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UNITED STATES
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Dr. Jerry R. Kline
G. Paul Bollwerk, III

In the Matter of	)	
	)	Docket No. 40-8027-EA
SEQUOYAH FUELS CORPORATION and GENERAL ATOMICS	)	License No. SUB-1010
	)	
(Sequoyah Facility)	)	January 11, 1994

SEQUOYAH FUELS CORPORATION'S REPLY TO
NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S
SUPPLEMENTAL FACTUAL ALLEGATIONS, NEW ARGUMENTS,
AND REQUEST FOR DISCRETIONARY INTERVENTION

Sequoyah Fuels Corporation ("SFC") respectfully submits this reply to the supplemental factual allegations, new arguments, and request for discretionary intervention contained in Native Americans for a Clean Environment's ("NACE") "Reply to Sequoyah Fuels Corporation's Answer In Opposition to NACE's Motion to Intervene" (hereafter "NACE Reply"), which was filed in this proceeding on December 30, 1993. In its Reply, NACE requests that the Atomic Safety and Licensing Board (the "Board") exercise its discretion to consider NACE's request for late-filed intervention and its newly submitted legal and factual arguments in support of such intervention. In addition, NACE submits new legal and factual arguments to support its claim of interest in this proceeding. NACE concludes by requesting that it be granted

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discretionary intervention if the Board finds that NACE does not have the right to intervene in this proceeding. SFC submits this Reply in response to the new arguments raised by NACE.

I. NACE HAS FAILED TO MEET ITS BURDEN OF PERSUASION REGARDING THE FIVE FACTORS TO BE CONSIDERED IN REVIEWING A LATE-FILED REQUEST FOR INTERVENTION

The proceeding before this Board resulted from an order issued by the NRC on October 15, 1993 (58 Fed. Reg. 55,087) (the "Order"), which provided that SFC, General Atomics ("GA"), or "any other person adversely affected by this Order" could request a hearing within 20 days, i.e., by November 4, 1993. NACE submitted a motion requesting intervention in this proceeding on November 18, 1993 (after the time for filing hearing requests had expired). NACE contended that its request for intervention was timely and asserted that it had a right to intervene in the proceeding initiated after SFC and GA had filed timely requests for hearing on the issue of whether or not the Order should be sustained.

In its Reply, NACE once again asserts that its intervention request was timely, but requests, in the alternative, that it be granted untimely intervention. NACE admits that it had no right to address the late-intervention criteria of 10 CFR § 2.714(a)(1) in its Reply, but requests that the Board exercise its discretion to permit NACE a second opportunity to address these lateness factors. NACE Reply at 5 n.2 (citing Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 468 (1985)).

Since NACE is represented by legal counsel who is well-versed in practice and procedure before the NRC, there is no good cause to permit NACE such an opportunity. However, even upon consideration of the new arguments raised by NACE, it is clear that NACE's request for intervention should be denied.

A. NACE Has Failed to Establish Good Cause For Its Failure To File On Time

The only cause proffered by NACE for its failure to file a timely request for intervention in this proceeding is NACE's conclusion that it "was not 'adversely affected' by the Order" and that the Order did not provide NACE with an opportunity to request a hearing, because NACE was in favor of the Order. NACE Reply at 3. With this admission, however, NACE establishes the inappropriateness of its intervention and its lack of standing in this proceeding. A person or organization that does not have the requisite interest to request a hearing in an enforcement proceeding cannot have the interest required to permit intervention in the very same proceeding. The answer to the one question must be the same as the other.

NACE challenges this proposition and attempts to distinguish the relevant authority relied upon by SFC, such as the opinion expressed by Administrative Judge G. Paul Bollwerk, III in correspondence filed in Lafayette Clinic (Order Modifying Byproduct Material License No. 21-864-02), EA 91-130 (Memorandum dated Feb. 18, 1992) (Enclosure 1 to "SFC's Answer in Opposition to NACE's Motion to Intervene"). Judge Bollwerk stated that only

interested persons can obtain party status in an enforcement proceeding, i.e., by requesting a hearing on an Order or by seeking late-intervention. However, NACE argues that this statement is inapplicable in this enforcement proceeding because "Judge Bollwerk's letter was written to counsel for a licensee, which clearly would have been eligible to request a hearing as an 'interested person.'" NACE Reply at 4. This distinction is meaningless, unless NACE is suggesting that only licensees are "interested persons" that can request a hearing. Obviously, this is incorrect, because enforcement orders contemplate the possibility that persons other than the licensee or subject of an order can request a hearing.[1/] Thus, it is clear that Judge Bollwerk's statement is relevant to any person, such as NACE, claiming to have an interest in a proceeding, not just licensees as suggested by NACE.

