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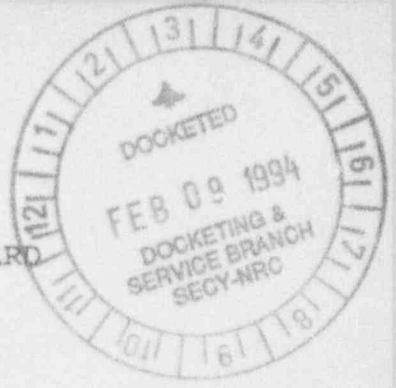

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter Of	
Sequoyah Fuels Corporation and General Atomics	Docket No. 40-8027EA Source Materials License No. SUB-1010
(Gore, Oklahoma Site Decontamination and Decommissioning Funding)	

NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S SUPPLEMENTAL PETITION TO INTERVENE

Pursuant to 10 C.F.R. § 2.714(b), Native Americans for a Clean Environment ("NACE") hereby submits the following contentions in this enforcement proceeding. These contentions are supported by the attached affidavit of Dr. Arjun Makhijani (Attachment 1).

1) **The NRC has enforcement authority over General Atomics.**

Basis: General Atomics ("GA") argues that the Nuclear Regulatory Commission ("NRC" or "Commission") lacks authority or jurisdiction over GA, that GA is not a licensee, that GA lacks the day-to-day operational control over Sequoyah Fuels Corporation ("SFC") which would provide a basis for liability for decommissioning costs, and that GA has not made promises to finance the decommissioning of the SFC site which were relied upon by the NRC. GA's Answer and Request for Hearing at 19-20 (November 2, 1993) (hereinafter "GA Answer"). However, the NRC is clearly acting within its jurisdiction and authority in ordering GA to provide decommissioning funding for SFC.

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a. First, as the Commission has explained, the NRC's statutory enforcement authority is "not limited to its licensees," but rather is "extremely broad, extending to any person (defined in section 11s to include, e.g., any individual, corporation, federal, state and local agency) who engages in conduct within the Commission's subject matter jurisdiction." Final Rule, Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664, Col. 3 (August 15, 1991). Thus, for example, the Commission has enforcement authority over contractors and subcontractors, although these individuals or entities are not technically licensees. Id.

In this case, GA's control over SFC, through its 100% ownership, clearly brings it within the NRC's subject matter jurisdiction. In Safety Light Corp. (Bloomsburg Site Decontamination), ALAB-931, 31 NRC 350 (1990), the Appeal Board found, inter alia, that the NRC had jurisdiction over a non-licensee parent corporation, based in part on the parent corporation's total control of the subsidiary licensee. One hundred percent ownership of a corporation "necessarily" conveys "the ultimate decisional authority on all matters pertaining to the use of the license." 31 NRC at 366. Whether or not GA exercises its right to "assert dominion" over SFC's licensed activities, "that right is dispositive of the jurisdictional question." Id. at 367, note 53 (emphasis in original). In addition, the numerous SFC licensed activities in which GA is directly involved, as described in section (b) below,

establish that GA is actively engaged in conduct within the NRC's subject matter jurisdiction.

b. The Atomic Energy Act, in Section 161(b), allows the NRC to "establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary to desirable to promote the common defense and security or to protect health or to minimize danger to life or property." 42 U.S.C. § 2201(b) (emphasis added). This provision provides the NRC with authority to take necessary enforcement action against GA, as the owner of SFC.

NACE is aware of no NRC case directly addressing the question of the extent of GA's liability for decommissioning funding. However, in Safety Light, the Appeal Board suggested that the degree of actual involvement by the parent corporation in the affairs of the subsidiary would be a relevant consideration. In this case, GA has had significant involvement and control in SFC's operations, dating from its 1988 purchase of the SFC plant, through its holding company, Sequoyah Holding Corporation ("SHC").

