

July 11, 1996
DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'96 JUL 15 P5:13

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)

SEQUOYAH FUELS CORPORATION)
GENERAL ATOMICS)

(Gore, Oklahoma Site)
Decontamination and)
Decommissioning Funding))

Docket No. 40-8027-EA

Source Material License
No. SUB-1010

NRC STAFF'S AND GENERAL ATOMICS'
JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT

General Atomics (GA) and the NRC Staff (Staff) hereby file this joint motion for approval by the Atomic Safety and Licensing Board (Board) of a settlement agreement (Agreement) (Attachment 1 hereto) entered into between GA and the Staff. The Staff and GA also request that the Board suspend all activities in this proceeding not related to consideration of the Agreement, pending review of the Agreement by the Board and, if applicable, the Commission and the Court of Appeals.

DISCUSSION

In connection with the October 15, 1993 Order¹ issued by the Staff against Sequoyah Fuels Corporation (SFC) and GA, 58 Fed. Reg. 55,087 (1993), relating to

¹ This proceeding was initiated following the requests for a hearing filed by Sequoyah Fuels Corporation and General Atomics. Sequoyah Fuels Corporation's Answer and Request for Hearing (Nov. 2, 1993); General Atomics' Answer and Request for Hearing (Nov. 2, 1993).

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decommissioning funding for the SFC site in Gore, Oklahoma, the Staff and GA have been involved in intensive settlement negotiations over the past ten months.² Numerous, highly complex issues arose during these discussions, some of which were not foreseen by one or both parties at the commencement of negotiations, requiring the fullest attention of the parties. For example, in order to ascertain the tax treatment of any settlement involving the contribution of cash, tax and trust advisors needed to be repeatedly consulted. In addition, because GA holds NRC licenses for facilities in San Diego, California,³ and thus has regulatory financial obligations with respect to those facilities, consideration had to be given to any impact a settlement in this proceeding might have on GA's responsibilities with respect to the California facilities.

In connection with the Board's previous approval of a settlement between SFC and the Staff, *see supra* note 2, the Board recognized that the Commission has long encouraged settlements of contested proceedings, and that the avoidance of protracted and needless litigation is in the public interest. LBP-95-18, 42 NRC at 154-55. Both the Staff and GA faced significant risks if this litigation were to continue. The Staff recognizes that its theory of GA's liability may not be sustained by this Board, the Commission, or the courts. In such case, no additional financial assurance would then be obtainable from GA for the decommissioning and decontamination of the SFC site.

² A settlement between the Staff and Sequoyah Fuels Corporation was approved by the Board on October 26, 1995. *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-95-18, 42 NRC 150 (1995).

³ GA and the Staff have asserted, and continue to assert that matters involving the California facilities are outside the scope of this proceeding and the jurisdiction of this Board.

On the other hand, GA believes that if an adverse judgment of a potentially very large amount should be entered against GA, it is highly unlikely that it would be able to continue to operate as a viable business entity. In addition to the ultimate litigation risks faced by both parties, GA believes that the continued existence of the October 15, 1993 Order has adversely and significantly affected the credit rating of GA and its ability to engage in its regular business activities. The Staff recognizes and acknowledges that the continuation of litigation has consumed, and would continue to consume, significant Staff resources that could be more productively utilized in the public interest.

The terms of the Agreement between GA and the Staff generally speak for themselves. To highlight the major provisions, GA will establish a trust fund and deposit in it a total of \$9 million, provided that the Internal Revenue Service (IRS) agrees that the contributions to the trust, as a qualified settlement fund or otherwise, are deductible to GA when made and taxable only when distributed from the trust. If the IRS does not agree with both parties' assessment as to the appropriate tax treatment, GA's contributions to the trust are capped at \$5.4 million. The funds in the trust are to be used for decommissioning the SFC site at the direction of the NRC or in accordance with procedures approved by the NRC, and will be outside of GA's control. In consideration of the trust established by GA, the Staff has agreed to permanently rescind the October 15, 1993 Order as to GA and forbear from reinstituting like proceedings against GA in accordance with the terms of the Agreement. Finally, the Staff can fully enforce the terms of the Agreement under NRC regulations and Chapter 18 of the Atomic Energy


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Act, as amended, 42 U.S.C. § 2271 *et seq.* Both parties believe that the Agreement is in the public interest.