NACE relies heavily upon, but, as discussed in greater detail in II.B. below, misapplies, the controlling decision of the Court of Appeals for the D.C. Circuit in Bellotti v. NRC, 725 F.2d 1380 (1983). NACE argues that under Bellotti it did not have a right to request a hearing because it did not oppose the Order, and therefore, the Order "gave NACE no right to petition to intervene to which lateness could have attached." NACE Reply at 5. In support of its interpretation of Bellotti, NACE relies

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1/ For example, the October 15, 1993 Order provided that "SFC and GA must, and any other person adversely affected by this Order may, file an answer to this Order, and may request a hearing on this Order." 58 Fed. Reg. at 55092 (emphasis added).

upon Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367, 370-372 (1980), which was decided prior to the D.C. Circuit's decision in Bellotti. We discuss at length in Section II, infra, why such reliance by NACE is mistaken. However, even if La Crosse was good law, it would not provide any support for NACE's failure to file a timely request for intervention. The intervenors in La Crosse filed timely hearing requests in support of the enforcement action in question. Id. at 367. NACE did not follow this course of action, and in fact has admitted that such requests would not be permitted under the D.C. Circuit's decision in Bellotti. Therefore, NACE's own position calls into question the continuing validity of La Crosse. In any event, even under La Crosse, NACE should have filed a timely request for intervention.

B. Any Interest That NACE May Have Is Protected By The Availability Of Other Means To Protect That Interest

NACE asserts that its interests in the NRC's enforcement action taken against SFC and GA are not protected by its right to request enforcement action pursuant to 10 CFR § 2.206. NACE argues that it wants "to participate in and influence the outcome of the pending adjudication of conflicting claims between the NRC and GA and SFC," and a Section 2.206 petition would not provide a vehicle for NACE's being able to do so. NACE Reply at 7. NACE's objection, however, is of no moment. NACE does not have a right to "participate in and influence the outcome" of a proceeding concerning SFC's dispute

with the NRC's proposed enforcement Order. NACE's only interest is its desire that NRC take enforcement action against SFC, action which it can request under Section 2.206 but cannot compel. If NACE is dissatisfied with the outcome of this proceeding, NACE can request that the NRC take additional enforcement action. The fact that NACE cannot compel such action merely underscores its lack of the requisite standing in this proceeding. Thus, to the extent that NACE has any interest in this proceeding, Section 2.206 provides an adequate, available "other means" to assert that interest.

NACE also argues that its member, Mr. Henshaw, would suffer the requisite injury if the Order is not fully sustained. NACE Reply at 17-23. However, as discussed in Section II.B, infra, the alleged injuries are hypothetical, conjectural, and highly speculative, and are based on multiple assumptions, and are not sufficiently concrete to confer standing in this proceeding, or to show that NACE does not have other means to protect such alleged interest.

C. NACE Has Not Shown That Its Participation Could Be Expected To Assist In Developing A Sound Record

As the proponent of this Order, the NRC Staff is obviously well-equipped to assure development of a full and sound record. In contrast, NACE has failed to establish that it would contribute to the development of a complete record in this proceeding. NACE asserts only "that it would provide 'expert testimony' regarding the costs of decommissioning the SFC

facility," and offers Dr. Arjun Makhijani as an expert qualified to provide expert testimony with regard to this matter. NACE Reply at 7-8. However, assuming arguendo that Dr. Makhijani can qualify as an expert on decommissioning costs associated with the Sequoyah Facility,[2/] his testimony would not be within the scope of this proceeding because the cost of SFC's decommissioning is not at issue.

The Order raises questions as to the adequacy of SFC's funding and seeks to require that GA provide financial assurance in the amount of $86 million, the total amount of SFC estimated expenditures for the years 1993-2003 in SFC's Preliminary Plan for Completion of Decommission. Order, Section VII, 58 Fed. Reg. at 55092. Although the Order reserves a right for the Commission to later increase the amount of financial assurance, the Order does not take issue with SFC's cost estimates. Therefore, the cost of SFC's decommissioning is not within the scope of this proceeding. Admittedly, the adequacy of SFC's source of funds (including its contractual arrangements with ConverDyn) will be at issue. However, NACE has not proffered any expert with qualified knowledge of financial assurance mechanisms or with qualified knowledge relevant to evaluating SFC's arrangements with ConverDyn and the reasonableness of SFC's expectations from this source of revenues.

2/ Dr. Makhijani's resume (included as Attachment A to the NACE Reply) does not make any reference to decommissioning. Thus, there are questions as to his expertise in this area.

NACE has failed to identify any relevant expert testimony or other resources that will assist in developing a sound record in this proceeding. This factor should therefore be weighed against NACE.

D. NACE's Limited Interest In This Proceeding Is Protected By The NRC Staff

NACE asserts the general proposition that the NRC Staff is not presumed to represent the interests of intervenors in a licensing proceeding, but nevertheless fails to meet its burden of persuasion to show that it has an interest in this enforcement proceeding that is not adequately represented by the NRC Staff. NACE Reply at 8. Unlike licensing proceedings, which involve licensee requests for NRC action that sometimes implicate broad safety issues and where the NRC Staff may take a position contrary to petitioners, this enforcement proceeding is limited to the issue of whether the Order should be sustained and the petitioner is supporting the position of the NRC Staff. The NRC Staff is the proponent of the Order and must be presumed to adequately represent the public interest in sustaining the Order.

