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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

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| In the Matter Of | |
| Sequoyah Fuels Corporation and General Atomics | Docket No. 40-8027EA<br>Source Materials License No. SUB-1010 |
| (Gore, Oklahoma Site Decontamination and Decommissioning Funding) | April 29, 1994 |

**NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S BRIEF IN OPPOSITION TO SEQUOYAH FUELS CORPORATION'S APPEAL OF LBP-94-5 AND LBP-94-8**

**Introduction**

Sequoyah Fuels Corporation ("SFC") has appealed LBP-94-5, the Licensing Board's February 24, 1994, Memorandum and Order granting Native Americans for a Clean Environment ("NACE") intervention as of right in this enforcement proceeding. As discussed below, SFC's appeal, which challenges NACE's standing to intervene, is baseless, because NACE has demonstrated that its interests will be adversely affected if the challenged enforcement order is not sustained. Therefore, LBP-94-5 should be affirmed. In the alternative, if the Commission finds that NACE is not entitled to intervene as a matter of right, NACE requests that the Commission grant NACE discretionary intervention or remand LBP-94-5 to the Licensing Board for a determination as to whether NACE should be granted discretionary intervention.



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**Background**

This proceeding involves the challenge by SFC and its parent corporation, General Atomics ("GA"), to an enforcement order by the NRC Staff. Order, In the Matter of Sequoyah Fuels Corporation General Atomics (Gore, Oklahoma, Site Decontamination and Decommissioning Funding) (October 15, 1993) (hereinafter "Order"). The Order requires GA and SFC to comply with NRC decommissioning funding requirements of 10 C.F.R. § 40.36, and requires GA to establish a guaranteed decommissioning fund of $86 million to clean up the SFC site, which is severely contaminated with uranium and other chemicals.

GA and SFC have both denied liability under the terms of the Order, and have requested and obtained a hearing before the Licensing Board. NACE, an Indian-controlled and staffed environmental organization which has members who live in the close vicinity of the SFC plant, petitioned to intervene in the proceeding shortly after GA and SFC requested the hearing. Native Americans for a Clean Environment's Motion to Intervene in Proceeding Regarding Sequoyah Fuels Corporation's and General Atomics' Appeal of Nuclear Regulatory Commission's October 15, 1993, Order (November 18, 1993). In support of its intervention petition, NACE attached the affidavit of Ed Henshaw, a NACE member who lives within a mile of the SFC plant, and whose property is completely surrounded by SFC property, including the fields used by SFC for disposal of liquid "raffinate" wastes from its former uranium processing plant.

SFC opposed NACE's intervention, relying, inter alia, on an affidavit from SFC's Vice President which alleged, based on studies performed by SFC, that it was impossible for Mr. Henshaw to be adversely affected by contamination from SFC because the contamination moved only in a westward direction, away from Mr. Henshaw's property, which lies southeast of the processing buildings and storage ponds. Sequoyah Fuels Corporation's Answer in Opposition to NACE's Motion to Intervene (December 6, 1993). NACE responded to SFC's arguments and included an affidavit from a hydrogeologist, Timothy P. Brown, which demonstrated that the geology of the SFC site is "variable and complex," and that contaminated groundwater may flow in several directions, including toward Mr. Henshaw's property. Mr. Brown also demonstrated the potential that groundwater at levels deeper than have been tested by SFC may be contaminated and may flow toward Mr. Henshaw's property; and that SFC has not done sufficient studies to rule out such deeper groundwater flows. NACE's Reply to SFC's Answer in Opposition to NACE's Motion to Intervene (December 30, 1993).

SFC responded with another pleading and an affidavit from Bert J. Smith of Roberts/Schornick, the consulting firm which had prepared SFC's environmental investigation. SFC's Reply to NACE's Supplemental Factual Allegations, New Arguments and Request for Discretionary Intervention (January 11, 1994). Mr. Smith attempted to demonstrate that SFC had gathered enough information to rule out further investigation into deeper levels of groundwater flow. NACE subsequently requested and was granted

leave to file a reply affidavit from Mr. Brown, which challenged Mr. Smith's assumptions and demonstrated that SFC's own data shows both (a) that the site is geologically complex and that (b) groundwater flows in more than one direction. NACE's Motion for Leave to File Reply Affidavit (January 21, 1994); Reply Affidavit of Timothy P. Brown (January 18, 1994). Mr. Brown further demonstrated that, even in the unlikely event that the groundwater flows in a solely westward direction, as SFC contends, Mr. Henshaw's property lies to the west of some of the fields where SFC has spread its raffinate wastes. Although data regarding groundwater quality in the raffinate fields are limited, SFC has reported measurements of contaminants such as nitrates and cadmium that exceed EPA drinking water standards. Brown Reply Affidavit, par. 13. Thus, Mr. Henshaw's property clearly lies in the flowpath of contaminated groundwater from SFC's raffinate fields.

