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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-94-5

ATOMIC SAFETY AND LICENSING BOARD '94 FEB 25 A8:32

Before Administrative Judges:

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

Thomas D. Murphy
Alternate Board Member

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| In the Matter of | Docket No. 40-8027-EA |
| SEQUOYAH FUELS CORPORATION and GENERAL ATOMICS | Source Material License No. SUB-1010 |
| (Gore, Oklahoma Site Decontamination and Decommissioning Funding) | ASLBP No. 94-684-01-EA |
| | February 24, 1994 |

MEMORANDUM AND ORDER
(Granting Intervention Motion;
Referring Ruling to the Commission)

This proceeding is before us to consider the challenge of Sequoyah Fuels Corporation (SFC) and General Atomics (GA), SFC's parent company, to an October 15, 1993 NRC staff order. Among other things, the order makes SFC and GA jointly and severally responsible for providing financial assurance for the decommissioning of SFC's facility near Gore, Oklahoma. See 58 Fed. Reg. 55,087 (1993). In a January 25, 1994 memorandum and order, the Board advised the participants that it was granting a motion for leave to intervene filed by petitioner Native Americans for a Clean Environment (NACE) and that a written order detailing its reasons would follow. See Memorandum and Order (Petition



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for Intervention) (Jan. 25, 1994) at 1-2 (unpublished) [hereinafter January 25 Memorandum and Order]. This memorandum and order sets forth the grounds for that ruling.

The NACE motion confronts the Board with the issue of whether, in an adjudicatory hearing convened pursuant to 10 C.F.R. § 2.202 to adjudicate the validity of a staff enforcement order, someone wishing to appear in support of the order can intervene in the proceeding. For the reasons detailed below, we have concluded that 1) as a general matter intervention as of right is available to such a petitioner; 2) petitioner NACE has demonstrated that it possesses the requisite interest establishing its standing in this instance; and 3) NACE's intervention motion was timely filed. Additionally, because of the sui generis nature of our determination that in a proceeding on a section 2.202 staff enforcement order a petitioner can intervene in support of the order, pursuant to 10 C.F.R. § 2.730(f) we refer that ruling to the Commission for its review.

## I. Background

Until last summer, SFC operated the Gore facility pursuant to a 10 C.F.R. Part 40 license permitting the use of source material for the production of uranium hexafluoride ($UF_6$) and depleted uranium tetrafluoride

($DUF_4$). SFC now is moving forward with plans to decommission the facility. Present SFC estimates put the cost of this decommissioning effort at some eighty-six million dollars. See 58 Fed. Reg. at 55,089.

In accordance with 10 C.F.R. § 2.202(a)(3), the October 1993 staff order at issue here provided that SFC, GA, and "any other person adversely affected by this Order" had until November 4, 1993, to file an answer to, and request a hearing regarding, the order. 58 Fed. Reg. at 55,092. The order also states that the issue in any hearing will be "whether this Order should be sustained." Id. SFC and GA filed timely answers and hearing requests on November 2 and 3, 1993, respectively. See [SFC's] Answer and Request for Hearing (Nov. 2, 1993); [GA's] Answer and Request for Hearing (Nov. 3, 1993). On November 18, 1993, the Secretary of the Commission referred these requests to the Chief Judge of the Atomic Safety and Licensing Board Panel for the appointment of a presiding officer, who subsequently appointed this Board to preside over the requested adjudication. See 58 Fed. Reg. 63,406 (1993). See also 59 Fed. Reg. 3382 (1994) (reconstituting Board to add Murphy, J., as alternate member). Also on November 18, petitioner NAGE filed a motion for leave to intervene in the proceeding.

NACE describes itself as an Indian-controlled and staffed citizens' environmental organization that endeavors to educate the public about environmental issues, with an emphasis on the nuclear industry. In its motion, NACE states that the organization and its members who live, work, and travel near the Gore facility "would be adversely affected if the October 15 order were reversed or weakened." Motion for Leave to Intervene in Proceeding Regarding [SFC's] and [GA's] Appeal of [NRC's] October 15, 1993, Order (Nov. 18, 1993) at 1 [hereinafter NACE Intervention Motion]. Included with the motion is the affidavit of Ed Henshaw, who declares that he is a NACE member and that NACE is authorized to help represent his interests. In his affidavit, Mr. Henshaw asserts that his home is adjacent to the Gore facility and that his health and safety, economic, and social interests will be adversely impacted if the October 1993 order with its directives regarding decommissioning funding is not sustained. See Nov. 23, 1993 Letter from Diane Curran, NACE Counsel, to Samuel J. Chilk, Secretary of the Commission, Affidavit of Ed Henshaw at 1 [hereinafter Henshaw Affidavit].

On December 6, 1993, both SFC and GA filed responses opposing the NACE intervention petition, with GA simply adopting the arguments made by SFC. See [SFC's] Answer in Opposition to NACE's Motion to Intervene (Dec. 6, 1993) [hereinafter SFC Intervention Answer]; [GA's] Answer in

Opposition to the Motion to Intervene of [NACE] (Dec. 6, 1993). Included with the SFC filing is the affidavit of its Technical Services Vice President, John S. Dietrich. Mr. Dietrich indicates that Mr. Henshaw's property is more than one mile southeast of the SFC industrial site and more than six-tenths of a mile southeast from some SFC fertilizer ponds that also are to be decommissioned. See SFC Intervention Answer, encl. 2, at 1, ¶ 5. See also id., attach. 2. Further, referencing hydrogeological studies done between 1990 and 1992, Mr. Dietrich states that the groundwater flow paths from the SFC industrial facility and the ponds are "generally" westward and away from Mr. Henshaw's property. Id. at 2, ¶ 8. Additionally, citing the topographic features of the area, Mr. Dietrich concludes that it is "impossible" for surface water from SFC's industrial facility and the ponds to drain onto Mr. Henshaw's property. Id. at 3, ¶ 12.

In contrast, in a response filed December 13, 1993, the staff declared that because it was conceivable NACE might be adversely aff..ted if the October 1993 order is not sustained, it did not oppose NACE's intervention request, subject to NACE's submission of a valid contention. See NRC Staff's Response to NACE's Motion for Leave to Intervene (Dec. 13, 1993) at 4-5 [hereinafter Staff Intervention Response].

By order dated December 17, 1993, the Board permitted NACE to file a reply to the SFC, GA, and staff responses to its intervention petition. See Order (Reply to Intervention Motion Responses; Prehearing Conference) (Dec. 17, 1993) at 1 (unpublished). NACE responded to this order by filing a December 30, 1993 reply to SFC's response. See [NACE's] Reply to [SFC's] Answer in Opposition to NACE's Motion to Intervene (Dec. 30, 1993) [hereinafter NACE Reply to SFC Intervention Answer]. Included with this reply is the affidavit of hydrogeologist Timothy P. Brown who asserts there is the potential for groundwater contamination to the Henshaw property from the SFC facility, including the industrial site, the nearby pond areas, and outlying agricultural fields on which fertilizer made from raffinate produced at the Gore facility has been spread. See id., attach. C. Among other things, Mr. Brown declares that the available data suggests that groundwater flows in the area are "variable and complex" and may flow in directions other than westward. Id. ¶ 9. Mr. Brown also states that airborne contamination of the Henshaw property from the SFC site is a possibility. See id. ¶ 12.