NACE has failed to demonstrate that it has any interest in this proceeding other than the limited interest implicated by its desire to see that the Order is sustained. NACE has identified no specific interest beyond the public interest in sustaining the Order, which is adequately represented by the NRC Staff. In fact, NACE's interest is clearly insufficient to confer standing in this proceeding. The Commission has long held

that "assertions of broad public interest . . . do not establish the particularized interest necessary for participation by an individual or a group in agency adjudicatory processes." Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). Commission practice has made clear that "a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens will not result in a distinct and palpable harm sufficient to support standing." Id. at 333; see also Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 529 (1991).

E. NACE's Presence In This Proceeding Will Broaden The Issues And/Or Delay The Proceeding

Contrary to NACE's assertions, NACE's participation in this proceeding is likely to broaden the issues. For example, NACE has suggested that it would like to provide testimony regarding SFC's decommissioning cost estimates. As discussed in Section I.C above, the adequacy of SFC's cost estimates is beyond the scope of this proceeding. Thus, NACE has already demonstrated a propensity for broadening the issues in this proceeding beyond issues relevant to the question of whether the Order should be sustained.

For the reasons stated above relevant to the five "lateness factors," and the reasons previously stated in SFC's Answer, NACE's request for intervention should be denied. NACE has failed to establish adequate interest to confer standing in

this proceeding in the first instance, and NACE has failed to meet its burden of persuasion regarding the five factors to be weighed in considering a late-filed petition.

II. NACE HAS FAILED TO ESTABLISH THAT ITS MEMBER HAS THE REQUISITE INJURY-IN-FACT TO INTERVENE IN THIS PROCEEDING

A. NACE Is Not Entitled To Participate Under Section 189a Of The Act Or 10 CFR § 2.714

As shown in SFC's Answer (at 13-15), NACE does not have any hearing rights under Section 189a of the Act since the Order was not issued as an Order Modifying a License and, in fact, does not amend or modify the SFC License. NACE's sole response is that compliance with the Order must entail some changes to the SFC License. NACE Reply at 11. However, NACE is mistaken. The provisions of SFC's current license (including provisions with respect to a reserve account) remain in effect, and SFC is obligated to remain in compliance with these license requirements. The Order seeks to impose additional requirements upon SFC and GA; it does not seek to change the license provisions cited by NACE. Any change in those provisions would be beyond the scope of this proceeding.

NACE also argues that, even if the proceeding does not involve a license amendment, it is entitled to intervene under 10 CFR § 2.714(a), citing La Crosse as a precedent. NACE Reply at 12-13. NACE's reliance upon La Crosse is again misplaced, because the intervenors in La Crosse filed a request for hearing pursuant to broad terms of the hearing opportunity provided in the order at issue in that case. See LBP-80-26, 12 NRC at 369.

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The scope of the hearing proffered in this proceeding is limited, as was the case in Bellotti, to "whether the Order should be sustained."[3/] In contrast, the Order at issue in La Crosse provided for a potentially much broader proceeding, as follows:

> In the event a hearing is requested, the issues to be considered at such hearing shall be:
>
> (1) Whether the licensee should submit a detailed design proposal for a site dewatering system; and
> (2) Whether the licensee should make operational such a dewatering system as soon as possible after NRC approval of the system, but no later than February 25, 1981, or place the LACBWR in a safe co[]ld shutdown condition.

Dairyland Power Cooperative (La Crosse Boiling Water Reactor), "Order to Show Cause," 45 Fed. Reg. 13,850, 13,852 (March 3, 1980).[4/] Thus, if Bellotti did not implicitly reverse the licensing board's conclusions in La Crosse, La Crosse is inapposite to this case, because the scope of the Order at issue and interests which could have been affected by the La Crosse Order were substantially broader than the scope of the Order at issue in this proceeding.

3/ In Bellotti the D.C. Circuit rejected efforts to litigate issues, other than the issue of whether the Order should be sustained, as "within the scope of the Order," because this "would result in a hearing virtually as lengthy and wide-ranging as if intervenors were allowed to specify the relevant issues themselves." 725 F.2d at 1382.

4/ NACE also relies upon Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-73-38, 4 AEC 1082, 1083 (1973), which also preceded Bellotti. Like the Order at issue in La Crosse, the Order at issue in Midland provided for a hearing that was broad in scope. See Order dated December 3, 1973. Thus, Midland is similarly distinguishable.

SFC agrees that affected persons other than licensees can request a hearing under the Order in this proceeding. However, SFC does not believe that 10 CFR § 2.714(a) grants an opportunity to participate that is more extensive than that provided by the explicit terms of the Order. Nevertheless, even if NACE were correct, it has not satisfied the requirement that it represent a person "whose interest may be affected by a proceeding."