In LBP-94-5, the Licensing Board ruled that NACE had standing to intervene in this proceeding. The Board found first that assuming they can satisfy the NRC's other standing requirements, public intervenors such as NACE generally have the right to intervene in challenged enforcement proceedings for the purpose of defending the enforcement order against attack by the licensee.[1] Second, applying traditional concepts of standing,

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[1] The Board referred this aspect of its decision to the Commission, and it was briefed by the parties.

the Board found that NACE had demonstrated the requisite "injury in fact" entitling it to participate.

On February 8, 1994, NACE filed a Supplemental Petition to Intervene which proferred two contentions for litigation in the proceeding. The Board admitted these contentions on March 22, 1994, in LBP-94-8. As permitted by 10 C.F.R. § 2.714a, SFC has appealed LBP-94-5 and LBP-94-8 on the ground that NACE should be denied intervention entirely.

## ARGUMENT

### I. THE LICENSING BOARD CORRECTLY RULED 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 SUSTAINED.

SFC contends on several grounds 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.[2] These arguments are without merit.

SFC first argues that NACE lacks standing because there is "no possible outcome" that could adversely affect NACE's interests. SFC Brief at 9. According to SFC, the worst that could happen as a result of this proceeding is a return to the status quo ante, and thus NACE will always be "in the same or better position" as it would have been in the absence of a proposed order.[3] SFC ignores the important fact that the issuance of an

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[2] In support of its position, SFC summarizes and incorporates by reference the arguments made in its Initial Brief and Reply Brief to the Commission regarding the referred ruling in Section II.A of LBP-94-5. SFC Brief at 7. Rather than repeating its own arguments in its briefs to the Commission, NACE will do the same. Thus, NACE incorporates by reference its Initial Brief and Reply Brief Regarding Appropriateness of Commission Review of LBP-94-5 and Whether Ruling in Section II.A Should Be Sustained (March 11 and March 17, 1994, respectively) (hereinafter "NACE Initial Brief" and "NACE Reply Brief").

[3] This argument apparently is based on the U.S. Court of Appeals' decision in Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983). NACE has already discussed the inapplicability to this case of Bellotti's narrow holding that a petitioner has no right to a hearing for purposes of challenging the sufficiency of an enforcement order. See NACE Initial Brief at 10-12, NACE Reply Brief at 6-8. Moreover, Bellotti has questionable vitality as a precedent. See NACE Initial Brief at 11, note 6. Thus, NACE will not repeat these arguments here.

enforcement order effectively constitutes a governmental declaration that the status quo ante is less than adequate, and needs to be improved in order to protect public health and safety. A challenge by a licensee to an enforcement order thus creates the possibility that the proposed safety improvement will be defeated, and the "plant could return to or remain in its pre-amendment unsafe condition," thereby adversely affecting the surrounding community's interests. Bellotti v. NRC, 725 F.2d 1380, 1386 (D.C. Cir. 1983) (J. Skelly Wright, dissenting). In contrast, if the enforcement order is not challenged by the licensee, the proposed safety improvement will be made without obstacle or objection, and thus the petitioner's interests in safety will not be adversely affected.[4] As the Licensing Board observed, in this case "the licensee has requested a hearing, raising the specter of the adverse outcome alluded to in the Commission's brief." LBP-94-5, slip op. at 12, note 6 (emphasis added).