In the 1988 Safety Evaluation Report ("SER") approving the transfer of SFC to SHC, the NRC specifically noted that "corporate oversight and audit responsibilities" designated by SFC's license to Kerr-McGee were being assumed by GA. Safety Evaluation Report at 2 (October 28, 1988) (Attachment 2). Moreover,

GA's oversight responsibility and significant involvement in SFC's operations are clearly established by the terms of the SFC license. For instance:

The chain of ownership of SFC is explicitly acknowledged in § 1.1 of the license:

> Sequoyah Fuels Corporation is a wholly-owned subsidiary of Sequoyah Fuels International Corporation, which is a wholly-owned subsidiary of Sequoyah Holding Corporation, which is a wholly-owned subsidiary of General Atomics, which is a wholly-owned subsidiary of General Atomic Technologies Corporation. General Atomic Technology Corporation is controlled by James N. Blue, a United States citizen.

Had the relationship between these corporations (and their owner, James Blue) been unimportant, there would have been no reason to mention SHC, SI, and GA in the license. By describing their relationship in the chain of total control over SFC, the license recognizes their responsibility for the actions of SFC.

Senior GA personnel are also identified as the responsible parties for key health and safety duties at SFC. GA's Manager for Health Physics is responsible for "establishing corporate radiation health and safety standards and procedures, and coordinating them with managers and executives directly affected." § 2.1. See also § 2.7.3. GA's Corporate Director for Licensing, Safety, and Nuclear Compliance is responsible for reviewing "the radiation health and safety practices of Sequoyah Fuels Corporation," in order to "ensure compliance with the current company radiation health and safety standards and procedures, applicable federal and state regulations, and license conditions." These

reviews must be documented, with recommendations for "new or revised standards and procedures," and submitted to high level GA officials, including GA's Corporate Vice President for Human Resources. § 2.1.

The responsibilities of the GA's Corporate Director for Licensing, Safety, and Nuclear Compliance also include directing quarterly audits at SFC "to evaluate and verify compliance" with applicable federal and state standards and NRC license conditions. § 2.2. GA's audit responsibilities are described in more detail in § 2.8. Not only must GA conduct quarterly audits to "evaluate and verify compliance" with applicable standards and license conditions, but they must be followed up "to ensure corrective actions is being taken in a timely manner." § 2.8.

GA's Corporate Manager, Health Physics, is responsible for "the preparation of detailed corporate standards dealing with the control of radiation, spread of radioactive contamination, and the monitoring of personnel and nuclear facilities." He or she is also "responsible for auditing procedures and plant operations in the health physics area." § 2.2. This person reports to the GA Corporate Director, Licensing, Safety and Nuclear Compliance. He or she also chairs the ALARA [As Low as Reasonably Achievable] Committee, which is responsible for conducting and evaluating the results of quarterly ALARA audits, and making recommendations to SFC for measures to reduce radiation exposures. § 3.2.2. SFC must respond in writing to these recommendations. Id.

SFC's license also contains a separate section entitled "Safety Review," which describes the "independent overview functions carried out under GA's Corporate Vice President, Human Resources." § 2.3. These functions include

-- establishing corporate standards for contamination control and radiation protection,

-- establishing corporate standards for safe operations procedures, conducting periodic inspections against these criteria

-- maintaining "technical liaison with regulatory agencies, of local, state, and federal government,"

-- offering "expert professional advice and counsel to corporate [GA] and Sequoyah Facility Management in health and safety matters, and

-- procuring "special audit services, inspections, or calculational capability" from GA "when it appears that an adequate solution definition exceeds the capability of the staff." Id.

SFC's license also establishes "personnel education and experience requirements" for GA personnel having a role in the oversight of SFC's operations. For example, the Corporate Vice President of Human Resources "shall have a minimum of five years of nuclear industry management experience of high level general management nature." § 2.5. Educational and training requirements are also established for GA's Corporate Director, Licensing, Safety and Nuclear Compliance, who must also "be capable of providing authoritative advice and counsel in matters related to

NRC licensing, regulations and procedures." Id. Similarly, minimum educational and experience requirements are established for GA's Corporate Manager, Health Physics and the Corporate Manager of Industrial Safety. Id.