Because approval of the Agreement would effectively conclude this proceeding, it would make no sense for the parties to waste resources to restart discovery activities and renew discovery disputes. Accordingly, GA and the Staff also request that the Board suspend all activities in this proceeding not related to the approval or disapproval of the Agreement, pending review of the Agreement by the Board and, if applicable, review by the Commission and the Court of Appeals.


CONCLUSION

In consideration of the above, the Staff and GA respectfully move for an order, as that term is used in subsections (b), (i), and (o) of Section 161 of the Atomic Energy Act, as amended, 42 U.S.C. § 2201, approving and incorporating by reference the attached Agreement, and for suspension of all activities in this proceeding not related to the approval or disapproval of the Agreement.


Of Counsel

Stephen M. Duncan
Bradford W. Davenport, Jr.
MAYS & VALENTINE
110 South Union Street
Alexandria, Virginia 22314

Respectfully submitted,


Steven R. Horn
Susan L. Uttal
Counsel for NRC Staff

ATTORNEYS FOR GENERAL ATOMICS

Dated at Rockville, Maryland
this 11th day of July 1996

ATTACHMENT 1

SETTLEMENT AGREEMENT

THIS AGREEMENT is made by and between the Staff of the United States Nuclear Regulatory Commission ("NRC Staff") and General Atomics (the "Company"), to-wit:

WHEREAS, on October 15, 1993 the NRC Staff issued an Order to Sequoyah Fuels Corporation ("SFC") (58 Fed. Reg. 55087, October 15, 1993) (the "October 15 Order"), relating to the funding of the site decontamination and decommissioning of the facilities located in Gore, Oklahoma that are licensed under NRC License No. SUB-1010, Docket No. 40-8027 (the "SFC Facility"); and

WHEREAS, the NRC Staff also issued the October 15 Order against SFC's third-tier parent company, General Atomics, alleging inter alia, that General Atomics and SFC were jointly and severally responsible for: (1) Providing funding to continue remediation of existing contamination at the SFC Facility site, regardless of whether the facility continued to operate or not; (2) Providing financial assurance for decommissioning in accordance with the requirements of 10 C.F.R. § 40.36; and (3) Providing an updated detailed cost estimate for decommissioning and a plan for assuring the availability of adequate funds for completion of decommissioning, in accordance with the requirements of 10 C.F.R. 40.42(c)(2)(iii)(D); and

WHEREAS, the October 15 Order does not allege, and the NRC Staff has not asserted, either that General Atomics caused any contamination which may exist at the SFC Facility, or that General Atomics has otherwise engaged in any form of activity that is

wrongful or dangerous to the public health and safety; and

WHEREAS, on November 2, 1993, General Atomics and SFC filed separate answers to the October 15 Order requesting that it be rescinded, or in the alternative, that a hearing be held on it; and

WHEREAS, an administrative enforcement proceeding is now being conducted before an Atomic Safety and Licensing Board (the "Board") in Docket No. 40-8027-EA ("Administrative Proceeding"), and General Atomics and the NRC Staff are parties in that proceeding; and

WHEREAS, General Atomics has consistently and specifically denied that the Nuclear Regulatory Commission ("Commission") has jurisdiction over it with regard to the matters set forth in the October 15, 1993 Order; and

WHEREAS, General Atomics commenced a civil action in the U.S. District court for the Southern District of California (the "California Civil Action") challenging the Commission's exercise of jurisdiction over it; and