SFC also argues that the right to intervene in an enforcement proceeding must be "coextensive" with the right to a hearing under the § 189a of Atomic Energy Act, and that LBP-94-5 is not consistent with this requirement. SFC Brief at 11. However, there is nothing in the Atomic Energy Act or any NRC regulation

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[4] The distinction between challenged and unchallenged enforcement orders, for purposes of determining standing to intervene, was explicitly recognized by the Commission in its brief in the Bellotti case. See LBP-94-5 at 12, note 6; NACE Initial Brief at 11.

that impedes the Commission's authority, as established in 10 C.F.R. § 2.714, to widely permit intervention to persons adversely affected by adjudicatory proceedings, whether they involve licensing or enforcement actions. Regardless of what other regulations the Commission may institute under Subpart B of 10 C.F.R. Part 2 for the protection of licensee's rights in enforcement matters, § 2.714 has independent vitality as the Commission's chosen vehicle to provide for public participation in such proceedings.[5]

In any event, as discussed in NACE's Initial Brief at 8-10, and as demonstrated in Attachment A thereto, this adjudication does constitute a Section 189a licensing proceeding under the Atomic Energy Act, in which NACE has a statutory right to participate.[6] While not titled as a license amendment, the Order involves the amending of SFC's license because it imposes substantive decommissioning funding requirements on SFC and GA which either contradict or greatly expand upon the terms of SFC's license. For instance, the Order raises to $86 million SFC's decommissioning cost estimate which, in its current license, is only $4,225,492. It also provides for the establishment of an $86 million guaranteed decommissioning fund, in place of the current license's provision for a "reserve account" that will be

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[5] See also LBP-94-5 at 30, note 19.

[6] The Licensing Board did not address this issue in LBP-94-5, because its based its decision on 10 C.F.R. § 2.714 rather than § 189a. LBP-94-5, slip op. at 10, note 4.

added to incrementally during the "remaining life of the plant" to a total of $4,011,407 in "1983 value." Finally, the Order explicitly requires a guaranteed decommissioning fund, in contrast to the current license's vague reference to the possible posting of a bond by New Sequoyah Fuels Corporation, a predecessor holding company. See NACE Initial Brief at 8-10 and Attachment A thereto. These changes "alter[]" the "binding norm[s] to which [SFC] must comply," and therefore constitute a license amendment proceeding to which statutory hearing rights attach under § 189a. Union of Concerned Scientists v. NRC, 711 F.2d 370, 383 (D.C. Cir. 1983) (holding that NRC effectively amended nuclear power plant licenses when it suspended deadline for compliance with environmental qualification requirements).

## II. THE LICENSING BOARD CORRECTLY FOUND THAT NACE DEMONSTRATED THE REQUISITE INJURY IN FACT TO ESTABLISH REPRESENTATIONAL STANDING.

### A. The Licensing Board Applied A Correct Standard for Establishing NACE's Standing.

SFC claims that in admitting NACE as an intervenor, the Licensing Board departed from the well-established standard that a petitioner must show "a concrete and particularized injury, which is actual or immine.t and not conjectural or hypothetical, and which is fairly traceable to the action at issue." SFC Brief at 14. According to SFC, the Licensing Board "misread" the Commission's recent decision in Cleveland Electric Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993), when it found that NACE had standing because SFC had failed to show that there is "no potential for offsite consequences" that could adversely affect NACE. Id., citing LBP-94-5, slip op. at 26. On a number of grounds, SFC's argument is without merit.

First, SFC misinterprets Perry. In Perry, the intervenor petitioned for a hearing on a proposed license amendment that would have moved the schedule for the withdrawal of reactor vessel material specimens from the technical specifications to the plant's final safety analysis report. The petitioners argued that the amendment would deprive them of hearing rights if the withdrawal schedule later changed, since changes in the final safety analysis report are not subject to public notice requirements, and that such schedule changes could reduce the NRC's ability to detect weaknesses in the pressure vessel, thereby

adversely affecting their safety. In finding that the petitioner had standing, the Commission followed its previously established doctrine that "[i]n 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., 38 NRC at 95, quoting Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989). The Commission held that the petitioner, who lived within 15 miles of the plant, had standing because at that "threshold stage" of the proceeding it could not 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 withdrawal schedule." Id.

SFC argues that the "no potential" standard applied in Perry is inapposite here because it is a weaker test devised for cases where loss of a procedural right is involved. In such cases, SFC contends, it is "logical that the required showing regarding concreteness and particularization of injury would be relaxed because of the inherent absence of hard facts." SFC Brief at 17. SFC also claims that the Perry standard only applies to cases involving reactor licensing, where mere proximity to the facility, coupled with an "obvious potential for offsite consequences," is enough to presumptively confer standing.

