UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	Docket No. 40-8027-EA
SEQUOYAH FUELS CORPORATION and GENERAL ATOMICS	(Decontamination and Decommissioning Funding)
(Gore, Oklahoma Site)	

SEQUOYAH FUELS CORPORATION'S BRIEF ON APPEAL OF LBP-94-5 AND LBP-94-8

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April 7, 1994

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Sequoyah Fuels Corporation ("SFC") submits this brief in support of its appeal of the Atomic Safety and Licensing Board's ("Licensing Board") rulings in a Memorandum and Order (Granting Intervention Motion; Referring Ruling to the Commission) issued February 24, 1994 ("LBP-94-5") and a Memorandum and Order (Supplemental Petition to Intervene) issued on March 22, 1994 ("LBP-94-8"). SFC is appealing the Licensing Board's rulings in both LBP-94-5 and LBP-94-8 because the NACE petition should have been wholly denied.[1/]

As described more fully below, the petition should have been wholly denied because NACE cannot be adversely affected by

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1/ The Licensing Board's ruling in Section II.A of LBP-94-5 was referred to the Commission pursuant to 10 CFR § 2.730(f), and review by the Commission is pending under the standards provided in 10 CFR § 2.786(g). Notwithstanding this fact, SFC's Notice of Appeal includes appeal of the ruling in Section II.A of LBP-94-5 because reversal of this ruling would result in the petition for intervention being wholly denied.

this proceeding. Even if NACE were otherwise qualified to intervene in this proceeding, the Licensing Board erred in granting NACE standing because NACE favors the enforcement action at issue in this proceeding. NACE could not have compelled the NRC to propose the order at issue in this proceeding, and therefore will not be adversely affected by this proceeding, even if the order is not fully sustained. NACE simply cannot be injured by any outcome of this proceeding.

Moreover, assuming arguendo that a petitioner can be admitted as a party for purposes of arguing in favor of a proposed enforcement action, the Licensing Board erred in finding that NACE had demonstrated the requisite injury in fact to establish representational standing in this proceeding. The Licensing Board misapplied judicial and Commission concepts of standing, erred in finding that NACE had demonstrated the requisite injury in fact, and erred in finding that NACE could suffer an injury that could be redressed in this proceeding. Significantly, the Licensing Board erred in adopting a standard of "no potential for offsite consequences" for evaluating intervention petitions, i.e., the Licensing Board erroneously concluded that a licensee must demonstrate that there is no potential for offsite consequences that could injure a petitioner in order to refute the petitioner's allegations of injury in fact based upon residence within geographical proximity to a non-reactor licensee.

BACKGROUND

SFC is the owner of the NRC-licensed facilities at Gore, Oklahoma ("SFC Facility"). SFC is the sole licensee named in NRC Source Materials License No. SUB-1010 (Docket No. 40-8027) ("SFC License"), and, pursuant to 10 CFR § 40.42(e), its activities are limited to those related to decommissioning the SFC Facility in accordance with the terms of its license, NRC regulations, and the Atomic Energy Act of 1954, as amended ("the Act").[2]

On December 29, 1992, the NRC issued a "Demand for Information" (the "DFI") to both SFC and General Atomics ("GA"), a third tier parent company of SFC. SFC and GA responded separately to the DFI.[3] Simultaneously, SFC filed a notification pursuant to 10 CFR § 40.42(b) that it intended to terminate activities involving materials authorized under the SFC License effective July 31, 1993 or earlier.[4] Along with this notice, SFC submitted a Preliminary Plan for Completion of Decommissioning ("PPCD"). In accordance with 10 CFR § 40.42(c)(2)(iii)(D), the PPCD included a plan for assuring the availability of adequate funds for completion of decommissioning.

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[2] Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (codified as amended in scattered sections at 42 U.S.C.).

[3] Letter from Mr. Sheppard to Mr. Bernero (Re: Demand for Information Dated 12/29/92) (Feb. 16, 1993); Letter from Mr. Blue to Mr. Bernero (Feb. 16, 1993).

[4] Letter from Mr. Sheppard to Mr. Bernero (Re: License No. SUB-1010; Docket No. 40-8027; Notification Pursuant to 10 C.F.R. 40.42(b)) (Feb. 16, 1993).

On July 7, 1993, SFC informed the NRC that licensed activities at the Sequoyah Facility (other than activities related to decommissioning) had been completed on July 6, 1993.

On October 15, 1993, NRC issued an enforcement order ("Order") to SFC and GA. The Order was published in the Federal Register on October 25, 1993 (58 Fed. Reg. 55,087). It provided that SFC, GA, and "any other person adversely affected by this Order" could request a hearing within 20 days, i.e., by November 4, 1993. The Order further provided that if a hearing were requested, the issue to be decided in such a hearing would be "whether this Order should be sustained." 58 Fed. Reg. at 55,092.