Thus, SFC's license contains numerous prescriptions for GA's extensive involvement in and oversight of SFC's day-to-day operations, thus demonstrating its liability for decommissioning costs.[1] The extent of that liability is a matter that should be determined in the evidentiary hearing.

c. GA claims that it is not now, and never has been, a licensee of the SFC facility; and thus the NRC has no authority over it. However, while GA is not specifically named as the "licensee," its 100% ownership, through its holding company, is recognized in the SFC license; and the license gives GA many responsibilities for the oversight and management of SFC's operation. Given the degree of involvement and control that GA has over the operations of SFC, as established in SFC's license, GA may be found to constitute a constructive or de facto licensee.

The determination of whether GA constitutes a de facto licensee may also be affected by the Licensing Board's consideration of whether the NRC's statutory purpose of protecting public health and safety and the environment has been wrongfully "frus-

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[1] NACE also adopts and incorporates by reference Section V of the NRC's October 15, 1993, enforcement order against GA and SFC, which provides further evidence of SFC's control over and involvement in SFC's operations, including the creation of the ConverDyn Corporation.

trated through the use of separate corporate entities," thus calling for it to "pierce the corporate veil." Safety Light, 31 NRC at 368, quoting Capital Telephone Co. v. FCC, 499 F.2d 734, 738 n. 10 (D.C. Cir. 1974). If the purpose of distancing GA from SFC through the creation of separate holding companies was to avoid liability for contamination known to GA or reasonably foreseeable by GA, then GA cannot be allowed to shield itself from liability through the corporate structuring of its business venture. There is significant evidence that GA knew, or should have known, that the SFC site was severely contaminated when it was purchased in 1988.

For example, "sandwells" near the solvent extraction ("SX") building were used to monitor levels of uranium contamination from 1976 through 1989, and showed levels which routinely extended to hundreds of thousands of micrograms per liter ("ug/l")[2]. Moreover, the data clearly indicate that "uranium contamination had migrated away from the SX building." EA 91-067 at 17 (October 3, 1991). In 1976, SFC also installed a standpipe in the floor of the Main Process Building ("MPB"). The standpipe, known as the "subfloor process monitor," was attached to a pump and piping that connected to the process. According to EA 90-158 (November 5, 1990), "[s]ince 1976, the operator had recog-

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2 This historical data is summarized in Roberts/Schornick's Final Environmental Investigation ("FEI") Report, Table 78 (July 31, 1991). The highest level reported was 1.2 million ug/l.

nized that contaminated liquid was escaping to the ground beneath the process building floor and periodically pumped liquid from the subfloor process monitor back into the process." Id. at 12. Data recorded in the Roberts/Schornick report shows that in the 1987-89 timeframe, uranium levels in the millions of ug/l, and extending as high as 62 million ug/l, were measured from this subfloor monitor.[3] Problems such as these would have been evident to GA if it conducted an environmental audit or investigation prior to purchasing the SFC plant, as standard business practice dicates in these sorts of transactions.

Rather than investigating and taking responsibility for the contamination, GA attempted to shield itself from liability, and ceased efforts to follow up on these disturbing test results. Directly after GA's subsidiary bought SFC, SFC discontinued the sandwell monitoring in 1989, and failed to report the sandwell monitoring data in its 1990 license renewal application. EA 91-067 at 26. The subfloor process monitor was never recorded on any plant drawings or plant procedures;" nor is it referred to in SFC's decommissioning file records. Id. Moreover, SFC's 1990 license renewal application made no mention of this source of groundwater contamination, as it was required to. Environmental Report at 4-22. As a result, the contamination of the site was probably exacerbated, thus increasing the costs. Accordingly, GA

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[3] FEI Report, Table 27. 62 million ug/l were measured on June 8, 1989.

cannot be allowed to use its corporate structure to hide from liability for the decommissioning of the SFC site.

d. As discussed in Section V of the NRC's October 15, 1993, enforcement Order, and incorporated by reference herein, GA committed in writing to guarantee sufficient funding for the decommissioning of the SFC site, in exchange for the NRC's consent to resume operation. (While SFC and GA argue that this guarantee was not a condition for restart, GA's commitment clearly was a consideration in the NRC's general decision to allow SFC to resume operation.) In making this commitment, GA put itself in the position of a guarantor, a responsibility that cannot be unilaterally relinquished.