SFC's interpretation of Perry ignores the fact that the Commission's principal concern in setting the "no offsite consequences" test was that the standing determination was being

made at the "threshold" stage of the proceeding, before the merits of the petitioner's claim could be judged. Id. at 95. As the Licensing Board noted in LBP-94-5, Perry reflected an appropriate reluctance to judge the merits of petitioner's case at this early stage. Slip op. at 20, citing City of Los Angeles v. National Highway Traffic Safety Administration, 912 F.2d 478, 495 (D.C. Cir. 1990). See also Lujan v. Defenders of Wildife, 112 S.Ct. 2130, 2137 (1992), noting the differing standards of proof for different stages of a case. Thus, at the summary judgment stage, which is analogous to the proceeding at bar, see Babcock and Wilcox (Appollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 83 (1993), a petitioner's factual statements, if properly supported by affidavits or other evidence, must be taken as true in order to determine if there is a material factual dispute with respect to the petitioner's standing. This the Licensing Board did. In such a procedural context, before the merits of the case were reached, it would have been improper for the Licensing Board to require proof or conclusive evidence from NACE regarding the likelihood of contamination from the SFC site.

Moreover, even if the Commission did intend in Perry to apply a special, laxer standard because of the "inherent absence of hard facts" in a case involving an alleged procedural violation, the same reasoning applies here. Just as in the Perry case, it is unclear whether this proceeding will ever adduce full or conclusive evidence regarding the nature, location, extent and

movement of contamination at the SFC site. As the Licensing Board noted, although characterization of the contamination at SFC is somewhat relevant to this case, "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." LBP-94-5, slip op. at 20. Moreover, at this point in time there exists no complete or approved study, nor has there been any discovery or opportunity for hearing, regarding the degree of contamination and likely movement of the contaminated groundwater beneath the SFC site. Indeed, SFC only recently submitted to the NRC Staff a plan to characterize the nature, location and degree of contamination of the site, SFC Site Characterization Plan (January 28, 1994). Thus, because "hard facts" regarding the precise location and movement of contaminated groundwater may not be available during the course of this proceeding, it would be illogical for the Board to require NACE to provide such facts.

It must also be noted in this context that NACE must rely entirely on information in the possession of SFC and the NRC regarding the characteristics of groundwater at the site. Thus, the Board could not reasonably require NACE to provide evidence showing the actual direction of deep groundwater flow on the site, when neither SFC nor the NRC has ever taken any measurements of this deep groundwater. Under these circumstances, NACE appropriately demonstrated that SFC, which is in control of the site and the studies conducted there, did not have a reasonable

basis for failing to determine whether deeper groundwater may be contaminated and may flow in the direction of Mr. Henshaw's property. Through Mr. Brown's affidavits, NACE showed that the hydrogeology of the site is quite complex, that groundwater flows in more than one direction, and that contamination may well to exist at deeper levels than tested by SFC. Given the uncertainty and incompleteness of available information, the Licensing Board properly applied a standard that recognizes potential harm as sufficient evidence of injury.[7]

SFC also attempts to raise the standard for intervention in enforcement proceedings, arguing that since NACE's claimed injury arises from a "lack of regulation" of SFC, standing will be "substantially more difficult" for it to establish. SFC Brief at 13, quoting Lujan, 112 S. Ct. at 2137. SFC relies on the Supreme Court's observation in Lujan that plaintiffs who challenge the adequacy of government regulation of third parties must show more

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[7] As the Licensing Board observed,

> The validity of SFC's decision not to do such studies [of deeper groundwater levels] based on a judgment that the possibility for significant lower level flow contamination was "unlikely," . . . may well be sustainable relative to the merits of any future determination about the adequacy of the FEI [Final Environmental Investigation] 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. . . .

LBP-94-5, slip op. at 26, note 17.

Finally, even assuming for purposes of argument that the standard for demonstrating standing was raised in Lujan, that case is inapplicable to these circumstances. While Lujan concerned a citizen group's efforts to force an agency to take action to protect wildlife, this case involves the circumstance where the government agency has already made a decision to take action, on the ground that it is required to protect public health and safety. Thus, by its own action, the NRC has itself established a causal connection between lack of adequate decommissioning funding and potential harm to the public.