SFC filed an answer dated November 2, 1993 and requested that the Order be withdrawn, or in the alternative, requested a hearing on the Order. GA separately filed an answer dated November 2, 1993 and also requested withdrawal of the Order or a hearing. No other hearing requests were filed with the NRC, and on November 18, 1993 the Secretary of the Commission referred the SFC and GA requests to the Chairman of the Atomic Safety and Licensing Board Panel for further proceedings in accordance with 10 CFR § 2.772(j). The Licensing Board was established on November 22, 1993, and notice of the proceeding was provided in the Federal Register on December 1, 1993. 58 Fed. Reg. 63,406.

On November 18, 1993, NACE submitted its late-filed request to intervene.[5] NACE acknowledged that it had no right to request a hearing on the Order "because NACE was not 'adversely affected' by the order." NACE's Motion at 3 (citing Bellotti v. NRC, 725 F.2d 1380, 1381 (D.C. Cir. 1983)). Indeed, it is clear that NACE could not have compelled the NRC to issue the Order in the first instance. However, NACE sought to intervene in the hearings requested by GA and SFC "solely for the purpose of protecting its interest in seeing that the October 15 order is fully defended." NACE's Motion at 4. NACE asserted that its interest in the proceeding and right to intervene was triggered when SFC and GA requested hearings because NACE would be adversely affected if the Order were not sustained or if it were sustained only in part.

NACE's Motion therefore presented the question of whether a petitioner can claim to be injured based upon the fact that the outcome of a proceeding may be that the NRC will not take an enforcement action (or will take some other lesser

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[5] "Motion for Leave to Intervene in Proceeding Regarding Sequoyah Fuels Corporation's and General Atomics' Appeal of Nuclear Regulatory Commission's October 15, 1993, Order" (Nov. 18, 1993) ("NACE's Motion"). The relevant subsequent filings include Sequoyah Fuels Corporation's Answer in Opposition to NACE's Motion to Intervene (Dec. 6, 1993) ("SFC's Answer"), NACE's Reply to SFC's Answer in Opposition to NACE's Motion to Intervene (Dec. 30, 1993) ("NACE's Reply"), SFC's Reply to NACE's Supplemental Factual Allegations, New Arguments and Request for Discretionary Intervention (Jan. 11, 1994) ("SFC's Reply"), NACE's Motion for Leave to File Reply Affidavit (Jan. 19, 1994) ("NACE's Reply Affidavit Motion"), and SFC's Response to NACE's Motion for Leave to File Reply Affidavit (Jan. 21, 1994) ("SFC's Response to Motion").

action) that the petitioner could not compel in the first instance. The Licensing Board answered this question in the affirmative, concluding in Section II.A of LBP-94-5 that a petitioner can intervene as of right in a 10 CFR § 2.202 enforcement proceeding in order to support the NRC Staff's proposed order. LBP-94-5, slip op. at 38. However, the Licensing Board referred this question, in accordance with 10 CFR § 2.730(f), for immediate review by the Commission. Commission review under the standards provided in 10 CFR § 2.786(g) is pending.[6/]

In LBP-94-5, the Licensing Board also ruled that NACE had shown "injury in fact" sufficient to establish NACE's representational standing on behalf of its member, Mr. Ed Henshaw. LBP-94-5, slip op. at 17-26 (Section II.B). In addition, the Licensing Board held that NACE's intervention request was timely. Id. at 26-35 (Section II.C).

The Licensing Board's decision that NACE had standing to intervene as a party in this proceeding was contingent upon the admission of at least one qualified contention. See

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[6/] By order dated March 3, 1994, the Commission invited the parties to this proceeding, and presumably NACE, to file briefs with the Commission addressing the questions of whether Commission review is appropriate and whether the ruling in section II.A of LBP-94-5 should be sustained. SFC filed its "Initial Brief in Opposition to the Ruling in Section II.A of LBP-94-5" on March 11, 1994 ("SFC's Initial Brief"), and filed its "Reply Brief in Opposition to the Ruling in Section II.A of LBP-94-5" on March 17, 1994 ("SFC's Reply Brief"). GA concurred with and adopted SFC's briefs, and NACE and the NRC Staff filed briefs opposing Commission review and supporting the Licensing Board's rulings.

LBP-94-8, slip op. at 1 & n.1. On March 22, 1994, the Licensing Board issued LBP-94-8 admitting the two contentions proffered by NACE in its supplemental petition to intervene dated February 8, 1994. This order was served upon SFC on March 23, 1994, and it provided that the Licensing Board's rulings in LBP-94-5 and LBP-94-8 could be appealed within ten days in accordance with 10 CFR 2.714a(a).