B. NACE Has Not Demonstrated The Requisite Interest To Intervene

NACE's conscious decision to refrain from seeking timely intervention within the terms of the Order establishes both that there is no good cause for NACE's late-filing and that NACE does not have the requisite standing to intervene, in the first instance. NACE's failure to acknowledge the full impact and logical conclusion of Bellotti goes to the very crux of its intervention petition. Bellotti establishes that only those who oppose an enforcement Order which purports to make a facility safer have the requisite interest to request a hearing and/or to intervene in a proceeding, where the scope of such a proceeding is limited by the Commission to the question of whether or not the Order should be sustained. The Bellotti court explained:

> The upshot is that automatic participation at a hearing may be denied only when the Commission is seeking to make a facility's operation safer. Public participation is automatic with respect to all Commission actions that are potentially harmful to the public health and welfare.

725 F.2d at 1383.

Without any authority other than an inconclusive citation to Judge Skelly Wright's dissenting opinion in Bellotti,[5] NACE rejects SFC's position that the Bellotti court implicitly adopted the position argued by the Commission before that court, i.e., that an enforcement proceeding is limited to possible intervenors "who think the Order should not be sustained." Id. at 1382 n.2; NACE Reply at 14-15. Although the D.C. Circuit's opinion in Bellotti did not explicitly adopt the Commission's position, the D.C. Circuit's implicit approval is clear. Moreover, the Commission's stated position before the D.C. Circuit, as favorably referenced by Bellotti, is, of course, entitled to significant weight on its own. Thus, La Crosse, even if it were apposite, is in conflict with Bellotti and the Commission position stated in Bellotti.

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[5] To the extent that the characterization of a court's holding by a dissenting opinion is of any moment, SFC notes that Judge Adams of the Third Circuit, who found Bellotti unpersuasive, has explained that:

> Bellotti holds that the Commission has broad discretion in limiting the scope of a license amendment proceeding at its outset and that where it limits it to whether a safety plan, developed wholly outside the proceeding, should be adopted, only those parties opposing the adoption of the plan have a right to request and participate in a hearing.

In re: Three Mile Island Alert, Inc. ("TMI Alert"), 771 F.2d 720, 746 n.11 (3d Cir. 1985) (Judge Adams, dissenting) (emphasis added), cert. denied sub nom., Aamodt v. NRC, 475 U.S. 1082, reh'g denied, 476 U.S. 1179 (1986).

Moreover, the rule suggested in La Crosse, and by NACE, would result in bad public policy. NACE argues that "once a hearing is commenced, the Staff cedes its authority to modify the Order to the Licensing Board." NACE Reply at 16 n.16. NACE would have this Board conclude that the Commission, through its Staff, could no longer exercise enforcement discretion in this case once a hearing request has been granted. Under NACE's construction of NRC procedures, the Order's provision in Section VII, permitting the Director of the Office of Nuclear Material Safety and Safeguards ("NMSS") to relax or rescind any conditions in the Order upon demonstration of good cause, is rendered meaningless. 58 Fed. Reg. at 55092. NACE argues essentially that once a measure of enforcement action is proposed and a hearing is requested by an interested party, a third party (who could not request the hearing in the first instance) can intervene and insist that the Board impose the enforcement action as originally proposed. NACE Reply at 16 n.16. Under this view, the Commission's delegate who issued an Order expressly reserving the authority to subsequently utilize his discretion (see Section VII of the Order), would be powerless to implement his reserved authority even if he were convinced that additional information or changed circumstances justified lesser action, or no action at all. This view is not only legally unsupportable, but it is inconsistent with Commission practice.[9/]

9/ For example, in a currently pending enforcement case, the NRC Staff relaxed its enforcement order both before and (continued...)

To the extent that NACE relies upon La Crosse for the alleged ceding of authority by the NRC Staff (NACE Reply at 16 n.16), NACE ignores that the order in La Crosse did not contain the explicit reservation of authority by the Director, NMSS, that is contained in Section VII of the Order in this proceeding.[7/] Moreover, when NACE suggests that, without such ceding of authority, there would be no purpose to appointing an independent adjudicatory body (id.), it also ignores that the purpose of a hearing on an enforcement order is to provide procedural protection to persons adversely affected by NRC's unilateral issuance of an order, i.e., the object of the order or any other person who can show an adverse effect.

The result advocated by NACE would have adverse impacts upon the Commission's regulatory regime. The Commission and its delegates might be discouraged from initiating formal enforcement actions if to do so could result in relinquishing their enforcement discretion to a lengthy adjudicatory process. As suggested in Bellotti, this could cause "the Commission to be more circumspect in its drafting of orders and seek to accomplish some reforms informally," and if the Commission were discouraged from taking formal actions, "the net effect would be regulation less visible to the public." 725 F.2d at 1382. Moreover, once a

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[6/](...continued)
after the licensee had requested and been granted a hearing. See, e.g., Oncology Services Corporation (Suspension Order), CLI-93-17, 38 NRC 44, 47 (1993).