**B. The Licensing Board Correctly Found That NACE's Affidavits Demonstrated the Requisite Injury In Fact.**

SFC asserts that NACE lacks standing because its "proffered injury" is "hypothetical, conjectural, and highly speculative," and because it rests on the "multiple assumptions" that "the rescission or relation 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 water that affects Mr. Henshaw's property." SFC Brief at 20. However, "it is not the length of the chain of causation, but rather its plausibility, that is dispositive in standing analysis." National Wildlife Federation v. Hodel, 839 F.2d 694, 710 (D.C. Cir. 1988). In this case, the plausibility that poorly financed and therefore poorly implemented decommissioning measures could lead to adverse

offsite effects is established by the Order itself, which finds that current decommissioning funding plans are inadequate to ensure that the site will be "properly" decommissioned. 58 Fed. Reg. at 55,089, Col. 2. Thus, NACE's assertions of potential harm as a result of inadequate decommissioning are hardly "speculative" or "conjectural," but are based on the reasoned determination underlying the NRC's enforcement action.[9]

Moreover, as discussed in detail in Mr. Brown's affidavit, the potential injuries to Mr. Henshaw are "concrete" and "fairly traceable" to the source of contamination at the SFC site. As demonstrated in Attachment 1 to Mr. Brown's affidavit, Mr. Henshaw's property is completely surrounded by the SFC site. Mr. Henshaw's property is susceptible to radioactive and other chemical groundwater contamination via groundwater flow from beneath

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9 SFC also argues that whatever the outcome of the enforcement proceeding, SFC will still be required to comply with the law -- thus, NACE's "hypothetical injuries" are not "fairly traceable to a possible outcome in this proceeding." SFC Answer at 29. This grossly simplistic argument would preclude intervention in every proceeding since, a priori, the NRC must always require compliance with the law. The issue here is how the law will be interpreted and applied and the resulting effect on NACE. If the Board finds that the "law" is fulfilled without the provision of guaranteed decommissioning funding, and if ConverDyn, the new business venture whose revenues are intended to support SFC's decommissioning costs, should fail to yield the profits projected by SFC, then the neighbors of the SFC plant will bear the impacts of living next to a contaminated site, with no prospects that cleanup will be funded. SFC may still have a "legal obligation" to "properly and safely decommission the SFC Facility," but a legal obligation without adequate resources to fund it does not comply with the law from the perspective of the neighbors who stand to be affected by SFC's contamination.

the SFC processing buildings, which are approximately a mile away, the wastewater retention ponds, which are approximately a half-mile away, and from SFC's raffinate fields, which completely surround his property. Id. If the groundwater on Mr. Henshaw's property becomes contaminated, it may adversely affect the quality of well water on the property, thereby impacting the health and quality of life for the Henshaw family and future generations.[10] Id., par. 11.

SFC claims that "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." SFC Brief at 21. However, NACE demonstrated through the affidavits of Mr. Brown, that SFC lacks an adequate technical basis for this assertion. As discussed in Mr. Brown's affidavit, SFC has not performed sufficient areal or

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[10] Not discussed in LBP-94-5, but raised by NACE before the Licensing Board, is the fact that if inadequate decommissioning funding is provided for the SFC site, a lack of resources may affect SFC's ability to fund adequate security and survey checkpoint measures, thereby increasing the risk of offsite contamination and danger to the community. As cited in Native Americans for a Clean Environment's Reply to Sequoyah Fuels Corporation's Answer in Opposition to NACE's Motion to Intervene at 22-23, there already have been numerous instances in which contaminated material or equipment was improperly transported offsite. See, e.g, PNO-IV-93-038) (three contaminated two-way radios belonging to SFC were confiscated during an offsite arrest on the night/morning of December 11-12, 1993); NRC Inspection Report 93-32 (January 29, 1993) (transfer of three barrels uranium to unlicensed firm offsite); Inspection Report 92-27 (November 23, 1992) (leakage of radioactive material found on transport vehicle); Inspection Report 91-14 (February 5, 1992) (leakage of uranium-contaminated slurry from tank truck during shipment to New Mexico).

vertical groundwater studies to identify all of the potential directions of groundwater flow beneath the SFC site; and the information that is available indicates that the hydrogeology of the area is quite complex, and that therefore groundwater is likely to flow in more than one direction. Even in the unlikely event that the groundwater flows in a solely westward direction, as SFC claims, Mr. Henshaw's property lies to the west of some of the fields where SFC has spread its raffinate wastes, and thus his land lies in the flowpath of contaminated groundwater from SFC's raffinate fields.[11]

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[11] SFC also cannot rely on the June 28, 1993 decision by a hearing examiner of the Oklahoma Water Resources Board ("OWRB") finding that NACE lacked standing to challenge a permit for a stormwater retention pond on the SFC site. First, the determination by a state hearing examiner regarding the potential migration of nitrates from a single retention pond on the SFC site has no res judicata effect on the much broader issue of the potential migration of radioactive contaminants from the entire SFC property.