Moreover, the NRC relied to its detriment on GA's commitment to guarantee sufficient funding for the decommissioning of the SFC plant when it allowed the SFC Facility to resume operation in the spring of 1992. Thus, under well-established precedent, GA is estopped from denying its liability to fund decommissioning of the SFC site. See Federal Deposit Insurance Corp. v. Jones, 846 F.2d 221 (4th Cir. 1988) and cases cited therein ("It is settled law that when a party induces another to take action prejudicial to his interests in reliance on a promise of that party, such party cannot later disavow his promise and obligation.") Accordingly, GA must be required to fulfill its commitment.

2) Guaranteed decommissioning financing by GA is required by NRC regulations, and is necessary to provide adequate protection to public health and safety.

Basis: SFC and GA claim that they are not legally required to satisfy the requirement of 10 C.F.R. § 40.36 to provide guaranteed decommissioning funding. SFC's Answer and Request for Hearing (hereinafter "SFC Answer") at 7, 9, 12, 15-16; GA Answer at 7. Moreover, GA and SFC both assert that SFC has satisfied the requirements of 10 C.F.R. § 40.42(c)(2)(iii)(D). For a number of reasons, neither of these assertions is correct.

First, both § 40.36 and par. 22 of SFC's license (see Amendment 19 (April 9, 1993)) required SFC to submit a decommissioning funding plan at the time of its license renewal application. Neither of these provisions qualify this requirement by stating that it only applies if SFC continues to prosecute the license renewal application. SFC's decommissioning funding plan "came due" at the time its license renewal application was filed, and its failure to comply with the applicable regulation and license term constitutes an enforceable violation.

Second, even accepting SFC's and GA's argument that SFC is governed by § 40.42(c)(2)(iii)(D), SFC has not complied. Section § 40.42(c)(2)(iii)(D) requires a licensee which has not submitted a renewal application to submit a proposed decommissioning plan which includes an "updated detailed cost estimate for decommissioning, comparison of that estimate with present funds set aside

for decommissioning and plan for assuring the availability of adequate funding for completion of decommissioning." However, the decommissioning cost estimate submitted by SFC in its Preliminary Plan for Completion of Decommissioning (PPCD") is by its own terms "preliminary," and has almost no "detail." For instance, the PPCD is uncertain about two major issues bearing on the decommissioning of the millions of cubic feet of contaminated soil at the site: the standard to which the site will be decontaminated, and the method for disposing of the soil (i.e., onsite or offsite). Thus, SFC has provided little or no basis for a reasonable decommissioning cost estimate.

Moreover, as discussed by the NRC in its enforcement order, SFC's current plans for funding the decommissioning of the SFC site are inadequate to "assur[e] the availability of adequate funds for completion of decommissioning," as required by § 40.42(c)(2)(iii)(D). For instance, as noted by the NRC,

> Estimates of income from the ConverDyn arrangement are necessarily uncertain because they are based upon assumptions about the market for UF6 conversion services over the next ten years, ConverDyn's ability to keep existing customers or to obtain new customers, and the costs of business operations, and because they are based upon some speculative assumptions about whether SFC will receive the maximum possible amount in fees, in view of the system of priorities for payments to be made under the ConverDyn arrangement.