SFC is filing this timely appeal of LBP-94-5 and LBP-94-8 pursuant to 10 CFR §§ 2.714a(a) and (c).

ARGUMENT

I. THE LICENSING BOARD ERRED IN FINDING THAT AN OTHERWISE QUALIFIED PETITIONER HAS THE RIGHT TO INTERVENE IN AN ENFORCEMENT PROCEEDING FOR THE PURPOSE OF ARGUING THAT A PROPOSED ORDER SHOULD BE FULLY SUSTAINED

In its Initial Brief and Reply Brief to the Commission regarding the referred ruling in Section II.A of LBP-94-5, SFC demonstrates that the Licensing Board erred in finding that an otherwise qualified petitioner has the right to intervene in an enforcement proceeding for the purpose of arguing that a proposed order should be fully sustained. Therefore, for the sake of efficiency, SFC incorporates its briefs by reference, as if fully set forth herein, and respectfully requests that the Commission consider the arguments contained therein and reverse the Licensing Board's ruling in Section II.A.[7]

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[7] Pursuant to the Commission's March 3, 1994 order, SFC, NACE and the NRC Staff also briefed the issue of whether review of the referred ruling is appropriate under the standards set forth in 10 CFR § 2.786(g). Although NACE and the NRC (continued...)

In summary, the Licensing Board held in Section II.A of LBP-94-5 that once a hearing is requested by a person opposed to a proposed order, a petitioner/intervenor that supports issuance of the order can be "entitled to standing as of right as a 'person whose interest may be affected by the proceeding.'" LBP-94-5, slip op. at 16. The premise of this conclusion is that once a hearing on an enforcement order is requested, a petitioner may be "adversely affected" by the proceeding, because a possible outcome of the proceeding is that the order will not be fully sustained.

In its Initial Brief and Reply Brief, SFC demonstrated that the rule articulated by the Licensing Board is in error because it would permit a petitioner to act as a "private prosecutor" any time that a licensee or other person opposed to an enforcement order challenges the Commission. Such a result is not only inappropriate in this case, but also would set an undesirable precedent for future NRC enforcement actions.

Enforcement action is within the sole discretion of the Commission, and a petitioner that favors the taking of enforcement action by the Commission against a third party cannot

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[2/](...continued)
Staff argued that such review was not appropriate, this issue is moot now that SFC has exercised its right to appeal this ruling pursuant to 10 CFR § 2.714a. In any event, the reasons for accepting review that were articulated in SFC's briefs establish that SFC's appeal presents significant policy questions of interest to the Commission, because failure to reverse the Licensing Board's ruling has the potential to adversely impact the Commission's future conduct of enforcement proceedings.

compel the Commission to take such action[8] and has no right to request a hearing on an action proposed by the Commission.[9] A petitioner that favors a proposed enforcement action simply cannot be adversely affected by the outcome of a proceeding regarding the enforcement action. If the proceeding were to result in no order being issued, the result would be a return to the status quo ante. If the proceeding results in an order that imposes some requirements, fewer than those originally proposed but more restrictive than the status quo ante, the petitioner's interests will be enhanced. There is therefore no possible outcome that adversely affects the petitioner's interests. The petitioner will always be in the same or better position as the petitioner would have been in the absence of any proposed action.

SFC has also demonstrated that the Licensing Board's ruling inappropriately draws a distinction based upon the notion that although a petitioner may not be "adversely affected" by an order, it can be "adversely affected" by the outcome of a proceeding regarding whether the order should be sustained. This distinction is fundamentally flawed. The core issue in such a proceeding is the Commission's proposal to issue an order. The

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[8] Such a person can petition the NRC to take enforcement action under 10 CFR § 2.206. However, any such action is within the sole enforcement discretion of the NRC. See, e.g., Arnow v. NRC, 868 F.2d 223, 235 (7th Cir. 1989), cert. denied, 493 U.S. 813 (1989); Safe Energy Coalition v. NRC, 866 F.2d 1473, 1477 (D.C. Cir. 1989); Massachusetts Public Interest Research Group, Inc. v. NRC, 852 F.2d 9, 19 (1st Cir. 1988).

[9] See Bellotti, 725 F.2d at 1381.

potential adverse effects of the proceeding must therefore be measured in terms of whether a person will be adversely affected by the issuance of the proposed order. Thus, only those who oppose the order have an interest that can be adversely affected by the proposed action in the proceeding.

Moreover, SFC has shown that a critical aspect of the Licensing Board's approach is the notion that the "adverse effect" upon a petitioner can be measured by the procedural posture of the proceeding at various points throughout the proceeding, rather than by looking to the petitioner's interest in the proceeding at the time it is initiated (i.e., when the action is proposed).[10] Under the Licensing Board's analysis, a petitioner may not have an interest in a proceeding or any hearing rights when the proceeding is initiated, but the fact that other persons exercise rights during the course of a proceeding would "create" new interests in the proceeding. This approach is inconsistent with the orderly adjudication of matters before the Commission.