WHEREAS, the California Civil Action was appealed to the United States Court of Appeals for the Ninth Circuit and that Court has ruled that the action is premature because of the absence of a Final Order by the NRC in the Administrative Proceeding; and

WHEREAS, on July 26, 1995, the Commission published a Final Rule, "Clarification of Decommissioning Funding Requirements" (60 Fed. Reg. 38, 235, July 26, 1995) that if applied to SFC, would require that on the effective date of the rule, November 24, 1995, SFC provide financial assurance of decommissioning funding for the Sequoyah Facility using one of the methods provided for in 10

C.F.R. § 40.36(e); and

WHEREAS, General Atomics and SFC commenced separate civil actions in the United States Court of Appeals for the Ninth and Tenth Circuits challenging the lawfulness of the new final rule, and the civil actions are now consolidated in the Ninth Circuit; and

WHEREAS, on August 24, 1995, SFC and the NRC Staff filed a joint motion with the Board seeking the Board's approval of a Settlement Agreement by and between SFC and the NRC Staff which would, subject to the terms of that Agreement, obligate SFC to devote all of its net assets and net revenues to the completion of the decommissioning of the SFC Facility in accordance with the requirements of the Commission, the U.S. Environmental Protection Agency ("EPA"), and any other state or federal agency with jurisdiction, until the NRC Staff determines that such decommissioning has been satisfactorily completed; and

WHEREAS, by its Memorandum and Order of October 26, 1995, the Board formally approved the proposed Settlement Agreement between the NRC Staff and SFC; and

WHEREAS, in connection with an August 3, 1993 Administrative Order on Consent ("RCRA Consent Order") issued by the EPA (U.S. EPA Docket No. VI-005-(h) 93-H) and agreed to by SFC for the environmental remediation of the SFC Facility, General Atomics voluntarily agreed to continue to make funds available to SFC as loans under certain Revolving Promissory Notes (in the amounts of \$2,500,000.00 and \$4,500,000.00 respectively) and for the purpose

of supporting SFC in its efforts to provide financial assurance regarding the availability of funds to implement the RCRA Consent Order; and

WHEREAS, based upon SFC's actual experience to date, General Atomics and SFC believe that SFC's net assets and net revenues, as defined in the Settlement Agreement between the NRC Staff and SFC, will provide adequate capital resources to allow SFC to conduct its ongoing standby operations and to complete environmental remediation and decommissioning; and

WHEREAS, the NRC Staff and General Atomics understand and acknowledge that many of the issues raised by the October 15 Order are complex and likely to require the continued expenditure of significant manpower and financial resources by each party if they are to be resolved through litigation; and

WHEREAS, the NRC Staff and General Atomics understand and acknowledge that it is in the public interest to avoid the dissipation of their financial resources and manpower in litigation, particularly since it is in the public interest that General Atomics retain the financial capability to meet certain other decommissioning obligations which are not disputed and which are not within the scope of the Administrative Proceeding or the jurisdiction of the Board; and

WHEREAS, General Atomics believes that the mere existence of the October 15 Order has adversely and significantly affected the credit rating of General Atomics and its ability to engage in its regular business activities, irrespective of the lawfulness or the

merits of the Order; and

WHEREAS, the business of General Atomics has been dependent upon government contracts, especially U.S. Department of Energy contracts for the development of the Company's Gas Turbine-Modular Helium Reactor (GT-MHR) and for its nuclear fusion research program; and

WHEREAS, funding for continued development of the GT-MHR has now been terminated by Congress; and

WHEREAS, General Atomics believes that funding for the Company's fusion research program in FY 1996 was reduced by approximately thirty percent (30%) by Congress from the FY 1995 level; and

WHEREAS, General Atomics asserts that it has sustained significant financial impairment since the NRC Staff issued the October 15 Order; and

WHEREAS, the NRC Staff and General Atomics have engaged in negotiations seeking an amicable resolution of the issues raised by the October 15 Order because they recognize that the public interest will be served and that certain advantages and benefits may be obtained by each of them through settlement and compromise of the controverted matters now pending.