SFC subsequently obtained permission to file an additional pleading addressing what it asserts were new factual allegations and arguments in NACE's December 30 reply. See Memorandum and Order (Memorializing Rulings on Pending Motions; Prehearing Conference Agenda) (Jan. 6,

1994) at 2-3 (unpublished). As part of its January 11, 1994 submission, SFC includes the affidavits of hydrogeologists Bert J. Smith and Kenneth H. Schlag, who contest Mr. Brown's assertions regarding groundwater contamination, and radiation protection consultant Thomas E. Potter, who disputes Mr. Brown's statements regarding airborne contamination. See [SFC's] Reply to [NACE's] Supplemental Factual Allegations, New Arguments, and Request for Discretionary Intervention (Jan. 11, 1994), encls. 1-3 [hereinafter SFC Reply to NACE Reply].

NACE, in turn, has submitted an additional affidavit by Mr. Brown.[1] See [NACE's] Motion for Leave to File Reply Affidavit (Jan. 19, 1994), Reply Affidavit of Timothy B. Brown [hereinafter NACE Reply Affidavit Motion]. In his

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[1] Both SFC and GA contest NACE's request to file this January 19 submission, asserting that NACE should not be given another opportunity to meet the burden that it should have sustained in its first two intervention filings. See [SFC] Response to NACE's Motion for Leave to File Reply Affidavit (Jan. 21, 1994) at 2-3; [GA's] Response to NACE's Motion for Leave to File Reply Affidavit (Jan. 21, 1994) at 1. As we note below, it is not apparent that, left uncontested, NACE's initial showing would have been insufficient to meet its burden on standing. See infra p. 19. Moreover, in granting NACE an opportunity to make a second filing to reply to SFC's response, we contemplated that it would have the last word on the subject of standing. SFC, however, was afforded another opportunity to file without opposition from NACE. See Tr. at 6-7. Although we are not particularly enamored of the "eleventh hour" nature of NACE's filing -- coming as it did on the morning of the prehearing conference scheduled to discuss NACE's standing -- because NACE's filing deals with matters that were not the subject of discussion at the conference, it is appropriate that NACE be given the opportunity to respond to SFC's additional filing.

reply affidavit, Mr. Brown contests portions of the Smith and Schlag affidavits, attempting to counter their position that groundwater flow from the SFC site will not carry contamination to the Henshaw property.

On January 19, 1994, the Board conducted a prehearing conference during which it provided the participants an opportunity to address various legal questions it had regarding NACE's intervention request. As was noted previously, in a January 25, 1994 memorandum and order, the Board advised the parties that it was granting NACE's intervention request, with a written order detailing its reasons to follow. See January 25 Memorandum and Order at 1-2.[2]

## II. Analysis

Relative to NACE's intervention request, the participants have raised a variety of concerns about both the general principles governing standing in NRC adjudicatory proceedings generally and the specific circumstances surrounding NACE's petition. These fall into three categories: 1) in an NRC proceeding involving a

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[2] The Board's January 25 directive also gave NACE until February 8, 1994, to submit its contentions in accordance with 10 C.F.R. § 2.714(b). See January 25 Memorandum and Order at 2. NACE has filed two contentions, which are currently under scrutiny to determine whether they constitute litigable issues. See [NACE's] Supplemental Petition to Intervene (Feb. 8, 1994).

challenge to a staff enforcement order issued under 10 C.F.R. § 2.202, does a person like NACE who wishes to support the staff's action have a right to intervene; 2) has NACE made a sufficient showing in this instance to establish its standing as of right; and 3) was NACE's November 18, 1993 intervention motion timely. We deal with each of these issues in turn.

A. Availability of Intervention as of Right to Support a Staff Enforcement Order

As a threshold matter,[3] the NACE intervention request requires that we determine whether, for one supporting rather than challenging an enforcement order, the existing statutory and regulatory framework sanctions intervention as of right in a 10 C.F.R. § 2.202 proceeding. NACE and the staff assert that intervention as of right is available. NACE Intervention Motion at 3-5; Staff Intervention Response at 4-5. SFC disagrees. It contends that, consistent with the decision of the United States Court of Appeals for the District of Columbia Circuit in Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983), only those who oppose an NRC enforcement order are persons "whose interest may be affected by the proceeding" so as to qualify for a hearing

[3] SFC asserts that the initial matter before the Board is whether NACE's intervention motion is timely. See SFC Intervention Answer at 7-8. Because of the somewhat novel nature of the NACE request, we find it appropriate to explore initially the question of whether there is a statutory or regulatory basis for its intervention in this proceeding.

upon request under section 189a(1) of the Atomic Energy Act of 1954 (AEA), 42 U.S.C. § 2239(a)(1), the AEA's hearing provision, and 10 C.F.R. § 2.714(a), the regulation governing intervention in all formal adjudications conducted pursuant to 10 C.F.R. Part 2, Subpart G.[4] See SFC Reply to NACE Reply at 12. According to SFC, in affirming the Commission's determination that it appropriately could limit the enforcement order proceeding to whether the order "should be sustained," the court in Bellotti noted that "[a]s [the Commission] interpret[s] it, this language limits possible intervenors to those who think the Order should not be sustained, thereby precluding from intervention persons such as petitioner who do not object to the Order but might seek further corrective measures." See SFC Intervention

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[4] As part of its attack on NACE's standing in this proceeding, SFC declares that the intervention right afforded by AEA section 189a(1) is not applicable because the October 1993 order issued to SFC and GA does not involve one of the types of licensing actions specified in that provision, i.e., "the granting, suspending, revoking, or amending of any license." See SFC Intervention Answer at 13-15. The staff agrees with SFC's assertion. See Tr. at 21. NACE, however, maintains that the order "alters a binding norm" so as to constitute a license amendment that comes under the rubric of section 189a(1). See NACE Reply to SFC Intervention Answer at 11-13.

We need not decide this question here, for, as SFC and the staff also suggest, see Tr. at 21, 24, 33, this issue has no practical impact in these circumstances. This is because the Commission's regulations, 10 C.F.R. § 2.714(a), in language identical to that in AEA section 189a(1), provide for intervention in any 10 C.F.R. Part 2, Subpart G adjudicatory proceeding, including a proceeding initiated under 10 C.F.R. § 2.202, see id. § 2.700.

