401(a). Considering Congress' intent to preserve and protect endangered species in passing the ESA, a 6-month delay in taking the administrative action necessary to enforce the ESA is not unreasonable. Moreover, the ESA includes a 60-day notice provision to ensure that agencies have a chance to respond to claims that they are violating the ESA. Requiring an "immediate" intervention would be contrary to the purpose behind the notice provision and would also result in frivolous intervention petitions that might be avoided if the agency were given a chance to come into compliance with the Act.

In addition, circumstances have not changed to preclude the granting of intervention and a hearing now as opposed to last fall. The proceedings were not closed at the time of intervention and still are not closed. Absolutely nothing of significance occurred in the six-month period between the publication of the BO and the filing of the Trust's petition that would have made a hearing more difficult or more onerous for the NRC Staff.[6] The NRC Staff has offered no reason at all why a hearing would be more onerous because the Trust filed its petition in January rather than a few months earlier. The NRC certainly did not take steps in the

[6] Although the licensee's declaration of bankruptcy, filed on September 22, 1998, certainly has an impact on these proceedings, that revelation weighs in favor of the Grand Canyon Trust's intervention to ensure that appropriate groundwater cleanup can be funded and implemented. The Atlas Corporation in fact has little interest now in a site in which it is seeking to abandon and for which it intends to abdicate all responsibility.

licensing action in reliance on the notion that any interested intervenors would have already intervened right after the BO was issued. Moreover, given the Trust's level of involvement in and advocacy on these issues, the NRC cannot reasonably claim that it believed the Trust had no interest in a licensing proceeding that would include groundwater remediation and protection of endangered fish or that the Trust was sleeping on its rights.

Finally, a hearing would, if anything, be more appropriate and timely now because a number of issues have crystallized in the months since the publication of the BO. First and foremost, Atlas' bankruptcy threatens to undermine the feasibility of the capping plan, let alone the ability of anyone to implement an entire reclamation plan that includes groundwater remediation and protects endangered fish. Second, the NRC has commissioned a new groundwater study, which was completed by the Center for Nuclear Waste Regulatory Analyses in late December 1998. Third, the NRC has introduced new license conditions related to groundwater. See Exhibit G of NRC Staff's Response Brief. The public interest and the complete circumstances of this case reveal that the Trust had good cause to intervene in January 1999, nearly six months after the issuance of the BO.

Question 13

In its intervention petition, the Petitioners assert (at 35) that seeking intervention in January 1999, less than six months after the issuance of the July 1998 final biological opinion, was reasonable due to the complex issues of fact and law involved. Why is this assertion credible in light of Staff Exhibit E showing that in October 1998 one of the Petitioners filed with the NRC a notice of intent to sue fully detailing that Petitioner's position in this matter on both the facts and the law?

The fact that the Grand Canyon Trust send a notice letter outlining some of the NRC's substantive ESA violations does *not* in any way support the NRC's argument that the Trust should have known its intervention in October would have been considered timely or welcome.

Quite the contrary. In fact, the purpose of the Grand Canyon Trust's ESA lawsuit in District Court, filed against the FWS on November 10, 1998 and to which the NRC was added as a defendant on December 17, 1998, was to force the NRC and the FWS to require a proper groundwater cleanup at the site. At the time the Trust sent its October 12, 1998 notice letter to the NRC and its supplemental notice letter on November 13, 1998 concerning the NRC's violations of the ESA, the NRC was still maintaining that groundwater cleanup would be addressed at some future, undetermined point in time – *not in this licensing action.* Therefore, one of the principal purposes of the Trust's federal court litigation was to require the NRC to do exactly what it now claims to be doing: to include groundwater remediation in *this* license amendment. Certainly, at the time the Trust filed its lawsuit, it had no reason to believe that intervention in this licensing action on the basis of its groundwater concerns was necessary or would have been successful. In fact, it was the NRC's change in position in response to the Trust's district court lawsuit that for the first time indicated that the NRC was planning to incorporate the Trust's main concern – groundwater remediation – into this licensing proceeding.