NOW, THEREFORE, in consideration of the mutual promises made herein, the NRC Staff and General Atomics agree as follows:

1. Within ninety (90) days of the execution of this Settlement Agreement, General Atomics shall establish a trust fund ("Fund") for the benefit of the NRC, into which General Atomics

shall deposit a total of \$9,000,000.00 in accordance with the schedule set forth in Annex "A," attached hereto. The governing trust fund agreement provided by General Atomics and approved by the NRC shall be structured, to the extent applicable, consistent with the model trust fund agreement set forth in NRC Regulatory Guide 3.66. The trust fund agreement shall provide that the trustee ("Trustee") shall make payments from the Fund as the NRC shall direct or in accordance with procedures approved by the NRC. Provided, however, that until such time as the Internal Revenue Service renders an opinion which is unqualified in any material respect (1) that all of the payments to the Fund by General Atomics are deductible when made for Federal income tax purposes, whether the Fund is deemed a "qualified settlement fund" as that term is used in the Internal Revenue Code, or otherwise constitutes a fund regarding which such payments by General Atomics are deductible when made under the Internal Revenue Code, and (2) that payments into the Fund are not taxable to SFC or General Atomics until such amounts are actually paid from the Fund to SFC if in fact so paid, General Atomics shall not be required to deposit into the Fund in excess of \$5,400,000.00, and shall make deposits totalling such amount in accordance with the schedule set forth in Annex "B," attached hereto.

2. General Atomics shall, immediately following the execution of this Settlement Agreement, seek the above-described opinion from the Internal Revenue Service regarding the trust fund established pursuant to Paragraph 1 of this Settlement Agreement.

At such time as General Atomics receives the opinion, it shall promptly transmit a copy of it to the NRC.

3. This Settlement Agreement constitutes full settlement of the NRC Staff's claims against General Atomics with respect to the October 15 Order.

4. General Atomics shall have no control over the management of either the Fund or the funds deposited therein. Any principal and interest of the trust will be distributed pursuant to the terms of the trust instrument as established by General Atomics and approved by the NRC Staff.

5. General Atomics further agrees that the two officers of General Atomics who currently serve on SFC's Board of Directors will resign from that board no later than June 30, 1997.

6. General Atomics further agrees that subsequent to the execution of the Settlement Agreement and no later than ten (10) days after the establishment of the Fund , it will pay into the Fund the sum of \$600,000.00. Except as the terms of paragraph 1 above expressly provide to the contrary, no further payments shall be required of General Atomics until there is final agency action regarding the Settlement Agreement, unless there is no final agency action by December 15, 1997, in which circumstance General Atomics will pay an additional \$1,200,000.00 into the Fund within sixty (60) days following December 15, 1997.

7. General Atomics further agrees that in the event that the Settlement Agreement is finally approved by the Commission or an order approving it becomes final agency action and all appeals of

such action have been exhausted without success by December 31, 1996, it will make payments into the Fund in the amounts and on the dates specified in either Annex "A" or Annex "B," whichever annex is most appropriate under the provisions of paragraph 1 above. If the Settlement Agreement is finally approved by the Commission, or an order approving it becomes final agency action, and all appeals of such action are exhausted without success after December 31, 1996, but before December 31, 1997, General Atomics agrees to make sufficient payments to the Fund to ensure that the payment schedule set forth in either Annex "A" or Annex "B," whichever is most appropriate under the provisions of paragraph 1 above, is made current no later than 120 days after final agency action.

8. It is the intent of the parties to this Settlement Agreement that as they are paid down by SFC, the Revolving Promissory Notes from SFC to General Atomics for amounts borrowed pursuant to the Lines of Credit extended by General Atomics, will be reduced to the sums still owed and extinguished as to excess borrowing capacity as the sums are paid by SFC to General Atomics. It is the further intent of the parties that the Promissory Notes will be fully extinguished no later than December 31, 1998. Notwithstanding anything in paragraphs 1-7 above or Annexes "A" or "B" to the contrary, in the event that all amounts borrowed by SFC pursuant to the Lines of Credit have not been repaid by December 31, 1998, General Atomics shall have the option of delaying until December 31, 1999, the payment to the Fund of one-half of the amounts otherwise due no later than December 31, 1998.