Second, the state hearing examiner's decision is neither final nor valid, because it was never submitted as a "proposed" order for final approval by the Water Resources Board, as required by Oklahoma Administrative code 785:4-9-2(a). This is because within 3 days after the decision was rendered, regulatory authority over the case was transferred to the Department of Environmental Quality by operation of title 27A, Section 6 of the Oklahoma Statutes (1992). The DEQ has not responded to NACE's request for reconsideration of the hearing examiner's order.

Finally, the process by which the hearing examiner made his decision was arbitrary and unfair. SFC first filed its objection to NACE's May 18, 1993, request to participate in the OWRB proceeding, along with an affidavit attacking SFC's standing, at 4:15 p.m. on Friday, June 25, 1993. On Monday, June 28, 1993, the Board held a hearing and orally granted SFC's opposition. Thus, NACE was not given the opportunity to submit expert affidavits of its own regarding its standing to participate in the proceeding.

SFC charges that the Licensing Board should have discredited Mr. Brown's affidavits, based on the "overwhelming" evidence supplied by SFC's affiant, Bert J. Smith, that groundwater will not flow toward Mr. Henshaw's property. SFC Brief at 25. This evidence consists of Mr. Smith's opinion, based on SFC's limited groundwater studies, that there is no need for an investigation of deeper groundwater flows. However, Mr. Brown demonstrated in his affidavits that the data collected by Mr. Smith's company showed the existence of more complex geological structures than was conceded by Mr. Smith; and that groundwater in fact flowed in more than one direction. Through Mr. Brown, NACE showed that SFC had an inadequate technical basis for asserting that NACE member Ed Henshaw could not be injured by contamination from the SFC plant. At the very least, Mr. Brown's affidavits created a material issue of fact. See LBP-94-5, slip op. at 23-24. Under the well-accepted standard for summary disposition, the Board was not permitted to simply ignore Mr. Brown's opinion in favor of Mr. Smith's.

Thus, it is clear that Mr. Henshaw's affidavit, as supplemented by the affidavits of Mr. Brown, meets the standard applied by the Supreme Court in Lujan, by showing "actual or imminent injury" that is "fairly traceable" to SFC's failure to adequately decommission the SFC site, and which is "likely" to be "redressed by a favorable decision."

**C. NACE's Injury Can Be Redressed in This Proceeding.**

SFC also argues that NACE has failed to demonstrate that its injury will be redressed by a favorable decision, because the Director of NMSS has the discretion to relax or rescind the conditions imposed by the Order. According to SFC, only if the Director was deprived of his "ongoing authority under the Order" would intervention provide NACE with the requested relief. SFC Brief at 27-28. However, the Staff does not have the authority to exempt itself from 10 C.F.R. §§ 2.203 and 2.717(b), which give the Licensing Board approval authority over the rescission, relaxation, or settlement of enforcement orders during adjudications.[12] Thus, nothing in the Order can be read to deprive the Licensing Board of its supervisory authority over the enforcement order.

Moreover, even if the NRC Staff could unilaterally modify its Order, there currently is no indication that the NRC Staff intends to do anything of the kind. Thus, the principal relief that NACE seeks and can obtain through this proceeding is to prevent GA and SFC from shirking their liability under the Order, a goal which they are striving mightily to accomplish. See General Atomics' Motion for Summary Disposition or for an Order of Dis-

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12 As the Licensing Board explained in LBP-94-5, under § 2.717(b), any staff action to "relax or rescind the Order would be subject to review by the Board "with input from all parties to the proceeding." Slip op. at 15, n. 8. In addition, pursuant to § 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," with opportunity for comment by NACE on whether the proposed settlement is in the public interest. Id., slip op. at 15, note 8.

missal (February 17, 1994), which NACE has vigorously opposed. Accordingly, intervention in this proceeding unquestionably could provide NACE with the relief requested, i.e. a decision from the Licensing Board requiring GA and SFC to comply fully with the Staff's Order.

