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RULEMAKING  
ADJUDICATIONS

In the Matter of:

FANSTEEL, INC.

(Muskogee, Oklahoma Facility)

Docket No. 40-7580-MLA

ASLBP No. 00-772-01-MLA

February 2, 2000

**STATE OF OKLAHOMA'S COUNTER-STATEMENT IN  
OPPOSITION TO FANSTEEL, INC.'S APPEAL**

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**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**COMMISSIONERS:**

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In the Matter of:  
  
FANSTEEL, INC.  
  
(Muskogee, Oklahoma Facility)

Docket No. 40-7580-MLA  
  
ASLBP No. 00-772-01-MLA  
  
February 2, 2000

**STATE OF OKLAHOMA'S COUNTER-STATEMENT IN OPPOSITION  
TO FANSTEEL, INC.'S APPEAL**

PURSUANT TO 10 C.F.R. § 2.1205(o) (1999), the Office of the Oklahoma Attorney General, by and through the undersigned, Stephen L. Jantzen, Assistant Attorney General, on behalf of the State of Oklahoma ("Oklahoma"), hereby submits its Counter-Statement in Opposition to Fansteel, Inc.'s ("Fansteel") Appeal from the Presiding Officer's Memorandum and Order (Granting Request for Hearing) dated December 29, 1999 (the "Order"). Contrary to Fansteel's arguments, the Presiding Officer correctly determined that Oklahoma has standing, and correctly ruled that Oklahoma specified areas of concern that are germane to Fansteel's request to amend

Source Materials License No. SMB-911 to authorize the construction of a permanent, on-site, above-grade, radioactive waste disposal cell at Fansteel's facility near Muskogee, Oklahoma (the "Fansteel Facility") and the decommissioning of the disposal cell site area for restricted release pursuant to 10 C.F.R. § 20.1403 (1999) (the "Proceeding"). Fansteel's Appeal fails to prove that the Presiding Officer erred in any way. Therefore, the Commission must affirm the decision of the Presiding Officer in the Order and uphold Oklahoma's opportunity to present evidence in an informal hearing to show why the decommissioning of the Fansteel Facility proposed in the Restricted Release Decommissioning Plan, or RRDP (as hereinafter defined), does not comply with U.S. Nuclear Regulatory Commission ("NRC") regulations, and to detail the dangerous consequences that would result from any approval of the Restricted Release Decommissioning Plan.

## **I. BACKGROUND**

### **A. Factual History**

The Fansteel Facility is situated on 110 acres of land located directly on the western bank of the Arkansas River (Webbers Falls Reservoir) in eastern Oklahoma near the City of Muskogee. Exhibits 1 and 2. It is bound on the west by State Highway 165 (the Muskogee Turnpike) and on the south by U.S. Highway 62. Exhibit 1. From 1958 until 1989, the Fansteel Facility housed a rare metal extraction operation, producing tantalum and columbium metals from raw and beneficiated ores and tin slag feedstock. REMEDIATION ASSESSMENT, FANSTEEL, INC. - MUSKOGEE, OKLAHOMA at 1-2 (1993).



The raw materials used for tantalum and columbium production contained uranium and thorium as naturally occurring trace constituents in such concentrations that Fansteel was required to obtain an NRC license. Id. The Fansteel Facility was licensed by the Atomic Energy Commission in 1967 to process ore concentrates and tin slags in the production of refined tantalum and columbium products. U.S. NUCLEAR REGULATORY COMMISSION, ENVIRONMENTAL ASSESSMENT - LICENSE AMENDMENT FOR MATERIAL LICENSE NO. SMB-911 at 1-1 (December 1997). Processing operations at the Fansteel Facility ceased in December of 1989. Id.

As a result of operations and various accidents and releases, the Fansteel Facility, including its soils and groundwater, have been and continue to be contaminated by uranium and thorium, as well as ammonia, arsenic, chromium, cadmium, methyl isobutyl ketone (MIBK), and fluoride.<sup>1</sup> REMEDIATION ASSESSMENT, FANSTEEL, INC. - MUSKOGEE, OKLAHOMA at 1-2 (1993).