In addition, the fact that the Trust was able to articulate at least some of its substantive ESA claims within a couple of months of the issuance of the BO indicates nothing about the complexity of the procedural and jurisdictional issues involved in actually bringing those claims. Even assuming that the Trust were somehow on notice that the NRC would be addressing groundwater remediation in this licensing action (in spite of the NRC's statements to the contrary), the "complex issues of law and fact" surrounding these issues justifies the Trust's intervention nearly 6 months after issuance of the BO. This is a case of first impression, involving numerous federal statutes and regulations, at least three different potential forums, and

many different forms of legal relief.[7] It is not a case where the Trust filed a suit in district court while watching the administrative proceedings come to a close.[8] Nor did the Trust elect to pursue one procedural avenue while ignoring another. First, the district court lawsuit was necessary, independent of any intervention within the NRC, to challenge the validity of the Biological Opinion issued by the FWS and the NRC's on-going ESA violations, which were unrelated to the proposed license amendment. Second, the Trust filed a petition to intervene in the licensing proceeding promptly once the NRC began publicly representing that groundwater issues would be taken up in this licensing proceeding.

The Trust has moved promptly at every turn to utilize appropriate legal avenues and to safeguard its procedural rights, particularly in light of the complex issues of law and fact in this case. As the Trust explained in its Reply Brief at 10-14, the NRC has made conflicting statements in federal court and in this proceeding concerning whether groundwater is part of the licensing action:

> [E]ven in its Response brief only two weeks ago, the NRC continued to maintain that groundwater remediation was going to be covered by a separate licensing action. See NRC Response Brief at 9 n.4; 13 n.7. . .[D]espite the NRC's representations in this forum to the contrary, the agency has recently stated that groundwater cleanup in order to protect endangered fish *is* part of the current licensing action. Indeed, on January 13, 1999, the NRC sent a letter to Congressman Miller explaining, for the first time, that groundwater remediation would, in fact, be addressed as part of the licensing action. See Letter from Shirley Ann Jackson to Congressman George Miller, January 13, 1999 (Exhibit J). Similarly, in its pleadings in support of its Motion to Dismiss in district court, the NRC made the case that the Trust should properly bring its claims in the licensing proceeding. As a result, it was only in January 1999 that the Trust was put on notice that its biggest issue of concern – groundwater cleanup designed to protect native fish – was before the NRC for consideration. At that point, the

[7] For example, the Grand Canyon Trust has filed two § 2.206 petitions with the NRC, has intervened in this licensing proceeding, has sued in federal district court, and may sue in the federal court of appeals if the license amendment is issued or if either of its § 2.206 petitions is denied.

[8] In In the Matter of New Jersey, 1993 LEXIS 72 (1993), the intervenors sued in district court when they knew that the issue was a part of the NRC administrative proceeding. In that case, they waited until they lost in district court and the administrative proceedings had closed before trying to intervene. See id.

> Grand Canyon Trust promptly put together and filed its intervention petition – just 14 days after receiving that January 13 notice.

Trust's Reply brief at 11-12. It would be a perverse result if the Trust had to divine that groundwater was included in a licensing proceeding even though the NRC was publicly stating that it was not.

This case is entirely different from the circumstances in the case of In the Matter of New Jersey, 1993 LEXIS 72 (1993). In that case, the NRC, in dicta, indicated that "the time by which New Jersey was able to file compete papers and a brief before the United States District Court on September 21 sets an outside limit to the time in which we might have expected a comprehensive filing here addressing all the matters required under our rules." See id. at *13. In that case, New Jersey had sought to intervene in a licensing proceeding that was already complete. See id. The NRC had in fact published notice in May 1993 of a proposal to allow the Philadelphia Electric Co. to use slightly-irradiated fuel at the Limerick nuclear power plant. See id. at *5. In June of that year, New Jersey became aware that barge shipments of the fuel would take place near its coast. See id. Sometime later, the license amendment was issued and the proceeding closed, before New Jersey attempted to intervene. See id. The NRC held that because the intervention request occurred after the issuance of the license amendment and after the judicial review period established by the Hobbs Act, the petitioners had no right to a § 189a hearing. See id. at *6-7.

In dicta, however, the NRC analyzed how New Jersey would have fared under its late-filing requirements, including the "good cause" standard. See id. at *11. It is in that context that the NRC commented that the outer limit for intervention in the administrative proceeding would have been the date that briefs were completed in the case in district court. The NRC concluded that, under its late-filing standards, New Jersey had information sufficient to enable it to

intervene *before* the issuance of the license amendment, yet it failed to file. See id. at *11-12. Acknowledging that the NRC has allowed parties to intervene six weeks to four years out of time, the NRC stated that New Jersey was different because it had no ongoing hearing to enter. See id. at *16.