[7/] Nor did the Order in the Midland case also cited by NACE.

licensee requested a hearing and intervention was requested, the Commission and its delegates would have no flexibility to revise their enforcement actions as needs arose. This could result in unnecessary litigation and wasted resources even in cases where the Commission and its delegates, who utilized their discretion in issuing the order initially, become convinced that their enforcement objectives are better served through lesser action. Curiously, the rule proposed by NACE would permit a person who could not initiate a hearing in the first instance to unnecessarily prolong the hearing.

As stated by the Commission in Marble Hill:

> We believe that public health and safety is best served by concentrating inspection and enforcement resources on actual field inspections and related scientific and engineering work, as opposed to the conduct of legal proceedings. This consideration calls for a policy that encourages licensees to consent to, rather than contest, enforcement actions.

Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441 (1980). Although that statement was made in the context of the Commission's denial of a petitioner's request for a hearing seeking more drastic remedies than specified in an order, the basic policy expressed is equally applicable when the agency official who utilized his discretion to issue an order later decides that the order should be relaxed or modified pursuant to authority retained in the order. The issuer of the order has been made responsible by the Commission for determining, in the

course of performing his overall duties, whether his resources should be devoted to actual field inspections and related scientific and engineering work or to the conduct of legal proceedings. A third party should not be able to insist on the continuation of legal proceedings when the agency official has determined that a modified order satisfies his enforcement objectives and enables him to apply his resources more effectively.

Moreover, NACE has failed to demonstrate the requisite "injury in fact." NACE refuses to acknowledge that injury in fact is "ordinarily 'substantially more difficult' to establish" in cases where the party "is not himself the object of the government action or inaction he challenges." Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2137 (1992). Rather, NACE criticizes SFC's citation to the Supreme Court's position in Lujan and suggests that this authority emanating from the highest court is somehow inadequate because SFC has failed to cite any concurring NRC decision. NACE Reply at 16. Thus, NACE argues that this Board should instead follow the licensing board's opinion in La Crosse. Id. at 17. Since even La Crosse acknowledges that "the Commission applies judicial concepts of standing, in enforcement as in other licensing proceedings," (LBP-80-26, 12 NRC at 372), it is clear that the Supreme Court's subsequent decision in Lujan and the cases cited therein are controlling before this Board. Lujan establishes that there is a particularly heavy burden for a person to establish standing

where he or she is not the object of government action. Therefore, either NACE's interpretation of La Crosse is overbroad, or reliance upon La Crosse is altogether misplaced.

Finally, NACE attempts to demonstrate that Mr. Henshaw, the sole member represented by NACE, will suffer actual, imminent or concrete injury if the Order is not sustained. NACE Reply at 17-23. In response to the arguments in SFC's Answer (at 28-32) that Mr. Henshaw's alleged injuries are hypothetical, conjectural, and highly speculative, and are based on multiple assumptions, NACE relies upon the NRC's allegation that existing decommissioning funding is inadequate. NACE Reply at 18. However, NACE fails to show, assuming arguendo that the funding is inadequate, that this will necessarily result in a decommissioning of the Sequoyah site that will be so inadequate as to pose a hazard that could impact Mr. Henshaw's property.

Since its Motion to Intervene lacked any support for its allegation that groundwater or surface water from the SFC site could affect Mr. Henshaw's property, NACE now submits an affidavit by Mr. Timothy P. Brown, a hydrogeologist. NACE Reply, Attachment C (the "Brown Affidavit"). Mr. Brown's affidavit does not contain any concrete evidence or credible suggestion that groundwater from the SFC site would flow southeast to Mr. Henshaw's property.[8/] However, he disputes SFC's conclusion that

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[8/] Since Mr. Brown's affidavit does not contain any discussion of flow of surface water, it appears that NACE has conceded that surface water could not flow past numerous barriers from the SFC site to Mr. Henshaw's property.

there is no indication of a groundwater flow path that would allow flow of groundwater from beneath SFC's industrial site and associated pond areas to reach Mr. Henshaw's property (SFC Answer at 30-31), because he claims SFC has not performed sufficient areal or vertical groundwater studies. NACE Reply at 21; Brown Affidavit at ¶¶ 7-9.

Attached to this Reply is the Affidavit of Bert J. Smith, Director of Hydrogeology for Roberts/Schornick and Associates, Inc. ("RSA")[9/] (the "Smith Affidavit") (Enclosure 1). Mr. Smith has over 14 years of experience as a hydrogeologist, managed the groundwater characterization studies conducted as part of the Facility Environmental Investigation ("FEI") at the SFC site in 1991-92, and is currently managing RSA's efforts assisting SFC in the preparation of an NRC Site Characterization Plan and a RCRA Facility Investigation Work Plan. See Smith Affidavit at Attachment A-1 and ¶ 2. Not only does Mr. Smith reaffirm the conclusion previously reached by SFC, but he provides the basis for his conclusion and explains why the criticisms and disagreements expressed in the Brown Affidavit are