Finally, SFC has shown that the right to intervene in an enforcement proceeding must be co-extensive with the right to request a hearing. If there is a class of persons that can be adversely affected by a proceeding that is different from the

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[10] The Licensing Board's approach is directly contrary to Commission policy. The Commission has made clear that it has set "the point at which a[n enforcement] 'proceeding' begins for purposes of triggering the adjudicatory rights under section 189 of the Atomic Energy Act to the point of issuance of an order." 56 Fed. Reg. 40,664, 40,678 (Aug. 15, 1991).

class of persons who can be adversely affected by an order, 10 CFR § 2.202(a)(3) would be in violation of section 189a of the Act. Section 2.202(a)(3) of the Commission's regulations only provides hearing rights to the class of persons adversely affected by an order, but section 189a of the Act requires that any person adversely affected by a proceeding has a right to request a hearing. 42 U.S.C. § 2239(a)(1). Since section 2.202(a)(3) was specifically intended to continue the hearing rights afforded under section 189a of the Act,[11] the term "adversely affected by the order," as used in section 2.202(a)(3), must be intended to include all persons who could be adversely affected by an enforcement proceeding.[12]

For these reasons, and the other reasons described more fully in SFC's Initial Brief and Reply Brief regarding the

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[11] In its Statement of Considerations accompanying the 1991 revisions to 10 CFR § 2.202, the Commission explained that "[t]he final rule, as revised, does not eliminate any hearing rights afforded under the statutory provisions of the 1954 Act; rather, it continues those rights." 56 Fed. Reg. at 40,670 (citing 10 CFR § 2.202(a)(3)).

[12] No additional class of persons is granted the right to participate in enforcement proceedings under 10 CFR § 2.714(a)(1) which permits intervention by "[a]ny person whose interest may be affected by a proceeding." (Emphasis added.) This is the same language as appears in section 189a of the Act, and therefore, for purposes of enforcement proceedings, must be limited by the Commission's interpretation of section 189a as reflected in 10 CFR § 2.202(a)(3), i.e., only persons "adversely affected by the order" could be "adversely affected by the proceeding" within the terms of 10 CFR § 2.714(a)(1). If the phrase were given any broader meaning in 10 CFR 2.714(a)(1), it would mean that 10 CFR § 2.202(a)(3) violates the Act.

earlier referred ruling, the Commission should reverse the Licensing Board's ruling in section II.A of LBP-94-5.

II. THE LICENSING BOARD ERRED IN FINDING THAT NACE HAD DEMONSTRATED THE REQUISITE INJURY IN FACT TO ESTABLISH REPRESENTATIONAL STANDING IN THIS PROCEEDING

A. The Licensing Board Misapplied Judicial And Commission Concepts Of Standing

In determining "whether a petitioner has established the requisite 'interest' to intervene, the Commission has long applied contemporaneous judicial concepts of standing." Cleveland Electric Illuminating Co., et al. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993) (and cases cited therein); see also Transnuclear, Inc. (Export of 93.15% Enriched Uranium), CLI-94-01, 39 NRC __, slip op. at 5-6 (Jan. 19, 1994); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976). A clear statement of the judicial requirements for standing, cited favorably by the Commission in Perry, was recently provided by the Supreme Court in Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992):

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally-protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the

> court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

112 S. Ct. at 2136 (brackets and ellipses in original) (citations omitted).

Although variously described, the basic precepts contained in the Lujan formulation and its predecessors have been consistently applied in NRC case law. See, e.g., Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 81 (1993); Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-67 (1991). Significantly, it is clear that in order to establish "injury in fact" for standing, a petitioner must have a real stake in the outcome of the proceeding. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48, aff'd, ALAB-549, 9 NRC 644 (1979). Therefore, NACE must establish that it, i.e., Mr. Henshaw, through whom NACE seeks to derive standing, will likely suffer a real and tangible personal injury if the proposed Order issued against SFC and GA is not fully sustained.

In addition, where a petitioner is attempting to intervene in the government's efforts to regulate a third party, injury in fact is "ordinarily 'substantially more difficult' to establish." Lujan, 112 S. Ct. at 2137 (quoting Allen v. Wright, 468 U.S. 737, 758 (1984); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 44-45 (1976); and Warth v. Seldin, 422 U.S. 490, 505 (1975)). The Lujan Court stated that when "a

plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed" to establish standing, than in a situation where the plaintiff himself is the object of the government action. Id. at 2137 (emphasis in original). Since NACE alleges that its injury arises from a potential NRC "lack of regulation" of SFC in that the Order might not be fully sustained in the hearing, "much more is needed" for NACE to establish standing.