## III. LBP-94-5 IS CONSISTENT WITH COMMISSION POLICIES FOR ADJUDICATIONS AND ENFORCEMENT ACTIONS.

SFC also makes a number of policy-based arguments against LBP-94-5, all of which are unfounded. First, SFC claims that by looking at a petitioner's standing after the licensee has requested a hearing instead of when the enforcement action is commenced, the Licensing Board takes an approach that "is inconsistent with the orderly adjudication of matters before the Commission." SFC Brief at 1[illegible]. In its Initial Brief on referral, SFC was even more dramatic, suggesting that this approach would "open the floodgates" to "continuous intervention petitions, by permitting petitioners to seek to become parties to proceedings at various stages of an adjudication." Initial Brief at 15. This argument is illogical. Clearly, it is within the Commission's discretion to require the submission of petitions to intervene within a short time of a licensee's request for a hearing on an enforcement order. Presumably, requests for hearing filed significantly later would be subject to a late-filing standard. Thus, although the NRC currently has no regulations which prescribe time periods for intervening in contested enforcement proceedings, the "orderly adjudication of matters before the Com-

mission" would not be affected by allowing members of the public a certain time, after the filing of a hearing request by a licensee, to petition to intervene in an enforcement proceeding. It certainly would not serve the orderly administration of justice if intervenors were required to file hearing requests directly upon the issuance of enforcement orders, before they knew whether such intervention was even necessary to defend the orders against challenges by licensees.

SFC also makes a policy-based argument that the precedent set by LBP-94-5 is "inappropriate" and "undesirable" because it would permit public petitioners to act as "private prosecutors" when licensees challenge Commission enforcement orders. SFC Brief at 8. As discussed in more depth in NACE's Reply Brief at 2-6, SFC's greatly exaggerates in making such dire predictions. Given that intervenors may not broaden the scope of an enforcement proceeding, it is absurd to claim that licensees will be intimidated from challenging enforcement orders by the mere prospect that the Staff's position on these limited issues will be buttressed by another party.

SFC also disregards the fact that the NRC's own regulations limit the extent to which an intervenor could compel continuation of an enforcement proceeding which the NRC Staff decided to settle or abandon. NRC regulations at 10 C.F.R. §§ 2.203 and 2.717(b) permit settlement or withdrawal of enforcement actions with the approval of the Licensing Board. As the Board held in LBP-94-5, the Board's review under these regulations would be

subject to "input from all parties to the proceeding."[13] LBP-94-5, Slip op. at 15, note 8. An intervenor's exercise of this opportunity to challenge the reasonableness of a proposed settlement or withdrawal could have only a limited, and entirely legitimate, effect on the conduct of the litigation. For example, on the basis of information provided by an intervenor, the Licensing Board might reject a proposed settlement as unreasonable, order additional discovery to establish the reasonableness of a proposed settlement, or request additional briefing on the legal basis for approval of the settlement. Such litigation would only be permitted to the extent that the Licensing Board deemed it necessary to a reasonable and valid settlement or resolution. SFC's claims that an intervenor could use its limited opportunity for input on a proposed settlement or withdrawal to "insist" on continuing unnecessary and wasteful litigation, and that the intervenor's participation would thus affect the enforcement policies of the NRC Staff, is pure hyperbole.

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[13] SFC argues that where, as here, the Director of NMSS specifically reserved his authority to "relax or rescind" any part of the October 15th Order for good cause, § 2.717(b) does not give the Licensing Board authority to review the Director's exercise of his authority unless it amounts to a settlement of the proceeding pursuant to 10 C.F.R. § 2.203. SFC Brief at 11, note 7. SFC's regulatory interpretation, which is totally unsupported by any citation, is completely inconsistent with the plain language of § 2.717(b). Moreover, as discussed above, the Staff would have no lawful basis for exempting itself, by fiat, from the supervisory authority which the regulations grant to the Licensing Board.

## IV. IF THE COMMISSION FINDS THAT NACE IS NOT ENTITLED TO INTERVENE AS A MATTER OF RIGHT, IT SHOULD EITHER EXERCISE ITS DISCRETION TO ADMIT NACE AS AN INTERVENOR OR REMAND LBP-94-5 TO THE LICENSING BOARD FOR SUCH A DETERMINATION.

As NACE contended before the Licensing Board, assuming for purposes of argument that NACE is not entitled to intervene in this proceeding as of right, NACE should nevertheless be admitted as a discretionary intervenor.[14] Discretionary intervention is not only permitted, but is encouraged so that agencies may "maximize productive public participation in their proceedings." Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976), citing Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1005-1006 (D.C. Cir. 1966).