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[9/] NACE complains that the Affidavit of John S. Dietrich (Enclosure 2 of SFC Reply) (the "Dietrich Affidavit") did not provide his resume or technical qualifications. NACE Reply at 21. John S. Dietrich, SFC's Vice President, Technical Services, summarized relevant portions of technical information that had been developed by hydrogeological experts and previously provided to the NRC, which demonstrated the lack of any merit to the totally unsupported claims contained in the original NACE Motion to Intervene. Now that NACE has provided an affidavit allegedly stating some relevant facts, SFC is providing a responsive affidavit from Mr. Bert J. Smith.

mistaken. Id. at ¶¶ 4-16. For example, Mr. Smith shows that extensive information developed during the FEI in 1991 and 1992 and in responding to NRC environmental questions in 1992 supports the conclusion that groundwater flow from SFC's industrial site and fertilizer pond areas will not impact Mr. Henshaw's property to the southeast. Id. at ¶¶ 7-8. He explains that over 200 groundwater monitoring wells were installed and hundreds of soil samples were taken in those two areas during the FEI, that extensive investigations based upon historical information regarding facility areas did not identify any other areas that needed to be investigated, and that there is no need to consider groundwater flow in other areas to evaluate potential impact on Mr. Henshaw's property. Id. at ¶ 9. Mr. Smith shows why Mr. Brown is mistaken in his allegations that the hydrogeology is too complex to make predictions or that a fault will provide a pathway to Mr. Henshaw's property. Id. at ¶¶ 10-12. Mr. Smith also discusses the extensive information developed during the FEI to evaluate the vertical extent of contaminants in the site area (both in soil and groundwater) and potential groundwater flow zones at deeper depths, shows why the information was sufficient to convince investigators that investigation to deeper zones was unnecessary, and explains why Mr. Brown's reliance on seven wells drilled to deeper depths is misplaced. Id. at ¶¶ 13-14. In addition, Mr. Smith rebuts Mr. Brown's allegation that none of SFC's reports provided any data for depths below 40-50 feet by discussing data provided in the FEI from surveys of 28 wells in

the area, including 19 at depths of 50 feet or below, conducted by SFC and the Oklahoma State Department of Health ("OSDH") in 1991, none of which showed contaminants above drinking water standards. Id. at ¶ 15. Based upon all of the discussed information, Mr. Smith concludes that groundwater flow from the processing areas and fertilizer pond areas will not impact Mr. Henshaw's property and that it is not necessary to expand the investigations to include any additional areas or to any greater depth. Id. at ¶ 16.

Mr. Brown also claims that Mr. Henshaw's property may "be susceptible to contamination from SFC's raffinate spreading fields which adjoin his property on several sides (see Attachment 1)."[10/] Brown Affidavit at ¶ 10. Issues relating to SFC's spreading of raffinate fertilizer for agricultural purposes have been raised by NACE many times in the past, most notably in a 10 CFR § 2.206 petition which was denied by the Director, NMSS, on April 14, 1993. See Sequoyah Fuels Corporation (Gore, Oklahoma Facility), DD-93-07, 37 NRC 303 (1993). Contrary to Mr. Brown's speculation, SFC's fertilizer spreading program has been

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10/ NACE alleges that "Mr. Henshaw's property is completely surrounded by the SFC site " NACE Reply at 19. The property owned by SFC lies entirely west of Highway 10 and north of Interstate 40, as shown by the cross-hatched area in Attachment 2 of the Dietrich Affidavit. Property east of Highway 10 and south of Interstate 40 is owned by Sequoyah Fuels International Corporation ("SFIC"), SFC's parent company, and SFC has applied, and is applying, raffinate fertilizer to portions of such property used for feeding cattle. However, such property is not part of the approximately 85-acre SFC industrial site and the associated pond areas to be decommissioned in accordance with NRC requirements. See Dietrich Affidavit, ¶ 4 and Attachment 1.

carefully scrutinized and includes an extensive monitoring program to watch for impacts on vegetation, surface water, and groundwater. Prior to approval, the NRC completed "a comprehensive environmental assessment. The assessment was prepared by Oak Ridge National Laboratory and was reviewed with no adverse comments by the Department of Agriculture, Food and Drug Administration, Environmental Protection Agency and Eastern Oklahoma Development District." DD-93-07, 37 NRC at 306. In addition, a "comprehensive series of experiments, test and monitoring studies were conducted over a 14-year period under the regulatory oversight of the U.S. Nuclear Regulatory Commission." SFC Fertilizer Program Report, 1973-1986, Dr. Billy B. Tucker et al., Publication No. A-88-5 Oklahoma State University at ii. Finally, test areas specified in SFC's license have been monitored prior to, during, and after each fertilizer season as part of the program which is "subject to NRC inspection to verify that the program is conducted in accordance with the license." See letter from Robert S. Bernero to Dianne Curran dated July 19, 1993, at 6.