9. The parties hereto agree that in the event that (a) the Commission does not approve the Settlement Agreement, or (b) the Commission's final approval of the Settlement Agreement is reversed or otherwise set aside by a court of law, all funds which have been paid under this Settlement Agreement, together with all earnings thereon, shall be returned to General Atomics by the Trustee no later than sixty (60) days after a Commission or judicial decision disapproving the Settlement Agreement. All other matters shall likewise return to the status quo which existed prior to the execution of the Settlement Agreement.

10. General Atomics further agrees not to take any action that an independent observer would reasonably conclude will interfere with the ability of SFC to carry out the NRC-SFC Settlement Agreement which was approved by the Board on October 26, 1995.

11. General Atomics further agrees to cooperate fully with the NRC Staff in explaining the terms of this Settlement Agreement to the public, the Board, the Commission, and/or any court of competent jurisdiction. In this context, and because of the potential effect upon General Atomics' competitive position within the marketplace, the NRC Staff agrees that the Office of Public Affairs of the NRC ("OPA") has represented to the NRC Staff that before OPA issues any news release describing the terms of this settlement, it will confer with General Atomics to confirm the accuracy of any statements of fact which it proposes to include in the news release.

12. The NRC Staff and General Atomics agree that the obligations assumed by the Company in this Settlement Agreement represent a good faith, voluntary and major effort to settle the matters relating to the October 15 Order. As a consequence of this effort, the NRC Staff agrees to permanently rescind the October 15 Order insofar as it applies to General Atomics and accepts the terms of this Settlement Agreement in lieu of those provisions of the October 15 Order that are directed to General Atomics. Subject to the provisions of Paragraphs 13 and 14 below, the NRC Staff further agrees to forbear from taking any enforcement or other action against General Atomics or its current, former, or future officers, directors or employees (relating to their actions in their official capacities), (a) based upon any alleged requirement to provide funds for the decommissioning of the SFC Facility or to provide financial assurance for the decommissioning of the SFC Facility, whether such requirement arises under any current NRC regulations or under any future regulation that might alter, redefine or clarify the currently applicable requirements, or (b) based upon the facts alleged in the October 15 Order and/or those reasonably known by the NRC Staff that are related to the subject matter of the October 15 Order.

13. The NRC Staff further agrees that it will not assert against General Atomics in the future, any "de facto licensee" or other claims which are similar to those asserted in the October 15 Order, and which are based upon (a) the performance by General Atomics' personnel of any of the audit or other oversight

responsibilities required by the license issued to SFC by the Commission, (b) the reasonable exercise by General Atomics' officers and management personnel of the business judgment referred to in paragraph 15 below, and (c) the nature of the degree of ownership by or of General Atomics of any of its parent, subsidiary or affiliated companies.

14. Notwithstanding any provisions in this Settlement Agreement to the contrary, nothing herein shall limit the NRC Staff's ability to take appropriate action to enforce General Atomics' compliance with this Settlement Agreement, or to take appropriate enforcement action based upon (a) future conduct by General Atomics which is materially different from that described in the October 15 Order, in paragraph 13 above, or which is reasonably known by the NRC Staff on the date this Settlement Agreement is entered into, (b) material information that is not currently available to or reasonably known by the NRC Staff, or (c) evidence that any representation in this Settlement Agreement is incomplete or inaccurate in a material respect. The NRC Staff and General Atomics acknowledge that the terms and provisions of this Settlement Agreement, once approved by the Board, shall be incorporated by reference into an order issued by the Board, as the term "order" is used in subsections (b), (i) and (o) of Section 161 of the Atomic Energy Act of 1954, as amended (the "Act"), 42 U.S.C. § 2201, and shall be subject to enforcement pursuant to the Commission's regulations and Chapter 18 of the Act, 42 U.S.C. § 2271 et seq.