There is no question that, regardless of whether contaminated groundwater from the SFC site reaches Ed Henshaw's property, the adequacy of SFC's decommissioning of the Gore site will have significant and long-lasting effect on the plant's neighbors. Moreover, to date, these neighbors have been given no opportunity to participate in any aspect of the decommissioning process which is currently going on at the site under the auspices of SFC's current license; nor has the Commission issued substantive decommissioning standards on which the public has had

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[14] The Licensing Board never reached this issue in LBP-94-5 because it admitted NACE as an intervenor as a matter of right.

an opportunity to comment.[15] The potential unfairness of this outcome was recently noted by Chairman Selin during a Commission briefing on the Site Decommissioning Management Plan:

> In looking at places where sort of a judgment as to what's the best outcome given that the finances don't seem to be consistent with our standards, those are prima facie places where you want the affected public to have a chance to make a statement. It would not be appropriate for bureaucrats in Washington to be making these tradeoffs at some site without a strong input from the people who are involved. If we're following our standards, the standards have been put out in a rule, they've been commented on, that's one situation. But in these situations where they're really judgment and value calls, the affected parties have to be strongly involved on each issue.[16]

Tr. at 32 (November 8, 1993) (emphasis added).

The pendency of this proceeding was also a factor in the Licensing Board's recent decision to unconditionally grant SFC's motion to withdraw its license renewal application. LBP-93-25, Slip op. at 29. The Board refused the State of Oklahoma's request to place conditions on the withdrawal relevant to financial assurances for completion of decommissioning, ruling that "[s]ince this matter will be considered in a subsequent adjudica-

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15 The Licensing Board's dismissal of SFC's license renewal application and consequent denial of NACE's request for a hearing on the proposed terms of license renewal is now on appeal before the Commission. The Commission is developing, but has not issued for comment, a proposed decommissioning rule.

16 See Attachment E to NACE's Reply to SFC's Answer in Opposition to NACE's Motion to Intervene. NACE notes that the cover page of this transcript contains the general disclaimer that statements during Commission meetings may not be relied on in pleadings "except as the Commission authorizes." Thus, NACE seeks Commission authorization to rely on Commissioner Selin's statement.

tive proceeding, the complex details and extent of decommissioning financing will be more appropriately reviewed and resolved in the context of that proceeding." Id. NACE had also requested the opportunity to litigate the adequacy of decommissioning funding in the context of the license renewal proceeding, or in the alternative to seek conditions on the withdrawal relative to decommissioning funding. Thus, it is appropriate to allow NACE to intervene in this proceeding for the purpose of advocating the public interest in assuring that the Order is carried out.

Other considerations, as set forth in the Pebble Springs decision, also weigh heavily in favor of admitting NACE as an intervenor in this proceeding. First, as demonstrated in NACE's Reply to SFC's Answer in Opposition to NACE's Motion to Intervene at 26, NACE has retained experts who are very familiar with decommissioning funding issues at the SFC site, and therefore may be expected to contribute to the development of a sound record. Second, NACE has established strong health and property interests in the proceeding through the affidavit of Mr. Henshaw. Finally, as discussed in NACE's Motion, if the terms of the Order are not fulfilled, decommissioning of the SFC site may be delayed or conducted improperly, thus putting NACE's members and the rest of the surrounding community at risk from contamination. Thus, NACE has demonstrated a strong interest in the outcome of this proceeding.

Moreover, as discussed above, there are no other available means for protecting NACE's interests in this proceeding and

NACE's interests cannot be represented adequately by the NRC Staff, which is the only other party to the hearing besides SFC and GA. Finally, NACE's participation will not necessarily delay the proceeding, and it will not broaden the proceeding. Furthermore, even if there is some minimal delay caused by the participation of an additional party, it is more than compensated for by the benefits of permitting the public to have a say in this proceeding, which stands to have such a significant effect on public health and safety.

Accordingly, all of the above factors weigh heavily in favor of admitting NACE as a discretionary intervenor to this proceeding. The Commission should either exercise its discretion to allow NACE to intervene, or remand LBP-94-5 for a determination by the Licensing Board regarding the appropriateness of discretionary intervention.

CONCLUSION

For the foregoing reasons, LBP-94-5 should be affirmed.

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April 29, 1994

CERTIFICATE OF SERVICE

I certify that on April 29, 1994, copies of the foregoing NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S BRIEF IN OPPOSITION TO SEQUOYAH FUELS CORPORATION'S APPEAL OF LBP-94-5 were served by first-class mail on the following:

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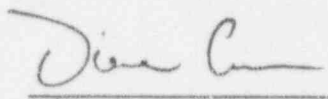

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