As shown in the enclosed Affidavit of Kenneth H. Schlag, the hydrogeologist employed by SFC (the "Schlag Affidavit") (Enclosure 2), Mr. Brown improperly relies on alleged comparisons between information contained in SFC's Ammonium Nitrate Fertilizer Program, 1989 Completion Report, April 1990 (the "1989 Completion Report") and EPA's drinking water standards and proposed limits for radioactive substances. If Mr. Brown

meant to compare information in the 1989 Completion Report on the fertilizer solution itself, he is mistaken regarding the radioactive levels and his comparison regarding metal contents is irrelevant since the fertilizer solution is not drinking water nor meant for human consumption. Schlag Affidavit at ¶¶ 4-5. If he was referring to groundwater monitor results in the 1989 Completion Report, he is mistaken as to all of his comparisons, except for a single sample explained by Mr. Schlag. Id. at ¶ 6. In addition, these comparisons are also irrelevant, since the water in the areas used for the fertilizer program is not a useful drinking water supply. Id.

Although there are no fertilizer program monitor wells near Mr. Henshaw's property, and, as discussed by Mr. Smith, Mr. Henshaw denied SFC and the OSDH access to his well during the 1991 area-wide survey, SFC and OSDH were able to sample four wells located near Mr. Henshaw's property. These four wells range from about 42 to 98 feet deep respectively. No contamination by nitrates or uranium was present in these wells above drinking water standards. Smith Affidavit at ¶ 15.

Furthermore, Mr. Brown inaccurately describes "raffinate" as "a highly concentrated nitrate solution containing heavy metals . . . ." Brown Affidavit at ¶ 10. SFC's fertilizer, derived from the processing of a raffinate solution, is a low concentration ammonia nitrate fertilizer registered in the State of Oklahoma as a commercial fertilizer. DD-93-07, 37 NRC at 306. As noted by the NRC "[t]he fertilizer contains trace

amounts of heavy metals, but the concentrations are so low that they do not pose an undue public health hazard." Id. at 307. In fact "[m]any commercial fertilizers have chemical properties similar to SFC's fertilizer, and contain ammonium nitrate and trace amounts of heavy metals and radionuclides. There are no special restrictions on the sale or application of these commercial fertilizers." Id. at 308. In addition, as pointed out by the NRC, "Since the fertilizer contains a uranium concentration below the NRC limits for release to unrestricted areas and a radium concentration below that considered safe for drinking water, the radionuclides in the fertilizer do not pose an undue radiological hazard." Id. at 307. Not only are the fertilizer spreading areas not implicated in the decommissioning of the SFC Facility, but the fertilizer does not constitute the risk to groundwater quality implied by Mr. Brown.

In addition to its principal factual allegations relating to groundwater impact, NACE raises some miscellaneous arguments relating to alleged injury to Mr. Henshaw. NACE seems to concede that the potential social and economic impact of an inadequate decommissioning of the Sequoyah Facility has little, if any, weight in evaluating Mr. Henshaw's standing (NACE Reply at 19-20 n.21), and provides no information supporting any such alleged impact, even if it were cognizable under these circumstances. Instead, NACE now presents two new speculative assumptions that were not mentioned either in the Motion to Intervene or Mr. Henshaw's affidavit. First, NACE postulates

that an inadequate decommissioning might result in contamination of Mr. Henshaw's property by wind-blown soil from the SFC site. Id. at 22. NACE relies upon a single paragraph in the Brown Affidavit. Not only was a concern regarding airborne contamination not raised in Mr. Henshaw's affidavit, but Mr. Brown, a hydrogeologist, makes only broad unsubstantiated allegations and presents no facts to support his general theory. In response to this sheer speculation, enclosed is the Affidavit of Thomas E. Potter, an expert consultant in radiation protection for over 20 years (the "Potter Affidavit") (Enclosure 3). Mr. Potter demonstrates that, even utilizing highly conservative bounding calculations, the amount of wind-blown material from the SFC site that could theoretically be deposited on Mr. Henshaw's property would add a negligibly small increment to the radiation dose from naturally occurring sources. Potter Affidavit at ¶¶ 4-10. He concludes that "it is obvious that the SFC site poses virtually no potential for significant wind-blown contamination of Mr. Henshaw's property." Id. at ¶ 11. Finally, NACE speculates that an unauthorized individual might remove contamination from the SFC site in sufficient quantities to pose a health hazard and that such a person would bring this contamination to Mr. Henshaw's property. Id. at 22-23. NACE offers no basis for engaging in this kind of speculation, and the Board is not obliged to entertain speculative notions of injury. See, e.g., Philadelphia Electric Company, (Limerick Generating Station, Units 1 and 2) LBP-82-43A, 15 NRC 1423, 1449 (1982)

(licensing board "will not take it upon itself to manufacture through sheer speculation a mechanism by which the petitioner might conceivably receive the injury he fears"). Such speculative injuries are not sufficiently concrete to confer standing in this proceeding.