15. Nothing in this Settlement Agreement shall limit the right and obligation of the officers and management personnel of General Atomics to fully exercise their best business judgment in the management of the Company.

16. The NRC Staff and General Atomics understand and acknowledge that this Settlement Agreement is the result of a compromise and shall not for any purpose be construed as an admission of the facts alleged or conclusions of law drawn in the October 15 Order, as an admission of the alleged joint and several responsibilities of General Atomics included in Section VII.A and other sections of the October 15 Order, or as an admission by General Atomics of any violation of 10 C.F.R. § 40.36, 10 C.F.R. § 40.42, or any statute, regulation, license condition, or other regulatory requirement.

17. The NRC Staff and General Atomics further agree that no inference adverse to either party shall be drawn based upon the parties having entered into this Settlement Agreement.

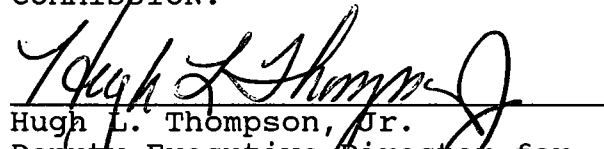
18. The NRC Staff and General Atomics further agree to file a joint motion requesting that the Board approve this Settlement Agreement, pursuant to the Commission's regulations in 10 C.F.R. § 2.203. Upon approval of this Settlement Agreement by the Board, without any substantive modification by the Board, the NRC Staff and General Atomics agree that they will not appeal the Board's approval or otherwise seek judicial review of such approval. If this Settlement Agreement is not approved by the Board, or if this Settlement Agreement is approved by the Board but is modified by

the Board in a manner which either party believes to be a substantive modification, or any body or court to which the Board's approval is appealed reverses such approval or affirms the approval but modifies the Settlement Agreement in a manner which either party believes to be substantive, either the NRC Staff or General Atomics may void the Settlement Agreement by giving written notice to the other party within ninety (90) days of such action by the Board, body or court, unless such 90-day period is extended by written agreement of both parties. The NRC Staff and General Atomics agree that under such circumstances and upon request they will negotiate in good faith to resolve differences which are the result of such substantive modification.

19. This Settlement Agreement shall become effective upon execution, and is revocable only upon a failure of the Board to approve it or upon the action of the Commission, another agency of the U.S. Government, or any other body or court of law which has jurisdiction to review and approve or disapprove the Settlement Agreement and which disapproves it or any substantive part of it.

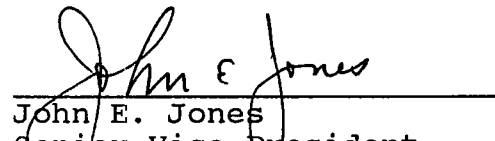
IN WITNESS WHEREOF, the NRC Staff and General Atomics have caused this Settlement Agreement to be executed by their duly authorized representatives on this 10th day of July, 1996.

FOR THE NUCLEAR REGULATORY
COMMISSION:



Hugh L. Thompson, Jr.
Deputy Executive Director for
Nuclear Materials Safety,
Safeguards and Operations
Support

FOR GENERAL ATOMICS:



John E. Jones
Senior Vice President

ANNEX "A"

<u>DATE</u>	<u>AMOUNT TO BE PAID</u>
No later than ten (10) days after the establishment of the Trust Fund	\$ 1,000,000.00
December 31, 1996	\$ 2,000,000.00
December 31, 1997	\$ 2,000,000.00
December 31, 1998	\$ 2,000,000.00
December 31, 1999	\$ 200,000.00
December 31, 2000	\$ 200,000.00
December 31, 2001	\$ 200,000.00
December 31, 2002	\$ 200,000.00
December 31, 2003	\$ 200,000.00
December 31, 2004	\$ 200,000.00
December 31, 2005	\$ 200,000.00
December 31, 2006	\$ 200,000.00
December 31, 2007	\$ 200,000.00
December 31, 2008	\$ 200,000.00
TOTAL	<hr/> \$ 9,000,000.00