Answer at 20 (quoting Bellotti, 725 F.2d at 1382 n.2 (emphasis added)). This, SFC maintains, is at least an implicit judicial endorsement of the Commission's intent to preclude anyone who wants to support an enforcement order from participating in any adjudication on the order. See SFC Reply to NACE Reply at 13.

We do not read Bellotti so broadly.[5] The issues before the court in Bellotti were 1) did the Commission have the authority under AEA section 189a to define the scope of the proceeding, and 2) did it abuse that authority by limiting the proceeding's scope to whether the order should be sustained. See 725 F.2d at 1381-82. The court held that the Commission did have that authority under section 189a and that it did not abuse its discretion by so defining the scope of a proceeding, even though this precluded intervention by a person championing corrective measures going beyond those in an enforcement order. Indeed,

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[5] None of the participants has contested the continuing validity of the Bellotti decision despite the fact that one of the supporting grounds of that decision -- the availability to the petitioner of a judicially reviewable request for additional enforcement action under 10 C.F.R. § 2.206, see 725 F.2d at 1382-83 -- is no longer operative. See, e.g., Nuclear Infor. Resource Serv. v. NRC, 969 F.2d 1169, 1178 (D.C. Cir. 1992) (en banc) (in line with Supreme Court's decision in Heckler v. Chaney, 470 U.S. 821 (1985), courts have treated section 2.206 petitions as presumptively unreviewable).

Bellotti is of little or no assistance here because the court simply did not reach the issue now before us.[6]

In resolving that issue, we find much more instructive the Appeal Board decision in Nuclear Engineering Company, Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737 (1978). In Sheffield, citing Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420 (1976), the Appeal Board found that the attempt of two groups to

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[6] Although we generally would not find it necessary to delve into the parties' arguments in a judicial case that were not addressed in the court's decision, given SFC's substantial reliance on what it understands was the Commission's position in the Bellotti case regarding intervention by anyone supporting an enforcement order, a review of the source of that position does not seem untoward. In its brief to the Bellotti court, in discussing the issue of standing the Commission declared:

> In this instance, in line with the scope of the [order at issue], petitioner Bellotti stands to suffer no harm adverse to his interests by the outcome of the proceeding. Of the two possible outcomes of any hearing, only one -- recession of the staff's order requiring the preparation and implementation of the [corrective] plan -- would have been adverse to his professed interests; that outcome, however, will not occur because the licensee has not requested a hearing to contest the order.

Brief for Respondents at 34, Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983) (No. 82-1932) (footnote omitted) [hereinafter NRC Bellotti Brief]. In the present instance, of course, the licensee has requested a hearing, raising the specter of the adverse outcome alluded to in the Commission's brief.

intervene in support of a pending license renewal application was inadequate because their claim by which they wished to vindicate "broad public interests" was insufficient to establish the particularized injury needed for intervention as of right. 7 NRC at 741-42. The Appeal Board went on to observe:

> It need be added only that we perceive no good reason why any different rule [regarding the need to establish a particularized injury] should apply to the petitioners here merely because, unlike the Barnwell petitioners, they favor rather than oppose the proposal under consideration. Standing to intervene hinges neither upon the litigating posture the petitioner would assume if allowed to participate nor on the merits of the case. Rather, the test is whether a cognizable interest of the petitioner might be adversely affected if the proceeding has one outcome rather than another. And, to repeat, no such interest is to be presumed. There must be a concrete demonstration that harm to the petitioner (or those it represents) will or could flow from a result unfavorable to it -- whatever that result might be. In this instance, if in fact the outright denial of the Sheffield application or the imposition of license conditions would pose a threat of injury to petitioners or their members, it should have been easy enough to have provided a bill of particulars on that score. In short, contrary to petitioners' claim on the appeal, to conclude (as we do) that their standing to intervene as of right has not been established is not perforce to foreclose all attempts at intervention in support of an application.

Id. at 743 (citation and footnote omitted). The Appeal Board then remanded the case for further consideration of whether the groups qualified for discretionary intervention. See id. at 743-45.

SFC contends that the Sheffield case has limited value because it was not an enforcement proceeding like this one.[7] See Tr. at 51. Nonetheless, in line with the directive in 10 C.F.R. § 2.714(d)(1)(iii) that a pertinent consideration in intervention rulings is "[t]he possible effect of any order that may be entered in the proceeding on

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[7] SFC also asserts that the Sheffield decision should be ignored because the case is a pre-Bellotti determination, because the discussion quoted above is dicta, and because a later Appeal Board in the Shoreham proceeding declined to rule on the issue of whether intervention to support a license application is permissible. See Tr. at 51-52. We do not find the pre-Bellotti status of the Sheffield decision particularly telling in light of our conclusion that Bellotti really did not address the central issue now before us. Further, it is not apparent that the discussion quoted above is dicta given the Appeal Board's further determination to remand the proceeding to consider the availability of discretionary standing, several of the standards for which are "[t]he nature and extent of the petitioner's property, financial, or other interest in the proceeding" and "[t]he possible effect of any order which may be entered in the proceeding on the petitioner's interest." Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976). Finally, the fact that a divided Appeal Board in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 390 n.4 (1983), chose to affirm the dismissal of an intervention petition supporting an application on the grounds of lateness without reaching the question of whether the intervenor had standing does not have any negative impact upon the validity of the analysis put forth in the earlier Sheffield decision.

the petitioner's interest," we think that decision provides valuable guidance in resolving the issue now before us.

Once SFC and GA requested a hearing relative to the staff's October 1993 order, as the Appeal Board's analysis in Sheffield suggests, NACE was presented with the likelihood that an adjudicatory proceeding would be conducted that could have two possible outcomes: The Board would fully sustain the staff's order or it would not, either because the Board would reject the order in whole or in part or because the order would be modified or withdrawn by some unilateral staff action or by a settlement between the staff and the parties contesting the order.[8] NACE has indicated that, given these two possible outcomes, only if it is permitted to participate in this proceeding can it protect its interest in seeing that the October 1993 order

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[8] SFC also suggests that NACE's interest in maintaining the terms of the October 1993 order is too illusory to provide NACE with a basis to intervene because of the order's provision permitting the staff to "relax or rescind" any of its conditions upon a demonstration of "good cause." See SFC Intervention Answer at 22-24, 32-33 (citing 58 Fed. Reg. at 55,092). We cannot agree. As the staff notes, under 10 C.F.R. § 2.717(b), any staff action of that kind would be subject to review by the Board with input from all parties to the proceeding. See Tr. at 91-92. See also Oncology Services Corporation (Order Suspending Byproduct Material License No. 37-28540-01), LBP-94-2, 39 NRC ___, ___ n.12 (slip op. at 24 n.12) (Jan. 24, 1994). In addition, pursuant to 10 C.F.R. § 2.203, any settlement between the staff and any of the parties subject to an enforcement order must be reviewed and approved by the Board. In such a circumstance, a participant like NACE would have an opportunity to vindicate its interest in having the order sustained fully by demonstrating why the settlement proposal would not be in the public interest.

and the requirements it imposes for decommissioning funding are sustained. See NACE Intervention Motion at 3-4. Therefore, consistent with Sheffield, if NACE can also establish a particularized injury that it or its members will suffer in the event the order is not sustained, it is entitled to standing as of right as a "person whose interest may be affected by the proceeding."[9]

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[9] We also see this determination as consistent with the pre-Bellotti Licensing Board decision in Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367 (1980), a case that has been the subject of considerable controversy among the participants before us.