III. NACE HAS FAILED TO MEET THE STANDARDS FOR DISCRETIONARY INTERVENTION

NACE asserts that "the Licensing Board effectively has a mandate from the Commission to allow NACE to participate in this proceeding." NACE Reply at 25. In support of this claim, NACE cites a statement made by NRC Chairman Ivan Selin on November 8, 1993, during a briefing on the status of Site Decommissioning Management Plan sites. However, NACE has submitted this statement in violation of 10 CFR § 9.103, which provides:

> Statements of views or expressions of opinion made by the Commissions or NRC employees at open meetings are not intended to represent final determinations or beliefs. Such statements may not be pleaded, cited, or relied upon before the Commission or in any proceeding under part 2 of these regulations . . . .

Moreover, in providing selected transcript pages to the Board, NACE has conveniently omitted the Disclaimer which accompanied the transcript of the November 8, 1993 briefing.[11/] NACE's

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11/ SFC is providing a copy of the Disclaimer as Enclosure 4. The Disclaimer provides that "[n]o pleading or other paper may be filed with the Commission in any proceeding as the result of, or addressed to, any statement or argument contained herein, except as the Commission may authorize."

reliance on the Site Decommissioning Management Plan briefing is clearly improper. SFC requests that the Board strike Attachment E to NACE's Reply from the record in this proceeding and that the Board disregard the related arguments contained on pages 24-25 of NACE's Reply.

In its Reply, NACE requests for the first time that it be granted discretionary intervention and claims that the factors to be considered in reviewing a request for discretionary intervention weigh in favor of admitting NACE as an intervenor in this proceeding. NACE Reply at 24, (citing Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976)). A review of the six factors set forth by the Commission in Pebble Springs demonstrates that it would be inappropriate to grant NACE discretionary intervention. Five of the six factors are the same as those to be considered for late-filed petitions. These factors are discussed thoroughly in Section I, supra, and need not be repeated here. SFC has demonstrated that these factors weigh against permitting late-filed intervention, and they therefore weigh against discretionary intervention as well. The sixth factor spelled out in Pebble Springs, is "[t]he possible effect of any order which may be entered in the proceeding on the petitioner's interest." CLI-76-27, 4 NRC at 616. As discussed in SFC's Answer (at 26-27), there is no possible effect of this proceeding which adversely affects NACE. If the proceeding results in no order being issued to SFC and GA, the result would

be a return to the status quo ante. If the proceeding results in an order that imposes fewer requirements upon SFC and GA than those proposed, but more than the status quo ante, NACE's interests will likewise remain unaffected.

NACE also argues that it would be "appropriate" to allow NACE to intervene because the pendency of this proceeding was allegedly a factor in the recent decision to grant SFC's motion to withdraw its license renewal application. NACE Reply at 25-26. This consideration is wholly irrelevant to NACE's request to intervene in the instant proceeding. If NACE believes that the Presiding Officer ruled improperly in the license renewal proceeding it can seek to appeal to the Commission, and in fact did so on January 4, 1994. But the fact that a condition regarding financial assurance was properly rejected in terminating that proceeding does not in any way enhance NACE's arguments regarding intervention here either as a matter of right or as a matter of discretion.

Finally, discretionary intervention by third parties who wish to support sustaining an order in an enforcement proceeding is inappropriate as a general proposition. In licensing proceedings, where the scope of the proceeding might involve broad safety issues, an intervenor might be in a position to assist in developing the record for a licensing decision. However, the purpose of the hearing rights afforded in enforcement proceedings is to protect the interests of those who are adversely affected by the issuance of an order. Therefore,

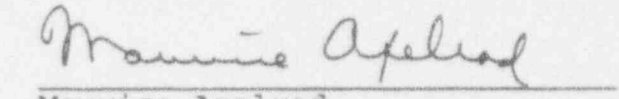
the Commission limits the scope of the hearing opportunity in enforcement orders to the issue of whether the order should be sustained. The NRC Staff, as the proponent of the order, has the burden to establish that the order should be sustained and is adequately equipped to protect the public's interest in sustaining the order. In such cases, it would be inappropriate to permit petitioners, who were unable to establish the requisite interest in an enforcement proceeding, to intervene on a discretionary basis and assume a duplicative prosecutorial role as a proponent of an order.

As noted in Pebble Springs, discretionary intervention should "prove more readily available where petitioners show significant ability to contribute on substantial issues of law or fact which will not otherwise be properly raised or presented." CLI-76-27, 4 NRC at 617 (emphasis added). The NRC Staff, which had the discretion to frame and issue the Order in the first place and which has the burden of proof in sustaining the Order that it issued, can presumptively be relied upon to properly raise and present the issues of law or fact upon which the issuance of the Order was based. Clearly, enforcement hearings are quintessential examples of proceedings where discretionary intervention is neither warranted nor appropriate.

CONCLUSION

FOR THE FOREGOING REASONS, AND THOSE PREVIOUSLY STATED IN SFC'S ANSWER IN OPPOSITION TO NACE'S MOTION TO INTERVENE, SFC respectfully requests that NACE's motion for leave to intervene in this proceeding be denied.

Respectfully Submitted,



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