In LBP-94-5, the Licensing Board ignored these long-standing requirements that, to establish standing, a petitioner has the burden of demonstrating a concrete and particularized injury, which is actual or imminent and not conjectural or hypothetical, and which is fairly traceable to the action at issue.[13/] Instead, it misread the Commission's recent decision in Perry as departing from judicial and Commission precedents and establishing a new standard, i.e., that a Licensing Board must find that there is "no potential for offsite consequences" that could affect a petitioner in order to conclude that such petitioner has failed to establish that it will suffer injury in fact. LBP-94-5, slip op. at 26. Under the Licensing Board's formulation of the standing requirements, once a petitioner establishes residence in geographic proximity to a materials facility, the non-reactor licensee must demonstrate that there is

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[13/] As discussed in Section II.C., infra, the Licensing Board also determined incorrectly that NACE's purported injury could be redressed in this proceeding.

no potential for offsite consequences. This formulation misunderstands the specific circumstances underlying the Commission's Perry decision and its limited applicability.

In Perry, petitioners had sought a hearing on an amendment to a reactor operating license that would have removed a surveillance program withdrawal schedule from the plant's technical specifications and transferred it to the facility's updated safety analysis report. Petitioners argued that the amendment would deprive them of the right to notice and an opportunity for a hearing on any future changes in the withdrawal schedule. They claimed to have standing because they would suffer irreparable injury from the loss of their procedural rights and that this injury would be traceable to the challenged action. Perry, CLI-93-21, 38 NRC at 91.

The Commission cited approvingly the Lujan standard that "a petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action." Id. at 92. It determined that the procedural injury (the loss of the rights to notice, opportunity for a hearing, and opportunity for judicial review) constitutes a discrete and palpable -- not hypothetical -- injury. Id. at 93. It agreed with the Licensing Board that "to confer standing a procedural injury must be linked to a concrete injury," but it noted that, in reactor operating license amendment proceedings, "residence near a nuclear facility is sufficient to establish injury for standing if the proposed action involves 'an obvious potential for offsite consequences.'"

Id. at 95 (quoting Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989)) (emphasis added). In light of potential concerns regarding reactor vessel embrittlement, the Commission stated in Perry that it could not conclude that "no potential for offsite consequences" is posed by the loss of procedural rights. Id. at 94-96.

The Licensing Board simply seized upon the "no potential for offsite consequences" language in the Perry decision as the standard for determining whether a petitioner had satisfactorily demonstrated injury in fact. LBP-94-5, slip op. at 20-21, 22, 24, 26. It failed to appreciate that Perry involved a claim of loss of procedural rights in a reactor operating license amendment proceeding, involving reactor embrittlement that could have "obvious" offsite consequences for all persons within geographic proximity of the reactor. Perry did not involve a materials license or a proceeding on an order where potential off-site consequences are less obvious and do not uniformly affect all persons with residences in geographic proximity to the facility.

Reversing the Licensing Board in Perry, the Commission found that a loss of procedural rights can be the basis for a demonstration of standing. In fact, it cited approvingly from Lujan that "[i]ndeed, procedural rights are 'special,' and the 'person who has been accorded a procedural right to protect his concrete interest can assert that right without meeting all the

normal standards for redressability and immediacy.'" Perry at 94 n.9. Thus, where loss of a procedural right is involved, such as loss of a hearing opportunity on a future license amendment whose precise terms and impacts are presently unknown, it is logical that the required showing regarding concreteness and particularization of injury would be relaxed because of the inherent absence of hard facts. Otherwise, a petitioner would invariably be foreclosed from protecting his asserted procedural right due to his inability to demonstrate the specific and precise harm that the loss of such right might occasion in the future.

Moreover, when nuclear reactors are involved, mere geographical proximity to the reactor has been found sufficient for standing in initial licensing proceedings. In reactor license amendment proceedings, a nearby residence coupled with "'an obvious potential for offsite consequences'" has sufficed. Perry at 95. But, in adopting 10 CFR Subpart L, establishing procedures for informal hearings for materials licensees, the Commission recognized the significant difference in hazards in activities at reactor licensees versus materials licensees, and it explicitly decided not to apply the geographic proximity standard from reactor licensing case law in materials licensing proceedings.[14]

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[14] See Proposed Rule; Informal Hearing Procedures for Material Licensing Adjudications, 52 Fed. Reg. 20090 (1987); Final Rule; Informal Hearing Procedures for Material Licensing Adjudications, 54 Fed. Reg. 8272 (1989).