Dairyland was decided under a regulatory enforcement scheme that is different from the current section 2.202, which was adopted in 1991. See 56 Fed. Reg. 40,664 (1991). Rather than placing a requirement on the person subject to the order, as is now done, the staff at that time would issue a order directing the subject to "show cause" why corrective measures proposed by the staff should not be required. The order also provided an opportunity for a hearing on the staff's proposed action. In Dairyland, the licensee sought a hearing on a staff order requiring it to show cause why certain facility changes should not be made. An individual and a group sought to intervene in the proceeding to support imposition of the proposed changes. Thereafter, the staff reversed its position regarding the need for the changes and the licensee moved to dismiss the intervention petitions and terminate the hearing. The Licensing Board concluded that the staff's change in position did not affect the ability of the petitioners to obtain a hearing to champion their assertion that the staff's original show cause proposal was correct and should be maintained. See 12 NRC at 370-72.

SFC seeks to distinguish Dairyland as a pre-Bellotti decision. See SFC Intervention Answer at 21. As we have stated previously, we do not see that case as controlling the matter before us. Rather, the Dairyland Board's explanation regarding the nature of the petitioners' interests relative to the possible outcomes of the proceeding supports a similar result here. See also NRC

(continued...)

B. NACE's Particularized Injury

In assessing whether NACE has made the necessary showing of particularized injury to establish its right to intervene in this proceeding, we are constrained to apply contemporaneous judicial concepts of standing. See Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993). This requires that we assess whether the intervenor will suffer any "injury in fact" relative to its interests in the proceeding and whether those alleged interests are within the "zone of interests" protected by the pertinent statutes and regulations under which the petitioner seeks to participate in the proceeding. See id.

NACE asserts that its interest in this proceeding is to act, on behalf of itself and its members living near the Gore facility, as an advocate for the legal authority and reasonableness of the October 1993 order that it believes must be sustained to provide funding that will be adequate to ensure the safe cleanup of the SFC site. See NACE

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[9](...continued)
Bellotti Brief at 34 n.21 ("The order modifying [license at issue in this case] was made immediately effective and was not contested by the licensee. These factors distinguish the instant case from cases like [Dairyland]. In Dairyland, after a matter was contested and referred to a [Licensing] Board for resolution, intervention within the scope of the proposed enforcement action may be permitted because the petitioners could show an adverse effect from a later staff decision not to require the proposed action." (emphasis in original)).

Intervention Motion at 3-4. We have no trouble concluding that the interest of intervenor NACE in seeing that the staff's decommissioning funding order is sustained falls within the zone of interests protected by the AEA. Further, for the reasons detailed below, we find that NACE has shown "injury in fact" sufficient to establish its representational standing in this proceeding.[10]

To establish the requisite injury in fact, a petitioner must allege a concrete and particularized injury that is fairly traceable to the action at issue.[11] See Perry, CLI-93-21, 38 NRC at 92. To fulfill the requirement for alleging a particularized injury, NACE initially presented the Henshaw affidavit described earlier. That affidavit establishes NACE's authority to represent Mr. Henshaw's interests. In the affidavit, Mr. Henshaw also asserts that his home is adjacent to the radiologically and chemically

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[10] In its intervention motion, NACE alleges injury both to itself and its members, see NACE Intervention Motion at 3-4, seemingly suggesting that it can be granted standing either on its own as an organization or as a representative of its members. SFC contends, however, that NACE has not made a showing that will sustain a finding of organizational standing, see SFC Intervention Answer at 16-18, an assertion that NACE does not challenge, see NACE Reply to SFC Intervention Answer at 13-23. We thus assess its intervention petition only under the standards governing representational standing.

[11] As the Perry decision also indicates, the injury must be likely to be redressed by a favorable decision in the proceeding. See CLI-93-21, 38 NRC at 92. As we noted above, this will in fact be the case in this proceeding. See supra note 8 and accompanying text.

contaminated Gore facility, which raises the possibility that contaminated groundwater and surface water will migrate onto his property. Because of this, he maintains that a failure to decontaminate the facility properly will have detrimental health and safety, economic, and social impacts upon him and his family and that a failure of SFC and GA to provide funding in line with the October 1993 order will jeopardize proper decommissioning of the facility. See Henshaw Affidavit at 1.

Standing alone, this affidavit likely would be sufficient to establish a concrete and particularized injury to Mr. Henshaw's AEA-protected health and safety interests that is fairly traceable to the action at issue in this proceeding.[12] See Perry, CLI-93-21, 38 NRC at 93. Yet, as we have described above, SFC controverts this affidavit with a series of affidavits from management and technical personnel.

In reviewing these affidavits, we must bear in mind the often-repeated admonition to avoid "the familiar trap of

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[12] As noted above, Mr. Henshaw's affidavit also expresses a concern about "the social and economic impacts of living near a de facto nuclear waste dump," albeit without further elaboration. Henshaw Affidavit at 1. It is not apparent that these types of interests (as opposed to health and safety concerns) are cognizable in this proceeding. See Perry, CLI-93-21, 38 NRC at 95 n.10 (standing requires more than general interests in the cultural, historical, and economic resources of a geographic area). Yet, even assuming they are, this statement is insufficient to identify the type of concrete and particularized injury needed to support intervention.

confusing the standing determination with the assessment of petitioner's case on the merits." City of Los Angeles v. National Highway Traffic Safety Administration, 912 F.2d 478, 495 (D.C. Cir. 1990) (citations omitted). To be sure, the merits of the litigation here generally concerns the question of responsibility for funding the decommissioning of the Gore facility rather than the extent of the contamination involved and the SFC actions necessary to deal with that contamination. Nonetheless, decommissioning funding and the nature and extent of site characterization and decommissioning activities bear a relationship to those issues that warrants some care in addressing the various factual allegations regarding NACE's asserted bases for its standing.

