UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
SEQUOYAH FUELS CORPORATION GENERAL ATOMICS	)	Docket No. 40-8027-EA
(Gore, Oklahoma Site Decontamination and Decommissioning Funding)	)	Source Material License No. SUB-1010

NRC STAFF'S ANSWER IN OPPOSITION TO THE INTERVENORS' PETITION FOR REVIEW OF LBP-96-24

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The NRC Staff (Staff) hereby files its answer in opposition to the Petition for Review of LBP-96-24 (Nov. 26, 1996) (Petition), filed by the intervenors in this proceeding, Native Americans for a Clean Environment and the Cherokee Nation (Intervenors), regarding the Atomic Safety and Licensing Board's (Board) decision approving the settlement between the Staff and General Atomics.[1] For the reasons set forth below, the Petition should be denied.

BACKGROUND

On October 15, 1993, the Staff issued an Order[2] against GA and Sequoyah Fuels Corporation (SFC) (1993 Order), alleging, *inter alia,* that GA and SFC are jointly and

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[1] *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-96-24, 44 NRC ___, slip. op. (Nov. 5, 1996).

[2] 58 Fed. Reg. 55,087-92 (1993).

severally responsible for providing funding to remediate contamination at the SFC site in Gore, Oklahoma, and for providing financial assurance for decommissioning the SFC site in accordance with the requirements of 10 C.F.R. § 40.36. 1993 Order at 23-24. Neither SFC nor GA had provided a financial assurance mechanism for adequate funds for the completion of decommissioning as described by NRC regulations, although contracts involving a partnership, ConverDyn, not deemed to meet NRC financial assurance regulations, had been established under which SFC projected that it would receive revenues of approximately $72 million through the year 2003. *Id.* at 9. SFC had also projected that it would have an income of more than $17 million from other sources. *Id.*

Under the 1993 Order, GA was specifically directed to provide financial assurance for decommissioning and decontamination in the amount of $86 million on or before November 19, 1993, and to make up any shortfalls if revenues to SFC in any year are less than the ConverDyn or other revenues projected in the Preliminary Plan for Decommissioning submitted by SFC. *Id.* at 24-25. GA and SFC both requested a hearing[3] on the 1993 Order, and the matter has been in litigation since then.

SFC and the Staff entered into a settlement agreement in August 1995, which was approved by the Board on October 26, 1995, and is presently under review by the Commission.[4] The SFC settlement essentially provides that SFC must dedicate to decommissioning all of its present and future net assets and revenues as defined in the

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[3] Sequoyah Fuels Corporation's Answer and Request for Hearing (Nov. 2, 1993); General Atomics' Answer and Request for Hearing (Nov. 2, 1993).

[4] *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-95-18, 42 NRC 150 (1995).

settlement agreement. It does not attempt to require that SFC must accumulate a specific minimum dollar amount. Rather, SFC is obligated "to furnish all of its assets and revenues that it would have to provide if a judgment were to issue against it in the proceeding." LBP-95-18, 42 NRC at 155.

The Staff and GA entered into a settlement agreement in July of this year following over ten months of intensive, complex negotiations. The principal features of the GA settlement include the following. It provides for GA to establish a trust in the amount of $9 million, or $5.4 million if the Internal Revenue Service does not agree with the Staff that the trust constitutes a qualified settlement fund. GA will have no control over the distribution of the funds in the trust for decommissioning activities. Rather, distribution will be governed by an NRC-approved trust agreement. In exchange, the Staff has agreed that it will withdraw the 1993 Order against GA and forbear from taking action against GA in the future relating to decommissioning funding for the SFC site, and forbear from asserting a "*de facto* licensee" claim against GA based on GA's oversight role regarding SFC, GA's exercise of reasonable business judgment, or the corporate relationships between GA and its parent, affiliates, or subsidiaries.

The GA settlement was filed on July 11, 1996, by the Staff and GA, for approval by the Board. The Intervenors, as well as the State of Oklahoma (State), filed briefs in

opposition to the settlement, to which the Staff and GA filed replies.[5] A majority of the Board approved the settlement on November 5, 1996, with Judge Bollwerk dissenting.

DISCUSSION

A petition for review must address at least one of the considerations listed in 10 C.F.R. § 2.786(b)(4):

> (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
> (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
> (iii) A substantial and important question of law, policy or discretion has been raised;
> (iv) The conduct of the proceeding involved a prejudicial procedural error; or
> (v) Any other consideration which the Commission may deem to be in the public interest.