Thus, the applicability of the Perry decision is clearly limited to circumstances where a petitioner is being deprived of a future procedural right and therefore cannot provide the level of concreteness and particularization of injury that is normally required under Lujan. This was coupled with the fact that the showing of potential injury needed for standing is less rigorous in proceedings involving reactor facilities. But there is nothing in Perry that would reflect any intention by the Commission to abandon the contemporaneous judicial concepts of standing expressed most clearly in Lujan. Surely, if the Commission had intended Perry to change longstanding Commission doctrine in cases not involving procedural rights, it would have done so much more explicitly than the Licensing Board inferred in LBP-94-5.

Accordingly, the Licensing Board erred in determining that, in this proceeding, the standard for judging the adequacy of NACE's demonstration of injury in fact is whether the Board could conclude that there is "no potential for offsite consequences." Instead, the Board should have held NACE to its burden of demonstrating a concrete and particular injury, which is actual or imminent and not conjectural or hypothetical, and which is fairly traceable to any failure to fully sustain the proposed order.

B. NACE Has Failed To Demonstrate The Requisite Injury In Fact

In its efforts to meet its substantial burden of proof, NACE asserts standing based upon the alleged adverse effects the proceeding could have on one of its members, Mr. Henshaw. In an affidavit submitted with NACE's original request for intervention,[15] Mr. Henshaw noted a number of concerns regarding alleged impacts of the SFC Facility, asserted that SFC needs to commit adequate funds in order to do an adequate job of decommissioning, and concluded ipse dixit that his interest in a clean and healthful home environment will be "jeopardized" if the Order to SFC and GA to provide $86 million in assured funding is not sustained.

After reviewing the subsequent pleadings, including several affidavits, filed by NACE and SFC, the Licensing Board concluded that NACE had made a sufficient showing of injury in fact because the Board was "unable to conclude that there was 'no potential for offsite consequences' relative to the Henshaw property from SFC site contamination migration by groundwater flow."[16] LBP-94-5, slip op. at 24.

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[15] NACE's Motion, Affidavit of Ed Henshaw ("Henshaw Affidavit").

[16] To the extent that Mr. Henshaw had expressed other concerns, the Licensing Board properly found that NACE had provided insufficient support for a finding of injury in fact even under the Board's interpretation of Perry. See, e.g., LBP-94-5, at 19 n.12 (alleged social and economic impacts), Id. at 22 n.14 (surface water flow; airborne contamination).

Having adopted the wrong standard for a demonstration of injury in fact, the Licensing Board improperly determined that the alleged potential impact of groundwater contamination upon Mr. Henshaw's property constituted a sufficient showing. Such alleged injury in fact resulting from the possible outcomes of this proceeding is not in any way concrete, particularized, actual, or imminent. Rather, the proffered injury is hypothetical, conjectural, and highly speculative, and relies on multiple assumptions. Before any injury could befall Mr. Henshaw, the rescission or relaxation of the Order would have to result in lessened funding to SFC, such lessened funding would have to result in a less than adequate decommissioning of the SFC Facility, and such presumed inadequate decommissioning would have to result in migration of contaminated groundwater that affects Mr. Henshaw's property.

NACE has failed to demonstrate that these multiple assumptions have any validity or that Mr. Henshaw's hypothetical injury is fairly traceable to a possible outcome in this proceeding. If the Order is not sustained at all, or if it is only partially sustained, SFC will still be obligated to decommission the SFC Facility in accordance with NRC requirements.

Moreover, and most importantly, even if it were permissible to assume that SFC would fail to properly decommission the SFC Facility due to inadequate funding as suggested by NACE, NACE has failed to meet its burden of making a

concrete and particularized showing that groundwater contamination from the SFC Facility could adversely impact Mr. Henshaw's property.

As demonstrated in an affidavit submitted with the SFC Reply, Mr. Henshaw's property is southeast of the approximately 85-acre SFC industrial site and associated pond areas to be decommissioned in accordance with NRC requirements. SFC's Answer, Enclosure 2, Affidavit of John S. Dietrich ("Dietrich Affidavit") at ¶ 5. His home is across Route 10 and across Interstate 40 from the SFC site, more than one mile from the nearest portion of the fence surrounding the 85-acre industrial site, and more than 0.6 miles from the nearest point of SFC's fertilizer ponds. Id. Throughout the course of the operation of the SFC facility, extensive information has been developed on the environmental conditions at the site, including the flow of groundwater. Id. at ¶ 7. Potentiometric groundwater flow maps show that groundwater under the area of industrial activity at SFC's site nearest to Mr. Henshaw's property flows generally westward and away from such property. Id. at ¶ 8. There is no indication of a groundwater flow path which would allow flow of groundwater from beneath SFC's industrial site and associated pond areas to reach Mr. Henshaw's property.[17] Id. at ¶ 9.