In fact, the Commission's recent Perry decision appears to reflect a similar concern about reaching the merits prematurely. In that proceeding, a local intervenor group and an individual living near the Perry nuclear plant sought to challenge a proposed license amendment transferring a particular reactor vessel maintenance schedule from the facility's technical specifications to its safety analysis report. The intervenors declared that they would suffer injury by reason of the fact that once the safety-related vessel maintenance schedule was removed from the technical specifications, which can only be changed by license amendment, they no longer would have notice of changes to

that schedule or an opportunity to contest those changes in an AEA section 189a(1) hearing. In reversing the Licensing Board's ruling that the intervenors had not established their standing,[13] the Commission found, consistent with its prior precedent linking standing injury with the potential for consequences for those living near a facility from a safety-related licensing action, "[a]t this stage in deciding threshold standing, we cannot conclude that no potential for offsite consequences is posed by the loss of notice and opportunity for a hearing to challenge future changes to the [maintenance] schedule." CLI-93-21, 38 NRC at 95-96.

As the staff's October 1993 enforcement order makes clear, there is uranium contamination of the soil and groundwater on the SFC main processing facility and the nearby pond areas with sufficient safety significance to warrant remediation before the property can be released for unrestricted use. See 58 Fed. Reg. at 55,087. What the Dietrich, Brown, Smith, and Schlag affidavits contain are various claims and counter-claims about the potential impact upon the Henshaw property of groundwater flow from that

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[13] The Commission reached this conclusion despite the Licensing Board's determination that the intervenors "ha[d] failed to identify the chain of circumstances culminating in 'offsite consequences' that must be linked to those future changes . . . ." Perry, LBP-92-4, 35 NRC 114, 123 n.45 (1992).

contaminated site.[14] In line with the Commission's Perry decision, we must review those affidavits to determine whether there is "no potential" for consequences to Mr. Henshaw's property from groundwater flow relative to the contamination at the Gore facility. And to answer this question on the basis of the record before us, we find we need focus only on the matter of the direction and depth of groundwater flow.[15]

Based upon groundwater flow studies relating to the SFC processing facility and the pond areas lying south of the

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[14] In contrast to the debate about groundwater flow, SFC's challenge to Mr. Henshaw's otherwise unexplicated concern about surface water is never really addressed by NACE. In the face of an analysis in the Dietrich affidavit indicating that the surrounding topography makes surface water flow to the Henshaw property from the SFC facility "impossible," SFC Intervention Answer, encl. 2, at 3, NACE fails to make any rejoinder, see NACE Reply to SFC Intervention Answer at 19-23. The same is true regarding Mr. Brown's assertion in his affidavit that there is the possibility of airborne contamination. See id. attach. C, ¶ 12. Besides the fact that Mr. Brown's opinion concerning airborne contamination is well outside the bounds of his expertise as a hydrogeologist, we have the detailed, unrebutted response to his claims in the affidavit of SFC radiation consultant Potter. See SFC Reply to NACE Reply, encl. 3. See also NACE Reply Affidavit Motion at 3 n.3 (NACE unable to conduct technical analyses to rebut Potter affidavit in time to make filing). Based on the record now before us, we can only conclude that there is insufficient support for a finding of injury in fact to the Henshaw property from surface water or airborne contamination.

[15] In contrast to its showing in the Schlag affidavit regarding the raffinate spreading fields, see SFC Reply to NACE Reply, encl. 2, on the issue of NACE's injury in fact from processing site and the pond area groundwater migration, SFC has not made any explicit assertion about the impact of the level of contaminants.

facility, including a July 1991 facility environmental investigation (FEI) report and a May 1992 addendum to the FEI report, Mr. Dietrich (who is not a hydrogeologist) concludes in the initial SFC affidavit that the groundwater flow from the processing site and the ponds is "generally" westward and away from the Henshaw property. SFC Intervention Answer, encl. 2, at 2, ¶ 8. In his first affidavit on behalf of NACE, Mr. Brown declares that Mr. Dietrich's statement about groundwater flow being to the west does not account sufficiently for the complex geology underneath the entire area around the SFC site, which could have significant impacts on flow direction. See NACE Reply to SFC Intervention Answer, attach. C., ¶ 9. Mr. Brown finds particularly important a faulted zone that lies about sixth-tenths of a mile east of the SFC facility and runs diagonally from the northeast to the southwest, going under the Henshaw property. See id. ¶ 7(b). Also of concern, according to Mr. Brown, is the fact that the hydrogeology studies relied upon by Mr. Dietrich focused only on the upper groundwater zones and so did not address the not uncommon phenomenon of deeper groundwater levels moving in a different direction from upper level flow. See id. ¶ 7(d).

Responding on behalf of SFC, Mr. Smith asserts that the groundwater flow under the SFC site area is well-understood and is representative of the adjacent areas. See SFC Reply to NACE Reply, encl. 1, at 2, ¶ 9. Mr. Smith also maintains

that the geology of the site is not overly complex. See id. at 3, ¶ 10. Further, while not challenging Mr. Brown's assertion that the nearby fault zone running under the Henshaw property could have a significant impact on flow patterns, Mr. Smith nonetheless discounts the relevance of the zone by declaring that "information developed in the FEI shows that groundwater in [the processing and pond areas] will not flow in the direction of that fault, and therefore will not be affected by that fault." Id. at 3, ¶ 12 (emphasis in original). Finally, while not contesting Mr. Brown's opinion about the potential for upper and lower groundwater levels to have different flow directions, Mr. Smith declares that his concerns about deeper flow direction are untoward because information in the 1991 FEI report and the 1992 addendum "was sufficient to convince the investigators that the possibility of significant contamination in even lower zones was unlikely and investigation to deeper zones was unnecessary." Id. at 4, ¶ 13.

Based on the record before us, we are unable to conclude that, as the Commission stated in Perry, there is "no potential for offsite consequences" relative to the Henshaw property from SFC site contamination migrating by groundwater flow. SFC's attempt to undercut the significance of the faulted zone as a groundwater path by declaring that groundwater will not flow toward the fault is

itself undermined by the FEI report. As FEI charts attached to Mr. Brown's second affidavit indicate, groundwater from the processing site does move south in the direction of the fault. See NACE Reply Affidavit Motion, Reply Affidavit of Timothy B. Brown, attachs. 1-2. At a minimum, this supports Mr. Brown's assertion that the groundwater flow patterns are "variable and complex" and leaves us unable to conclude that there is "no potential" for contaminated groundwater to flow towards the Henshaw property via the faulted zone (or some other pathway).[16] In addition, SFC itself described the results of the FEI report for the staff by stating that deeper flow systems are "expected." SFC Reply to NACE Reply, encl. 1, attach. A-2, at HYD 5-2. As Mr. Brown indicated, the potential for upper and lower level flows carries with it the possibility of differing flow directions. Having failed to measure the direction of these "expected" deeper flows, SFC is in no position to show that

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[16] Our conclusion in this regard is not affected by the fact that the pond area lies to the south between the processing site and the Henshaw property and that the groundwater flow chart for the pond area shows a generally westerly flow. The difference between the groundwater flows in the processing and pond areas only serves to emphasize that, at least on the basis of the information now before us, the groundwater flows in the area apparently are sufficiently complex that we cannot conclude that there is "no potential for offsite consequences" relative to the Henshaw property. See Perry, CLI-93-21, 38 NRC at 95.

there is "no potential for offsite consequences" relative to the Henshaw property from such deeper flow patterns.[17]

In sum, on the basis of the NACE and SFC presentations before us, like the Commission in Perry we "cannot conclude that no potential for offsite consequences" exists for the Henshaw property relative to the contamination on the SFC site. Accordingly, we find that there is a sufficient demonstration of injury in fact by NACE to provide standing to intervene as of right in this proceeding.