58 Fed. Reg. at 55,089, Cols. 1-2.

The NRC also observes that "there are a number of other claims on ConverDyn revenues that have higher payment priority than payments to SFC." Id., Col. 2. For instance, it is unclear

whether these claims include SFC's liability for cleanup costs under the Consent Decree which SFC entered into with the U.S. Environmental Protection Agency on July 26, 1993. There is no indication in the PPCD that SFC expects to receive any other revenues through 2003, other than the $89 million described in Table 10-2 of the PPCD. If not, then SFC must pay for both the NRC cleanup and the EPA cleanup out of the same revenues.[4] Thus, this is another reason why a guaranteed decommissioning fund is necessary to protect public health and safety.

Moreover, as the NRC notes,

> SFC's estimate of the amount of revenue projected to be derived from the ConverDyn arrangement is based upon the unsubstantiated assertion that ConverDyn's fixed costs of operation wil steadily decline after 1994. Revenue estimates also assume that ConverDyn will operate at a 100% capacity utilization rate continuously through the year 2003. Finally, there is uncertainty concerning SFC's projected decommissioning costs. The proposed decommissioning plan has not yet been submitted to NRC, although a preliminary plan (PPCD) has been submitted. SFC's cost estimate for decommissioning is based on assumptions as to acceptable decommissioning alternatives. If more costly decommissioning alternatives are required by NRC as a result of its review of SFC's decommissioning plan, the $89 million

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[4] According to the Consent Decree, by letters of April 23 and 30, 1993, SFC "submitted to EPA commercial and financial information under a claim of confidentiality and on which a determination by EPA regarding confidentiality is pending." According to EPA, in these documents, SFC "establishes its financial capability and intent to complete the provisions and requirements" of the Consent Decree. Consent Decree at 14, U.S. EPA Docket No. VI-005-(h)93-H. (The section of the Consent Decree which addresses financial assurances is included as Attachment 3). SFC is also required to submit quarterly and annual reports regarding the financing of its cleanup efforts. Id. NACE has not been able to obtain these documents.

> in revenues from the ConverDyn arrangement and other sources are unlikely to be sufficient.

58 Fed. Reg. at 55,089, Col. 2 SFC and GA "den[y] the implication" that the $89 million in expected revenues from the Converdyn arrangement "are unlikely to be sufficient." SFC Answer at 12, GA Answer at 8. However, as discussed above, SFC's PPCD does not provide enough information to support such a statement. Moreover, what little information is provided indicates that decommissioning costs will be far higher than estimated by SFC. With respect to disposal of contaminated soil, for example, SFC estimates that there are 2 to 4 million cubic feet of contaminated soil (PPCD at 10-1), whose excavation and disposal will cost $2 million. PPCD, Table 10-1. (SFC does not provide a cost estimate for transportation of the soil, should it choose to dispose of the soil offsite.) SFC's cost estimate is far below even the lowest estimate that NACE was quoted by Envirocare, a low level waste repository in Utah.[5] In a telephone conversation on February 7, 1994, an Envirocare official informally quoted a disposal price of $10 to $15 per cubic foot of soil. This would bring the cost of soil disposal alone, excluding excavation and transportation, to between $20 and $60 million. The NRC itself has cited an estimate of $30 per cubmic foot, which could bring

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[5] Other than Barnwell North Carolina, which is due to stop accepting waste from outside the Southeast compact area in the summer of 1994, the Envirocare is the only site currently available for disposal of low-level contaminated soil from commercial facilities.

the high end estimate to $120 million for soil disposal alone. In contrast, SFC has estimated only $2 million for this item. SECY-92-200, Memorandum from James M. Taylor to the Commissioners at 9 (May 29, 1992) (Pages 9-11 are included as Attachment 4). Thus, since SFC appears to have grossly underestimated the costs of decommissioning the site, the $86 million required by the NRC constitutes the bare minimum that should be set aside for the decommissioning of the facility.

For these reasons, and all other relevant reasons stated in the October 15 Order, the decommissioning measures required by the October 15 Order are required in order to satisfy the NRC's regulations for decommissioning financing, and to provide reasonable assurance that the contaminated condition of the SFC facility will not pose an undue risk to the public health and safety in the future.

Respectfully submitted,

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