Here, unlike in New Jersey, the equities weigh heavily in favor of allowing intervention. In New Jersey, the petitioner chose a district court action in lieu of intervening in a licensing proceeding that was still open, and it waited to file an intervention motion until the licensing proceeding was closed. In this case, the Grand Canyon Trust did not choose one type of proceeding over the other, but rather filed its lawsuit and its intervention petition for independent and equally valid reasons, each at the point in time when the different avenues of relief became available. In pursuing the various forms of relief, the Trust completed its filings in short order – not long after it learned of the effects to the fish and *before* the close of the licensing proceedings. Moreover, the Grand Canyon Trust did not file "complete papers and brief" in its district court action against the NRC until December 17, 1998. Given the winter holidays immediately afterward, the slightly more than one month that elapsed between the time the Trust added the NRC as a defendant (and filed an accompanying motion for preliminary injunction) and the filing of the Trust's intervention petition in this proceeding is hardly significant.

Moreover, in the New Jersey case, unlike here, it was clear that the action New Jersey sought to challenge was directly related to the licensing proceeding. There, New Jersey was complaining about the handling of barge shipments as part of the licensing amendment. In this case, by contrast, the NRC itself was publicly asserting that the issues of concern to petitioners were *not* part of the licensing proceeding. Therefore, the Trust federal court claims were based upon the NRC's *refusal* to deal with groundwater remediation, which it is legally required to

address under the ESA. It is obvious that this case is far different from New Jersey, where the issues were clear from the beginning and New Jersey simply failed to take advantage of the appropriate forum.

Finally, the October 12, 1998 and November 13, 1998 letters put the NRC on notice that the Trust wished to pursue an enforcement action against the NRC related to groundwater cleanup and protection of endangered fish. These letters are not the same as a fully formed pleading in court and do not have to comport to the same legal or factual standards. Rather, notice letters should be written as quickly as possible to alert the action agency of possible violations and to include just enough detail to provide an understanding of the problem. The point at which these letters are sent is certainly not the point at which potential plaintiffs understand the facts and law necessary to bring claims in federal court.

Even more important, the point of these 60 day notice letters was to give the NRC time to come into compliance with the Act. In this case, the NRC never responded to either letter in any way. If the NRC was planning during the fall to address the Grand Canyon Trust's stated concerns about potential ESA violations, it should have notified the Trust that it was going to include groundwater remediation in its license amendment and informed the Trust of its right to intervene. Such a course of action might have avoided the federal court claims against the NRC altogether and certainly would have resulted in earlier notice of the need to intervene. As it stands, the NRC's failure to respond to those letters and its various arguments in both the federal court litigation and in this proceeding simply appear to be an effort to sandbag public participation in its process and to use whatever procedural arguments are convenient to avoid any jurisdiction over the Trust's claims.

The October and November notice letters had no bearing on the administrative proceeding, from the Trust's perspective, except to put the NRC on notice that the Grand Canyon Trust was serious about pursuing its ESA claims. If anything, the notice letters should have alerted the NRC that as soon as the NRC decided to claim that the ESA and groundwater issues were part of this licensing action, the Trust would seek to intervene. The October and November notice letters are merely one part of the effort by the Grand Canyon Trust to force the NRC to meet its obligations under the ESA and does not in any way detract from the Trust's intervention in this licensing action.

NRC Staff and Petitioners:

Question 14

Assuming that the scope of the Commission's April 7, 1994 notice did not include groundwater remediation and the agency subsequently expanded the scope of the materials license amendment action to include matters relating to groundwater remediation, does the Presiding Officer pursuant to 10 C.F.R. Par 2, Subpart L, or any other regulatory provisions, have the authority to renotice the licensing action to include groundwater remediation matters in light of the agency's subsequent expansion of the scope of the licensing action and the length of time between the original notice and that subsequent expansion of the scope of the licensing action? Cf., Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-539, 9 NRC 422 (1979).

The Presiding Officer has the authority to renotice a licensing action or order the NRC Staff to renotice a licensing action pursuant to 10 C.F.R. Subpart L regulations. The Presiding Officer has adequate grounds for requiring new notice in this case, and such a renoticing is supported by NRC precedent. The Presiding Officer, therefore, should require renoticing of the new license amendments in this case.

The NRC Subpart L regulations impose a duty upon the Presiding Officer to conduct fair and impartial, orderly, and speedy hearings and grant the Presiding Officer broad powers in the

administration of proceedings. See 10 C.F.R. § 2.1209. The powers of the Presiding Officer are set forth as follows:

> A presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order. The presiding officer has all powers necessary to those ends, including the power to . . . (a) Regulate the course of the hearing and the conduct of the participants, (b) Dispose of procedural requests or similar matters . . . [numerous other specific powers of the presiding officer are listed] . . . (g) Issue initial decisions . . . [more specific powers are listed] and l) Take any other action consistent with the Act and this chapter.