C. Timeliness of NACE's Intervention Request

With the legal basis for its standing thus established, NACE nonetheless faces an additional hurdle to its admission to this proceeding: the timeliness of its intervention motion. The staff's October 15, 1993 order specified that within twenty days of its issuance, hearing requests had to be filed by those "adversely affected by this Order." 58 Fed. Reg. at 55,092. Acknowledging that it filed its November 18, 1993 intervention motion two weeks past that

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[17] The validity of SFC's decision not to do such studies based on a judgment that the possibility for significant lower level flow contamination was "unlikely," SFC Reply to NACE Reply, encl. 1, at 4, ¶ 13, may well be sustainable relative to the merits of any future determination about the adequacy of the FEI report or SFC's decommissioning activities generally. In the context of our "no potential for offsite consequences" standing determination here, however, it is insufficient to compel a finding of no injury in fact against NACE. The same can be said for SFC's statement in its description of the FEI report that there is a "low potential" for groundwater movement between the upper level flow systems and the deeper systems. See id., encl. 1, attach. A-2, at HYD 5-2.

date, NACE maintains that because it was not adversely affected by the order, the twenty-day deadline in the order did not apply to it. According to NACE, consistent with the scope of this proceeding as defined by the Bellotti decision, it suffered an adverse impact entitling it to intervention only when SFC or GA (or some other person adversely affected by the order) requested a hearing. The timeliness of its hearing request thus must be gauged in relation to the filing of those hearing requests. See NACE Intervention Motion at 2-3. Finally, NACE contends that even if its intervention motion is untimely, a balancing of the five factors for late-filed petitions set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v) supports admission of its filing.[18] See NACE Reply to SFC Intervention Answer at 5-10 & attach. A (resume of Arjun Makhijani).

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[18] Section 2.714(a)(1) has been interpreted to require that the late-filed factors be addressed in the initial late petition. See Boston Edison Company (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466-68 (1985). NACE, however, first addressed the late-filed factors in NACE's reply to SFC's response to NACE's intervention motion. See NACE Reply to SFC Intervention Answer at 5-10. Acknowledging that we have the discretion to permit an intervenor to make such a belated lateness showing, see Pilgrim, ALAB-816, 22 NRC at 468, SFC asserts that the familiarity of NACE counsel with NRC proceedings establishes there is no good cause for NACE's failure to discuss those factors in its initial motion. See SFC Reply to NACE Reply at 2-3. We conclude, however, that NACE's assertion that its petition was not late at all was made in good faith so as to provide good cause for permitting it to address the late-filing factors for the first time in its reply pleading.

Not unexpectedly, SFC argues that, consistent with 10 C.F.R. § 2.202(a)(3) and the language of the staff's order, NACE's intervention request was untimely. See SFC Intervention Answer at 8-10. SFC also asserts that NACE is unable to make the required showing under the section 2.714(a)(1) five-factor test for late-filed intervention petitions. See SFC Intervention Answer at 10-13; SFC Reply to NACE Reply at 2-10. In its filing in response to the NACE intervention motion, the staff seemingly agrees that NACE's request was untimely, but declares that given the short period of time involved, it does not oppose granting the motion. See Staff Intervention Response at 2 n.5. During its presentation at the January 19 prehearing conference, however, the staff expressed support for NACE's position that its motion was not untimely because it was not "adversely affected" under the terms of the order. See Tr. at 65-66.

The timeliness issue presented by NACE's filing requires that we explore the meaning of, and relationship between, two agency regulations. One is 10 C.F.R. § 2.202(a)(3), which requires that an enforcement order inform any person "adversely affected by the order" of his or her right to request a hearing within twenty days of issuance of the order. The other is 10 C.F.R. § 2.714(a)(1), the intervention provision that applies to all 10 C.F.R. Part 2, Subpart G proceedings, including

section 2.202 enforcement order proceedings. See supra note 4. By its terms it permits "[a]ny person whose interest may be affected by a proceeding" to seek party status subject to any time limits that may be established in an appropriate notice.

If, as NACE (and apparently the staff) contend, section 2.202(a)(3) does not apply to a petitioner like NACE who wants to intervene in support of the order, the October 1993 order with its "adversely affected by the order" language did not provide NACE with notice of when it had to file a request for intervention. The timing of NACE's intervention request then would be subject to any notice issued in conformity with section 2.714(a)(1) to those "whose interest may be affected by the proceeding." On the other hand, if the "adversely affected by the order" language of section 2.202(a)(3) and the language of section 2.714(a)(1) providing an intervention opportunity to persons "whose interest may be affected by the proceeding" are coextensive, as SFC maintains, then the deadline specified in the October 1993 order was applicable to NACE and its petition is untimely.

A principal problem with the latter interpretation is that it runs contrary to the usual inference that different language is intended to mean different things. See United States v. Stauffer Chemical Co., 684 F.2d 1174, 1186 (6th Cir. 1982), aff'd, 464 U.S. 165 (1984). The difference in

language is readily apparent here. Section 2.202(a)(3) concerns those who suffer adverse effects from the "order"; section 2.714 (in imitation of AEA section 189a) refers to those whose interests may be affected by the "proceeding." Further, as this case illustrates, as between the "order" and the "proceeding," there is a real distinction in terms of the impact on the petitioner's interests.

As we noted in section II.A above, an intervenor may become a party to a hearing to protect its interest in seeing that a staff enforcement order challenged in the proceeding is sustained. Accordingly, the matter that adversely affects this petitioner's interest is not the "order," with which it agrees, but the agency's "proceeding" relative to that order, which carries the potential for overturning or modifying the order in derogation of its interests. The differing language in section 2.202(a)(3) and section 2.714(a)(1) mirrors this distinction flawlessly.[19]

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[19] Of course, the inference regarding differing meanings for differing language might be negated by a showing that the purpose or regulatory history behind the language demonstrates no difference was intended. See Stauffer Chemical Co., 684 F.2d at 1186. We are unable to find any such a purpose or history here. Instead, the regulatory history of the recently adopted section 2.202 shows that its central purpose was to make clear the agency's authority over both licensees and nonlicensees who are the targets of the enforcement action taken in the order. See 56 Fed. Reg. at 40,664-65. These are the persons to whom the "adversely affected by the order" language in section 2.202(a)(3) obviously was directed.