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[17] NACE's lack of standing based upon any alleged impact of groundwater from the SFC site upon Mr. Henshaw was also reflected in a recent decision by a Hearing Examiner in a proceeding before the Oklahoma Water Resources Board ("OWRB") on SFC's application for revision of the Industrial Waste Disposal Permit No. WD-75-074. See SFC Reply, (continued...)

Recognizing that its Motion to Intervene lacked any support for its allegation that groundwater from the SFC site could affect Mr. Henshaw's property, in replying to SFC's Answer NACE submitted an affidavit by Mr. Timothy P. Brown, a hydrogeologist. NACE's Reply, Attachment C (the "First Brown Affidavit"). Mr. Brown's affidavit did not contain any concrete evidence or credible suggestion that groundwater from the SFC site would flow southeast to Mr. Henshaw's property. However, among other arguments, he disputed SFC's conclusion that 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, because he claimed SFC had not performed sufficient areal or vertical groundwater studies. NACE Reply at 21; First Brown Affidavit at ¶¶ 7-9.

In view of these new claims by NACE, SFC submitted the Affidavit of Bert J. Smith, Director of Hydrogeology for Roberts Schornick and Associates, Inc. ("RSA"). SFC's Reply, Enclosure 1 ("Smith Affidavit"). Mr. Smith has over 14 years of experience

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[17] (...continued)
Enclosure 3, Order dated June 28, 1993. NACE sought representational standing based on its concern that its members would be impacted by potential contamination of the groundwater at the SFC facility from a newly constructed stormwater retention pond, which was being contested by NACE. As SFC's representatives recall the discussion at the June 28, 1993 prehearing conference, NACE indicated that Mr. Henshaw was the NACE member who resided most closely to the SFC facility. It was estimated that his residence was approximately 1½ miles from the stormwater retention pond. The Hearing Examiner denied NACE representational standing and further stated that: "Individuals who live 1½ and 4 miles away, away from the flow of groundwater in this area, would not have had standing."

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 did Mr. Smith reaffirm the conclusion previously reached by SFC, but he provided the basis for his conclusion and explained why the criticisms and disagreements expressed in the First Brown Affidavit are mistaken. Id. at ¶¶ 4-16. For example, Mr. Smith showed that extensive information developed during 1991 and 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 explained that over 200 groundwater monitoring wells were installed and hundreds of soil samples were taken in those two areas during the FEI. Id. at ¶ 9. Mr. Smith showed 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 discussed 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, showed why the

information was sufficient to convince investigators that investigation to deeper zones was unnecessary, and explained why Mr. Brown's reliance on seven wells drilled to deeper depths is misplaced. Id. at ¶¶ 13-14. In addition, Mr. Smith demonstrated the erroneous nature of 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 concluded 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.

Contrary to this comprehensive presentation by an experienced hydrogeologist who had gained extensive knowledge of this site through detailed site investigations, the Licensing Board found that NACE had made a sufficient demonstration of injury in fact. It did so because of its belief that FEI charts attached to a subsequent affidavit from Mr. Brown allegedly indicated that groundwater from the processing site moved south, and that the charts supported Mr. Brown's allegation of variable and complex groundwater flow patterns, thus leaving the Board unable to conclude that there was "no potential" for contaminated

groundwater to flow towards the Henshaw property.[18] LBP-94-5, slip op. at 25. The Board also found that since SFC admitted that there was a deeper flow zone and had not measured its direction, SFC was in no position to show there was "no potential for offsite consequences" from such deeper flow patterns. Id. at 25-26.

With respect to direction of groundwater flow, the Board relied upon several directional markings on FEI charts indicating southerly flow while disregarding the conclusions of the expert who managed the FEI investigation as to the results of the FEI and the meaning of the information presented on those charts. See Smith Affidavit at ¶¶ 7-12, 16. For example, the Board failed to appreciate that even if there were a southerly component of groundwater flow from the processing areas it would be encompassed in the groundwater regime of the pond area south of the processing site. Id. at ¶ 7. Thus, the Licensing Board's mistaken rulings essentially ignored the overwhelming evidence presented by SFC that groundwater flow from the processing areas and fertilizer ponds will not impact Mr. Henshaw's property.[19]

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[18] A second affidavit from Mr. Brown was submitted with NACE's Reply Affidavit Motion on January 19, 1994, notwithstanding SFC's objections to the Board allowing NACE this third attempt to show standing. See SFC's Response to Motion filed on January 21, 1994.

[19] The Licensing Board sought to avoid this fact by alluding to "the familiar trap of confusing the standing determination with the assessment of petitioner's case on the merits," citing City of Los Angeles v. National Highway Traffic Safety Administration, 912 F.2d 478, 495 (D.C. Cir. 1990). However, the Board itself implicitly acknowledged the lack (continued...)