10 C.F.R. 2.1209(l).

Under the rubric of these regulations, the Presiding Officer clearly has the power to renotice, or require the Staff to renotice, a licensing proceeding if the Presiding Officer determines that such action is necessary to conduct a fair hearing, avoid delay, and maintain order. Additionally, renoticing of a licensing proceeding would fall under any of the four powers listed in 10 C.F.R. § 2.1209 (a),(b),(g), and (l).

The NRC Licensing Board has renoticed licensing proceedings in the past when the passage of time or the advent of new issues or changes in the scope of the proceeding made renoticing necessary. See e.g., In the Matter of Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), 9 NRC 422 (1979) (passage of more than 10 years made original notice manifestly stale); In the Matter of Rochester Gas & Electric Corp. (R.E. Ginna Nuclear Plant, Unit 1), 18 NRC 1231 (1983) (changes in plant design and reduction in the proposed facility required renoticing of action).

In this case, the revelation that ESA issues at the Atlas site are so serious as to jeopardize two species of native fish has caused sufficient changes in the licensing action to warrant renoticing. As the Trust explained in its Reply brief, neither the Trust nor any other parties, including the NRC, were aware of the threats to endangered fish at the time of the original notice

in April 1994. These issues came fully to light only after the publication of the BO. The BO was not published pursuant to notice and comment, and even though the Grand Canyon Trust had notice of the BO, the rest of the public did not. Furthermore, the NRC's plan to introduce new conditions related to groundwater as part of this licensing action is a sufficient change in the proceeding and presents sufficient new issues to require renoticing of the action to include the new issues and allow new intervenors to enter the proceeding.

Renoticing the proceeding is squarely within the Presiding Officer's authority pursuant to 10 C.F.R. § 2.1209, and the circumstances of this case clearly warrant such renoticing.

Dated this 28th day of May, 1999.

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Grand Canyon Trust, et al.

CERTIFICATE OF SERVICE

I hereby certify that copies of "GRAND CANYON TRUST'S ANSWERS TO QUESTIONS PRESENTED IN THE PRESIDING OFFICER'S MAY 14, 1999 ORDER" in the above-captioned proceeding have been served on the following by United States mail, and by facsimile or email (indicated by asterisk) on this 28th day of May 1999:

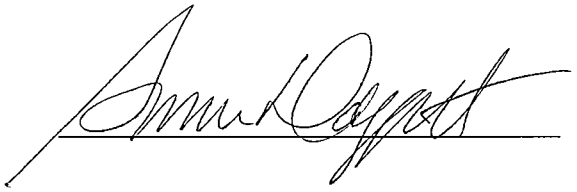

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EXHIBIT A

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Title: THE CLEANUP OF ATLAS URANIUM MILL

Location: Moab, Utah

Date: Wednesday, September 16, 1998

Pages: 1 - 98

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They looked at pumping and pulling back the contamination, and it wouldn't work because of the natural system out there wouldn't allow it to work.

In ten years there's been a lot of development in ground-water cleanup. They're looking at things like bacteria that can go in the water and eat up contaminants. They're looking at things called oxidation socks which you put in and it takes the ammonia, and it taxes on the hydrogen and ammonia and leaves you with nitrate which is not as much as a problem. They're looking at walls, where you put a wall in that contours. It's kind of like a filter that captures the water before it gets to the river. I don't know which one they're considering. You have the extent of my knowledge on the kind of things they're considering. They're not sure yet what they're going to do. They're looking at all their options. When that comes in, I think probably what we'll see is this change in the ground water maybe using a little bit of all of those. We'll probably see some concentration limits in there for like ammonia which we need to incorporate into our license. When that comes in Atlas projects end of year we'll have a better idea what that ground-water program looks likes. There's not a lot of detail I've got.

I spoke too soon. I will issue the final EIS when we complete this analysis we're looking at, ground water an

ground water cleanup and whether the site can be maintained, whether the ground water can be kept clean to standards that are protective of the fish and protective of health and human safety. Atlas may submit that ground water program before we even finish the EIS. Atlas may submit it after we finish the EIS. Cleanup of ground water is an independent action of the tailings. If Atlas can clean up the ground water today by using chemical means and oxi-socks, oxidation socks, they've got to do that today whether the tailings are there. They have got to do that whether the tailings move. The question is really being addressed to the EIS. The long-term question we're looking at is can a the ground water be kept clean. Our current view of ground water cleanup is something we want to see accelerated, but whether tailings stay or go, it's independent of the final EIS. EIS is looking at long-term stabilization and long-term ground water protection.

Susan.

SUSAN: Is there any chance that the tailings could be move?