The Intervenors' first general argument is under the heading that the Board "erred in approving the settlement." Petition at 6. More specifically, the Intervenors claim that the Board "applied [10 C.F.R.] § 2.203 in an erroneous and arbitrary manner, by interpreting the 'due weight' requirement of § 2.203 to permit blind reliance on staff assurances of reasonableness, no matter how poorly supported or deeply flawed." *Id.* The

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[5] Intervenors' Opposition to Joint Motion for Approval of Settlement Agreement Between NRC Staff and General Atomics (Aug. 9, 1996); State's Response to NRC Staff's and General Atomics' Joint Motion for Approval of Settlement Agreement (Sept. 5, 1996); NRC Staff's Reply to Intervenors' Opposition to Joint Motion for Approval of Settlement Agreement Between NRC Staff and General Atomics and to the State of Oklahoma's Response to NRC Staff's and General Atomics' Joint Motion for Approval of Settlement Agreement (Oct. 11, 1996); General Atomics' Response to the Opposition of the Intervenors and the Attorney General of Oklahoma to the Joint Motion for Approval of Settlement Agreement Between NRC Staff and General Atomics (Oct. 11, 1996).

Intervenors assert that the Staff and GA placed no evidence before the Board to support the reasonableness of the settlement, and that in the absence of information such as a decommissioning cost estimate to which the settlement could be compared, current projections of SFC revenues, or how cleanup will be funded if GA and SFC contributions fall short, "it is impossible to evaluate the adequacy of the settlement to protect public health and safety, or its value as a compromise measure." *Id.* at 7. The Intervenors also allege that the Staff "refused to make any assertion of the settlement's adequacy to protect public health and safety to which the Board could give 'due weight.'" *Id.* at 8 (emphasis in original). Moreover, the Intervenors argue that the Board "unlawfully shifted the burden of supporting the reasonableness of the settlement away from the staff and GA, transferring to Intervenors the burden of showing its unreasonableness." *Id.* Further, the Intervenors claim that the Board "committed reversible error" because it "ignor[ed] Intervenors' calls for sufficient disclosure to allow a meaningful evaluation of the settlement." *Id.* at 9. Finally, the Intervenors assume that there has been some kind of "global settlement" which includes GA's facilities in San Diego, California, and assert that the Board "erred in ruling that consideration of the global settlement between the NRC staff and GA was beyond its jurisdiction," and that the Board should have ordered the disclosure of information relating to the San Diego facilities. *Id.*

The Intervenors' second major area of contention is that LBP-96-24 "raises important issues of law, policy and discretion." *Id.* at 10. Under this heading, the Intervenors argue that the Board's decision "raises grave questions as to whether the SFC [facility] will ever be cleaned up, [and] renders meaningless the Commission's regulations

requiring Board approval of settlements." *Id.* (Emphasis in original.) Also, the Intervenors argue that the Commission has acted in violation of principles regarding ex parte communications, and has granted waivers of regulations in secret by approving a "global settlement," rather than in what should have been a "public hearing process." *Id.*

With respect to the Intervenors' first set of arguments, the Intervenors have failed to establish that there is a substantial question with respect to any of the considerations in 10 C.F.R. § 2.786(b)(4) by reason of the Board's decision in LBP-96-24. Contrary to the Intervenors' assertion, the Board had in front of it sufficient information upon which it could independently assess the reasonableness of the settlement, and thus did not have to "blindly rely" on Staff assurances of reasonableness. The Intervenors complain that, for example, the Staff has not provided a decommissioning cost estimate to which the settlement could be compared, or current projections of revenues to SFC. However, the Intervenors have ignored the fact that the 1993 Order, which was the basis for the proceeding to begin with, contains a cleanup cost estimate of $86 million, and statement of projected revenues to SFC from ConverDyn and other sources of $89 million.[6]

Contrary to the Intervenors' assertions, the Board did not "unlawfully shift the burden" of supporting the reasonableness of the settlement from the Staff and GA to the Intervenors. The Staff and GA fully disclosed the terms of the settlement and the immediate value of the settlement amount to the Board and the Intervenors, and

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[6] General Atomics also filed before the Board a recent affidavit supporting projections of ConverDyn revenues to SFC. Affidavit of John E. Jones (Oct. 10, 1996) (attachment to General Atomics' Response to the Opposition of the Intervenors and the Attorney General of Oklahoma to the Joint Motion for Approval of Settlement Agreement Between NRC Staff and General Atomics (Oct. 11, 1996)).

acknowledged the substantial risks of litigation. The Board was fully aware of the cleanup cost estimates on which the 1993 Order was based, and the projected revenues to SFC to finance cleanup, which were stated in the 1993 Order. By providing the foregoing information, the Staff and GA more than met their burden of showing the reasonableness of the settlement. Furthermore, contrary to the Intervenors' assertion that the Staff "refused to make any assertion of the settlement's adequacy to protect public health and safety to which the Board could give 'due weight'," the Staff clearly represented in the Joint Motion for Approval of Settlement Agreement (July 11, 1996) that it believed that the settlement is in the public interest. Based on the totality of the information before it, the Board properly accorded due weight to the position of the Staff, consistent with 10 C.F.R. § 2.203, and approved the settlement.