With respect to the flow in the deeper zone, the Licensing Board disregarded Mr. Smith's statements that extensive information developed during the FEI regarding the vertical extent of contaminants persuasively demonstrated that investigation to deeper zones was unnecessary; and that a survey of 28 wells in the area, including 19 at depths of 50 feet or below, showed no contaminants above drinking water standards. Id. at ¶¶ 13-15. The Board found that NACE had met its burden even though it presented not a scintilla of information indicating that contaminants from the SFC site had reached the deeper zone, that groundwater in the deeper zone flowed in a southeasterly direction, that groundwater in the deeper zone was of a quality or quantity that would be used for drinking water or any other purpose, or that Mr. Henshaw had ever used or was likely to use groundwater from the deeper zone.

It is clear that any potential injury to Mr. Henshaw's property from groundwater from the SFC site is sheer speculation and conjecture. By any reasonable application of the

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[19] (...continued)
of relevance of that principle to the instant case, noting that "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." LBP-94-5, slip op. at 20. The nature of Mr. Henshaw's claimed injuries will not be the subject of any future consideration in this proceeding. In order to find standing, the Board was required to find that Mr. Henshaw was likely to suffer a real and tangible injury if the Order is not fully sustained. The Board's failure to make such a finding cannot be defended on the ground that to do so would confuse the standing determination with the case on the merits.

Commission's and judicial concepts of standing, NACE has failed to meet its burden of demonstrating a concrete and particularized injury, which is actual or imminent.

C. NACE's Purported Injury Cannot Be Redressed In This Proceeding

As expressly stated in Lujan, an additional minimum element of standing is that "it must be 'likely,' as opposed to merely 'speculative' that the injury will be redressed by a favorable decision.'" 112 S. Ct. at 2136. NACE's purported injury fails to satisfy this requirement.

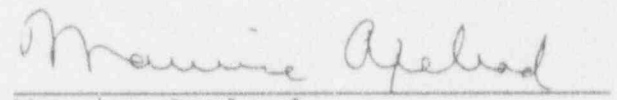
NACE's claim to injury is based upon the notion that it would be harmed if the Order were not fully sustained. NACE appears to be claiming to be entitled to assurance that SFC and GA will never receive any relief from the conditions imposed by the Order. However, the terms of the Order itself provide that the Director of the Office of Nuclear Material Safety and Safeguards has discretion to relax or rescind the conditions imposed by the Order. Order at 26. Even if the Licensing Board fully sustained the Order and a final Order were issued, NACE would continue to be subject to the Director's ongoing authority to relax or rescind the Order. Therefore, NACE would still be subject to its purported injury (the potential grant of relief to SFC or GA) even if it were to prevail and the Order were sustained. The only way that NACE could achieve a remedy would be if the Director were to be deprived of his ongoing authority under the Order. Such requested relief would be beyond that

proposed in the Order and would therefore fall precisely within the type of relief determined in Bellotti to be unavailable to a petitioner.

CONCLUSION

FOR THE FOREGOING REASONS AND THOSE PREVIOUSLY STATED IN SFC'S BRIEFS REGARDING SECTION II.A OF LBP-94-5, the Commission should reverse the Licensing Board's rulings in LBP-94-5 and LBP-94-8, and deny NACE's request to intervene in this proceeding as a matter of right.[20]

Respectfully submitted,



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ATTORNEYS FOR
SEQUOYAH FUELS CORPORATION

April 7, 1994

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[20] The Licensing Board declined to decide the question of whether NACE should be afforded discretionary intervention. LBP-94-5, slip op. at 37-38 n.23. Because of the need to determine NACE's status promptly and for reasons of judicial economy, SFC urges the Commission not to remand this question to the Licensing Board but to schedule the filings of briefs by the participants to permit a decision thereon by the Commission. SFC will show that NACE should not be granted discretionary intervention for similar reasons that it is not entitled as a matter of right to participate as a private prosecutor in a proceeding on an order. The Licensing Board's tentative weighing of the Pebble Springs factors (Id.) is mistaken, just as its rulings in Sections II.A and II.B of LBP-94-5 were mistaken.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	Docket No. 40-8027-EA
SEQUOYAH FUELS CORPORATION and GENERAL ATOMICS	(Decontamination and Decommissioning Funding)
(Gore, Oklahoma Site)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Sequoyah Fuels Corporation's Notice Of Appeal Of LBP-94-5 and LBP-94-8" and "Sequoyah Fuels Corporation's Brief On Appeal Of LBP-94-5 and LBP-94-8" were served upon the following persons by deposit in the United States mail, first class postage prepaid and properly addressed on the date shown below:

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U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Docketing & Service Branch
(Original and two copies)

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Chairman Ivan Selin
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Washington, D.C. 20555

Commissioner Kenneth C. Rogers
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Commissioner Forrest J. Remick
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Commissioner E. Gail de Planque
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