MR. HOLONICH: The question was: Is there any chance that the tailings could be moved? Again, I have to look at what Atlas has proposed to do with those tailings. They have not proposed to move them, so my job is to look at whether what Atlas is proposing is acceptable in terms of

EXHIBIT B

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

GRAND CANYON TRUST, a non-profit corporation; GRAND COUNTY, UTAH, a political subdivision of the State of Utah; DAVE BODNER; KEN SLEIGHT; COLORADO PLATEAU RIVER GUIDES, and unincorporated association; 3-D RIVER VISIONS, a Utah corporation; JOSEPH KNIGHTON; SIERRA CLUB, a non-profit corporation,

Plaintiffs,

vs.

BRUCE BABBITT, in his official capacity as Secretary of the Interior of the United States; UNITED STATES FISH AND WILDLIFE SERVICE; and RALPH MORGENWECK, in his official capacity as Regional Director (Region 6), Denver, United States Fish and Wildlife Service, and the U.S. NUCLEAR REGULATORY COMMISSION,

Defendants.

Civil No. 2:98CV 0803S

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT NUCLEAR REGULATORY COMMISSION'S MOTION TO DISMISS

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B. The Plaintiffs' Claims of Alleged NRC "Inaction" Under the ESA Are In Effect Demands that the NRC Issue a Different License Amendment — the Type of Claim That Is Governed by the Hobbs Act and AEA's Grant of Exclusive Jurisdiction

The plaintiffs argue that because they are suing (in part) over the alleged failure of the NRC to comply with requirements of the ESA, these claims do not involve a "final order" of the NRC. As explained above, this argument is contradicted by the law and logic of Lorion. It is also contradicted by the particular situation of the Atlas site. As the plaintiffs know, the NRC is currently considering a significant license amendment to the Atlas site — an amendment that would enable Atlas to close its operations there entirely, after completion of requisite reclamation and groundwater cleanup activities. As part of the license amendment proceeding, the NRC consulted with the U.S. Fish and Wildlife Service about potential effects to endangered fish in the Colorado River. The Fish and Wildlife Service's Biological Opinion, which the plaintiffs have already submitted in the record, states that the NRC should require Atlas to create a better groundwater cleanup plan, in order to comply with the ESA. The NRC intends to include these groundwater cleanup requirements as part of any license amendment it issues to Atlas, as the plaintiffs know. See Letter of NRC Chairman Shirley Ann Jackson at 2-3, Jan. 13, 1998, attached as Exh. A to Pls.' Petition to Intervene to the NRC, Jan. 27, 1998, which is Exhibit B to the NRC's current Reply Brief.

Accordingly, the plaintiffs' claims of alleged "on-going" violations of the ESA will necessarily involve scrutiny of the NRC's proposed license amendment, which forms the NRC's response to the potential jeopardy to the endangered fish. The plaintiffs' claims are, in essence, that the NRC should issue a different sort of amendment to Atlas's license. Indeed, the plaintiffs

have made such a request in their 10 C.F.R. § 2.206 petition to the NRC, dated January 11, 1999. See Exhibit A at 2 (request for NRC licensing action). Accordingly, all their claims against the NRC involve the subject matter of a "final order," and thus may only be brought in the Court of Appeals, by virtue of the Hobbs Act and the AEA.

Moreover, because the plaintiffs are currently petitioning the NRC for action and are challenging the NRC's proposed license amendment, the Court of Appeals will have an administrative record to review, contrary to the plaintiffs' argument.

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In addition to their challenge to the proposed license amendment itself, the plaintiffs sue the NRC for alleged "on-going" violations of the ESA in the administration of Atlas's license. First Am. Compl. ¶¶ 90-96. While the plaintiffs *argue* in their Opposition brief that these claims are "not related to any particular licensing decision," this contention is belied by the claims in the Complaint against the NRC, which allege that the NRC is violating the ESA through the agency's "administration of Atlas's Materials License." See First Am. Compl. ¶¶ 90, 92. Indeed, the primary statutory source for the plaintiffs' ESA claims, § 7(a)(2) of the Act, applies only to an "action" authorized by an agency. 16 U.S.C. § 1536(a)(2). Accordingly, the plaintiffs must challenge an agency "action" in order to assert a viable claim under § 7(a)(2). They cannot allege in their Complaint that they are challenging an agency "action," but then deny this assertion for the purpose of opposing the motion to dismiss.

First, they allege that NRC has failed in its "duty to ensure that the Atlas site does not cause jeopardy to endangered fish and adverse modification of critical habitat," in violation of § 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2). Pls.' Opp. at 4. This assertion is simply a