With respect to the Intervenors claim that there has been a "global settlement" involving the SFC site as well as GA's licensed facilities in San Diego, and that the Board erred by not ordering the disclosure of information relating to the San Diego facilities, the documents on which the Intervenors rely do not support such a claim. The three attachments to the Petition reveal the Staff's exercise of enforcement discretion with respect to financial assurance requirements for GA's licensed San Diego facilities. While the documents disclose that the exercise of such discretion is conditioned upon GA's being subject to a settlement in this proceeding,[7] the settlement here is not conditioned upon any matter involving the San Diego facilities or otherwise unrelated to the SFC site in Gore, Oklahoma. The terms of the settlement approved by the Board are straight forward and

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[7] *See* Attachment A to Petition at 2.

contain no contingencies pertaining to anything that has occurred, or may occur, regarding GA's cleanup responsibilities in San Diego. Further, the Commission's Staff Requirements Memorandum, dated July 8, 1996, provided as Attachment C to the Petition, expressly provides that no matter relating to the Gore site is or has been prejudged. Accordingly, the Board properly recognized that its jurisdiction did not extend to any matter pertaining to the GA facilities in San Diego, and committed no error by not ordering disclosure of information relating to such facilities.

With respect to the Intervenors' claim that LBP-96-24 raises important issues of law, policy and discretion, because the Board's decision "raises questions" as to whether the SFC facility will ever be cleaned up, such claim is based on the inherent nature of all settlements which involve compromises, rather than this particular Board decision. It may be true that this settlement does not provide for an unconditional guaranty of all possible cleanup costs, no matter how great they may be. However, putting aside the question of whether GA, or any given company, could in fact ever fulfill such a guaranty assuming it was willing to settle under such terms, the settlement factored in litigative risks and the distinct possibility that the Staff could fail to obtain any relief if the litigation was pursued to its ultimate conclusion. Given litigative risks and other considerations, settling for something less than a one hundred percent guaranty of cleanup costs does not mean that "important issues of law, policy and discretion" have been raised. The Commission has already addressed the fundamental issue of whether compromises may be acceptable, by providing for settlements and compromises in its regulations. *See* 10 C.F.R. § 2.203; *see also* 10 C.F.R. § 2.759. Simply because the Board has approved a settlement which does

not eliminate all possible questions as to whether the Gore site may be completely cleaned up by reason of the money set aside through the settlement does not mean that an important question of law, policy and discretion as contemplated by 10 C.F.R. § 2.786(b)(4)(iii) has been raised. Otherwise, practically all settlements would, by their nature being the result of compromises, raise such questions and thus be subject to review by the Commission.

The Intervenors' final argument that the Commission has violated prohibitions against ex parte communications and has secretly agreed to a "global settlement" is simply not based in fact. The terms of the GA settlement make absolutely no reference whatsoever to any matters relating to GA's decommissioning funding responsibilities for its licensed facilities in San Diego. Enforcement of the settlement is not dependent upon any occurrence or nonoccurrence of any event regarding the San Diego facilities. While the circumstances or considerations surrounding the exercise of enforcement discretion by the Staff with respect to the San Diego facilities may have included the possibility of GA contributing financial resources towards a settlement involving Sequoyah Fuels, the terms of the GA settlement stand alone, and are independent of what has occurred, or may occur regarding any of GA's responsibilities for its San Diego facilities.

Nothing in the attachments to the Petition evidence any "waiver" given to GA regarding the San Diego facilities; rather, the attachments indicate that the Staff has decided to exercise enforcement discretion given certain circumstances at this time, which it is entitled to do. *See Union of Concerned Scientists v. NRC*, 711 F.2d 370 (D.C. Cir. 1983). In other words, nothing was "settled" with regard to the San Diego facilities, and, therefore, there is not, and could not be, a "global settlement" involving those facilities as

well as the SFC facility. The attachments further do not indicate that the Staff sought any judgment by the Commission as to the merits of a settlement regarding this proceeding. As the Staff made clear to the Board on several occasions, the Staff understood that GA had financial assurance obligations with respect to its licensed facilities in San Diego, and thus reasonably factored in these and other financial obligations of GA in assessing the merits of settling for a particular sum. The Staff's actions clearly do not evidence a "global settlement" as the Intervenors allege, and thus no substantial questions of law, policy or discretion have been raised.

CONCLUSION

Based on the foregoing, the Petition should be denied.

Respectfully submitted,

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Susan L. Uttal
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Dated at Rockville, Maryland
this 11th day of December 1996

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
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In the Matter of	)	
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SEQUOYAH FUELS CORPORATION	)	Docket No. 40-8027-EA
GENERAL ATOMICS	)	
	)	Source Material License
(Gore, Oklahoma Site	)	No. SUB-1010
Decontamination and	)	
Decommissioning Funding)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER IN OPPOSITION TO THE INTERVENORS' PETITION FOR REVIEW OF LBP-96-24" 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 December 1996.

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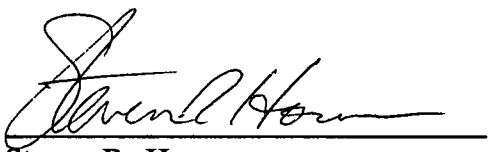

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