(continued...)

We thus conclude that the NACE (and the staff) reading of these regulations is the correct one. The language of section 2.202(a)(3) establishing a twenty-day deadline for hearing requests, as echoed in the order, was not applicable to NACE.[20] Instead, its intervention is governed by

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[19](...continued)
This same intent is reflected in the language of the other provisions of section 2.202, which consistently refer to the same type of persons. See 10 C.F.R. § 2.202(a)(1) (order must allege charges against "the licensee or other person subject to the jurisdiction of the Commission"); id. § 2.202(a)(2) ("licensee or other person" must file an answer within 20 days of order); id. § 2.202(b) ("licensee or other person to whom the Commission has issued an order" must respond with an answer that is to deny or admit each charge and may demand a hearing).

[20] SFC also seeks to rely upon a letter written by one of this Board's members in another section 2.202 enforcement order proceeding as support for the proposition that NACE's intervention is subject to the twenty-day time limit specified in section 2.202(a)(3). See SFC Intervention Answer at 9-10. The letter in question was written in response to an inquiry from counsel for a medical clinic concerning the timing for its intervention in a four-month old proceeding in which a clinic employee had filed a timely hearing request regarding an order modifying the clinic's license to prohibit him from performing activities under that license. In pertinent part, the letter stated:

> Further, once the time specified in the enforcement order for filing a hearing request has expired, an interested person who wishes to obtain party status in an adjudicatory proceeding regarding the order is obliged to petition for late-intervention. Among other things, a late intervention petition must address the factors set forth in 10 C.F.R. § 2.714(a)(1).

Id., encl. 1. In the context of that proceeding, in which the clinic clearly was a person adversely affected by the order that had failed to meet the section 2.202(a)(3)
(continued...)

section 2.714(a)(1) and any time limits that are established in accordance with that section.

As it is applicable to govern intervention by NACE in this proceeding, section 2.714(a) states that an intervention petition "shall be filed not later than the time specified in the notice of hearing, or as provided by the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on the petition and/or [hearing] request . . . ." Here, the only agency issuance providing constructive notice of a filing deadline has been the staff's enforcement order that, as we already have found, was not applicable to NACE. It thus appears there has not been any agency notice of hearing (or opportunity for hearing) that specifies a time limit for persons, such as NACE, who wish to intervene to protect an interest in having the order sustained.[21] NACE's petition,

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[20](...continued)
deadline, the letter's statement about the applicability of the section 2.714(a)(1) factors no doubt was correct. See infra note 22. Nonetheless, in light of our determination here about the timeliness of NACE's petition, the use in the letter of the term "interested person" was inaccurate.

[21] It stands to reason that without a constructive notice of the deadline for filing a hearing request for these other potential intervenors, there is no apparent point at which the agency can reject a hearing request from such a person as untimely. The administrative inefficiency of such a circumstance is apparent and cries out for some remedy.

Fortunately, Commission guidance on how to handle this problem already exists in the agency's rules governing
(continued...)

therefore, cannot be deemed untimely for failing to meet an appropriately noticed filing deadline.

Yet, even in the absence of any constructive notice, the possibility remains that NACE had actual notice of the pendency of this enforcement proceeding and failed to make a timely intervention request following that notice. See 54 Fed. Reg. 8269, 8272 (1989). NACE asserts that the first time it was given any actual notice relevant to its intervention in this proceeding was on November 8, 1993, when it received service of the SFC and NACE answers requesting a hearing on the October 1993 order. See NACE

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[21](...continued)
informal adjudications in materials and operator licensing cases. It is agency practice to provide notice of only some of the material licensing actions to which AEA section 189a(1) hearing rights attach. See 54 Fed. Reg. 8269, 8270-71 (1989). As the Commission has acknowledged, this can create a situation in which a hearing will be convened at the request of an interested person who finds out about the licensing action, while others similarly situated have no notice of their right to request and participate in such a proceeding. To rectify the potential inefficiencies (not to mention unfairness) in this situation, the informal hearing rules provide that once an intervenor's hearing request is granted regarding a previously unnoticed action, a notice is to be published in the Federal Register that advises all other interested persons of the proceeding and sets a specific deadline for them to file intervention petitions. See 10 C.F.R. § 2.1205(i)(4).

Consistent with this Commission guidance, in the event we find NACE has presented a litigable contention so as to be fully admitted as a party to this proceeding, pursuant to the Board's authority under section 2.714(a)(1), we will issue a notice of hearing that invites all other persons whose interest may be affected by this proceeding to intervene by a date certain.

Intervention Motion at 2. NACE maintains that it acted reasonably thereafter by filing its intervention motion on November 18, 1993. See id. at 3. SFC argues, however, that NACE had actual notice earlier but failed to act promptly to file its intervention petition. According to SFC, because SFC's and GA's February 1993 responses to a staff demand for information made it apparent that they disagreed with the staff's approach to decommissioning funding liability, NACE had actual notice that there would be a proceeding when it received the October 1993 staff enforcement order, which the agency served on NACE. See SFC Intervention Answer at 11.

Given our previous finding that it is NACE's interest in the "proceeding" rather than the "order" that is relevant here, the pertinent actual notice was that affording NACE knowledge that this adjudicatory proceeding would be comm nced. The SFC and GA hearing requests received by NACE on November 8 constituted such a notice. And, by filing its intervention motion within ten days thereafter, NACE acted seasonably relative to that actual notice. Compare 10 C.F.R. § 2.1205(c)(2)(i) (hearing request must be filed within thirty days of actual notice).

We thus conclude that, under the circumstances here, NACE's November 18, 1993 intervention motion was timely filed.[22]

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[22] Our conclusion that NACE's intervention motion is timely obviates the need to determine whether its petition can be admitted as untimely. We nonetheless observe that, even if its intervention motion was subject to the twenty-day filing date specified in the October 1993 order, NACE has made a sufficient showing to excuse its failure to act by that deadline.

As an initial matter, it seems apparent that the agency's procedural rules do not have a provision that explicitly governs an untimely section 2.202(a)(3) answer/hearing request. The five late-filed factors in section 2.714(a)(1) seemingly provides the appropriate guidance for considering such a filing, however.