ANNEX "B"

<u>DATE</u>	<u>AMOUNT TO BE PAID</u>
No later than ten (10) days after the establishment of the Trust Fund	\$ 600,000.00
December 31, 1996	\$ 1,200,000.00
December 31, 1997	\$ 1,200,000.00
December 31, 1998	\$ 1,200,000.00
December 31, 1999	\$ 120,000.00
December 31, 2000	\$ 120,000.00
December 31, 2001	\$ 120,000.00
December 31, 2002	\$ 120,000.00
December 31, 2003	\$ 120,000.00
December 31, 2004	\$ 120,000.00
December 31, 2005	\$ 120,000.00
December 31, 2006	\$ 120,000.00
December 31, 2007	\$ 120,000.00
December 31, 2008	\$ 120,000.00
 TOTAL	 \$ 5,400,000.00

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

96 JUL 15 P5:13

In the Matter of)

SEQUOYAH FUELS CORPORATION)
GENERAL ATOMICS)

(Gore, Oklahoma Site)
Decontamination and)
Decommissioning Funding))

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Docket No: 40-80270EA
Source Material License
No. SUB-1010

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S AND GENERAL ATOMICS' JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT" in the above-captioned matter have been served on the following by deposit in the United States mail, first class; or as indicated by single asterisk through deposit in the Nuclear Regulatory Commission's internal mail system; or as indicated by triple asterisk by hand delivery this 11th day of July 1996.

James P. Gleason, Chairman*
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555
Fax: 301-415-5599

G. Paul Bollwerk, III, Esq.*
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555
Fax: 301-415-5599

Jerry R. Kline*
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555
Fax: 301-415-5599

Thomas D. Murphy*
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555
Fax: 301-415-5599

John H. Ellis, President
Sequoyah Fuels Corporation
P. O. Box 610
Gore, Oklahoma 74435

Mr. John R. Driscoll
General Atomics Corporation
3550 General Atomics Court
San Diego, California 92121-1194

Office of the Secretary (2)***
ATTN: Docketing and Service Branch
Mail Stop: O-16 G15
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Stephen M. Duncan, Esq.
Bradfute W. Davenport, Jr., Esq.
Mays & Valentine
110 South Union Street
Alexandria, Virginia 22314
Fax: 703-519-0140

Diane Curran, Esq.
Harmon, Curran, Gallagher & Spielberg
2001 S Street, N. W., Suite 430
Washington, D. C. 20009-1125
Fax: 202-328-6918

Office of the Commission Appellate
Adjudication*
Mail Stop: O-16 G15
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Adjudicatory File (2)*
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Jeannine Hale, Esq.
Assistant Attorney General
2300 North Lincoln Boulevard
Suite 112
Oklahoma City, Oklahoma 73105-4894

Atomic Safety and Licensing Board
Panel*
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Alvin H. Gutterman, Esq.
John E. Matthews, Esq.
Morgan, Lewis & Bockius
1800 M Street, N. W.
Washington, D. C. 20036
Fax: 202-467-7176

Betty Robertson
HCR 68 Box 360
Vian, Oklahoma 74962

Lance Hughes, Director
Native Americans
for a Clean Environment
P. O. Box 1671
Tahlequah, Oklahoma 74465

James Wilcoxon, Esq.
Wilcoxon, Wilcoxon & Primomo
P. O. Box 357
Muskogee, Oklahoma 74402-0357
Fax: 918-682-8605

Alan D. Wingfield, Esq.
Mays & Valentine
P. O. Box 1122
Richmond, Virginia 23208



Steven R. Hom
Susan L. Uttal