Applying those standards relative to the NACE and SFC arguments concerning timeliness, see supra pp. 27-28, we are of the opinion that four of the factors clearly are in NACE's favor. We agree with NACE that under factor one, "good cause" did exist for late filing in light of what we consider to be NACE's good faith argument that the section 2.202(a)(3) filing deadline was not applicable to one supporting the staff's order. In that context, NACE's intervention filing within ten days of receiving notice of the SFC and GA requests to begin this proceeding was reasonably prompt. Regarding factor two -- the availability of other means to protect NACE's interests -- we cannot agree with SFC that NACE's right to file a petition seeking staff action under 10 C.F.R. § 2.206 is an adequate alternative to an adjudicatory proceeding. See Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1175-76 (1983). As NACE suggests, this is particularly true when the staff-initiated action under consideration came about after a process that is the same as that which would result from a successful section 2.206 petition. We also cannot accept SFC's assertion that the presence of the staff weighs against NACE relative to the fourth factor concerning the representation of the petitioner's interest by other parties. Prior cases have emphasized the potential for a divergence of interests between the staff and private parties, see id. at 1174-75 & n.22, a consideration that seems especially relevant here given NACE's assertion that any staff action in this

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## III. Conclusion

For the reasons stated herein, we find that intervenor NACE's stated interest in protecting the health and safety of its members by ensuring that the staff enforcement order contested in this proceeding is sustained is cognizable under the agency's statutory and regulatory provisions permitting intervention by those "whose interest may be affected by the proceeding." Further, we conclude

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[22](...continued)
proceeding to modify or withdraw the October 1993 order would be inimicable to its interest in seeing that the order is fully sustained, see supra note 8. Finally, as to factor five, because the scope of this proceeding under Bellotti precludes NACE from advocating measures going beyond those set forth in the order, NACE's admission at this very early stage of the proceeding is not reasonably likely either to delay this proceeding or to broaden the issues before the Board.

The only element for which NACE's showing may be wanting is factor three -- the petitioner's assistance in developing a sound record. In support of this factor NACE proffers the resume of Dr. Arjun Makhijani and asserts that his expertise in nuclear engineering, including technologies and costs associated with nuclear waste containment and disposal, and his familiarity with decommissioning issues regarding the SFC facility, will ensure that NACE can make a valuable contribution to record development. As SFC points out, however, it is not apparent how that asserted proficiency provides any help in addressing the issues of liability and funding adequacy that are central to this proceeding. Although we are troubled by NACE's failure to make explicit any link between Dr. Makhijani's purported expertise and these issues, ultimately we do not give this shortcoming much weight. In light of Dr. Makhijani's apparent expertise, we see this as a pleading deficiency rather than the proffer of a witness who manifestly cannot assist in developing a sound record. Because the other four factors so clearly supporting NACE's participation, we ultimately conclude that this failing is insufficient to tip the balance against permitting late-filed intervention.

that NACE has established its standing to participate in this proceeding by making a sufficient demonstration that the health and safety interests of its members are within the AEA-protected zone of interests and that injury in fact may accrue to those interests that is traceable to the challenged order.[23] We also find NACE's intervention

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[23] Having determined that NACE is entitled to intervention as of right, we do not have to reach its alternative assertion that it should be afforded discretionary intervention pursuant to the balancing test established in Pebble Springs, CLI-76-27, 4 NRC at 616. Nonetheless, assuming such intervention is available in a proceeding regarding a section 2.202 order, it is apparent that petitioner NACE has made a sufficient showing under the Pebble Springs factors.

Four of the six factors -- assistance in record development, availability of other means to protect the petitioner's interests, representation of the petitioner's interests by other parties, and broadening or delaying the proceeding -- are essentially identical to items we already have addressed relative to the admission of NACE's petition as late-filed. See supra note 22. As we indicated there, only one of those factors -- assistance in record development -- weighs against NACE, although not substantially so. Indeed, in the context of discretionary intervention, the negative impact of that factor is further dissipated by the fact that there will be a proceeding even absent intervention by NACE. Compare Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977) (need for strong showing on potential record contribution factor is pressing where, absent discretionary intervention, no hearing will be held).

Concerning the other two factors -- nature and extent of petitioner's interest in the proceeding and possible effect of any order in the proceeding on that interest -- for the reasons we have outlined in sections II.A and II.B above regarding NACE's standing, we think that the impact of the possible outcomes of this proceeding on the legitimate health and safety interests of NACE's members is apparent and that, with at least one representative of the organization living within approximately a mile of the

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motion was timely filed in accordance with 10 C.F.R. § 2.714(a)(1). Finally, because we perceive the question of whether intervention as of right exists for a petitioner that wants to enter a section 2.202 enforcement order proceeding to support the staff's order addressed in this memorandum and order is of some moment for the structure of this proceeding, as well as the Commission's adjudicatory process generally, and in order to alleviate any delay in Commission consideration of this matter pending our determination regarding the admissibility of NACE's contentions,[24] in accordance with 10 C.F.R. § 2.730(f), we refer our ruling on this matter to the Commission for its

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[23](...continued)
facility, there is a cognizable potential for adverse impacts flowing from the possible inadequate funding of decommissioning activities that the staff's order is intended to forestall. Balancing these two factors weighing in favor of NACE's participation along with the four discussed above, its seems apparent that NACE should be afforded discretionary intervention in this proceeding.

We note further in this regard that we do not find especially relevant to any determination on NACE's discretionary intervention statements made by Commissioners during a November 8, 1993 briefing on the agency's site decommissioning management plan that are included as Attachment E to NACE's Reply to SFC's Intervention Answer. We thus see no need to strike the attachment, as SFC requests.

[24] Until a determination is made that an intervenor has proffered a litigable contention, a Licensing Board's ruling on an intervenor's party status is not final. Our rulings in this memorandum and order thus are not yet appealable pursuant to 10 C.F.R. § 2.714a. See Cincinnati Gas & Electric Company (William H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 864-65 (1980).

immediate review. Cf. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456-57 (1981) (in licensing hearings, licensing boards should seek Commission guidance on significant legal or policy questions and should do so in a manner that will avoid delay in the proceeding).

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For the foregoing reasons, it is this twenty-fourth day of February 1994, ORDERED that:

1. The January 19, 1994 motion of petitioner NACE for leave to file reply affidavit is granted.

2. In accordance with the Board's memorandum and order of January 25, 1994, the November 18, 1993 motion of petitioner NACE for leave to intervene is granted.

3. Pursuant to 10 C.F.R. § 2.730(f), the Board refers to the Commission for its review the Board's ruling in section II.A above that in a proceeding on a 10 C.F.R. § 2.202 staff enforcement order, there is no prohibition

against an otherwise qualified petitioner intervening as of right in support of the order.

THE ATOMIC SAFETY
AND LICENSING BOARD

James P. Gleason, Chairman
ADMINISTRATIVE JUDGE

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Thomas D. Murphy
ADMINISTRATIVE JUDGE

Bethesda, Maryland

February 24, 1994

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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|---|---|
| In the Matter of | |
| SEQUOYAH FUELS CORPORATION | Docket No.(s) 40-8027-EA |
| (Sequoyah Facility) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O GRANTING INTERVENTION have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
25 day of February 1994

Emile J. Julian
Office of the Secretary of the Commission