#### **B. Procedural History**

On July 6, 1998, Fansteel submitted its proposed Decommissioning Plan for the Fansteel Facility, requesting an amendment to Source Materials License No. SMB-911 to decommission the Fansteel Facility (the "Proposed Decommissioning Plan"). In essence, the Proposed Decommissioning Plan incorporated a two-pronged approach. Under the first prong, part of the Fansteel Facility would be decommissioned for unrestricted

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<sup>1</sup>Of the radioactive contaminants at the Fansteel Facility, thorium-232 has a half-life of approximately 14,000,000,000 years and uranium-238 has a half-life of approximately 4,500,000,000 years.

release. DECOMMISSIONING PLAN, FANSTEEL, INC.-MUSKOGEE, OKLAHOMA at 1-1, 2-1 (December 1998). Under the second prong, an on-site, above-grade, disposal cell for the permanent disposal of radioactive decommissioning waste would be located at the Fansteel Facility, and the corresponding portion of the Fansteel Facility would be decommissioned for restricted release pursuant to 10 C.F.R. § 20.1403 (1999). Id.

By correspondence dated March 31, 1999, NRC notified Fansteel of its intention to review the Proposed Decommissioning Plan as two separate plans. Therein, NRC also requested additional information from Fansteel relating to the Proposed Decommissioning Plan. In response, Fansteel requested a meeting to discuss NRC's request for additional information. During this meeting, which was held on April 13, 1999, it was decided that Fansteel would bifurcate the Proposed Decommissioning Plan for the entire Fansteel Facility. Exhibit 3. One portion would relate to the eastern portion of the Fansteel Facility, for which Fansteel sought decommissioning for unrestricted release pursuant to SDMP criteria. Exhibit 3. Fansteel would submit a separate decommissioning plan for a smaller segment of the Fansteel Facility where Fansteel proposed to place a permanent disposal cell for the placement of radioactive decommissioning waste. Exhibit 3.

On August 13, 1999, Fansteel submitted its proposed plan for the decommissioning of the disposal cell portion of the Fansteel Facility (the "RRDP"). The RRDP is a request to amend Source Materials License No. SMB-911 to permit the decommissioning of a portion of the Fansteel Facility for restricted release pursuant to 10

C.F.R. § 20.1403 (1999), utilizing an on-site, above-grade, disposal cell for the permanent disposal of radioactive decommissioning waste, including long-lived radioactive contaminants such as uranium and thorium. As proposed by Fansteel, the disposal cell would have a estimated volume of over 25,500 cubic yards, DECOMMISSIONING PLAN, FANSTEEL, INC - MUSKOGEE, OKLAHOMA at 2-1 (August 1999), an estimated footprint of over six (6) acres, 2 REMEDIAL DESIGN REPORT STABILIZATION AND SOLIDIFICATION OF ABOVE-ACTION-LEVEL SOIL AND CONSTRUCTION OF CONTAINMENT CELL, FANSTEEL, INC - MUSKOGEE, OKLAHOMA at B.2.5-6 (August 1999), and a height of approximately twenty (20) feet above-grade. 1 REMEDIAL DESIGN REPORT STABILIZATION AND SOLIDIFICATION OF ABOVE-ACTION-LEVEL SOIL AND CONSTRUCTION OF CONTAINMENT CELL, FANSTEEL, INC - MUSKOGEE, OKLAHOMA at 15 (August 1999). The disposal cell would be located only three hundred (300) yards from the Arkansas River (Webbers Falls Reservoir), and just a few hundred feet from State Highway 165. Exhibits 1 and 2. The disposal cell would be located directly on native soils, without a liner or leachate collection system.

On September 14, 1999, NRC published its Notice of Consideration of an Amendment Request for Construction of a Containment Cell at Fansteel Facility in Muskogee, Oklahoma and Opportunity for a Hearing (the "Notice") relating to the RRDP. Exhibit 4. The Notice stated that NRC is considering Fansteel's request to amend Source Materials License No. SMB-911 as requested in the RRDP, and that any person whose interest may be affected by the Proceeding can request an informal hearing

pursuant to 10 C.F.R. § 2.1205 (1999). *Id.* In response to the Notice, Oklahoma timely filed its Request for Hearing on October 14, 1999 (the “Request for Hearing”).

On October 29, 1999, Fansteel filed its Answer in Opposition to the Request for Hearing alleging that Oklahoma did not have standing and that Oklahoma did not set forth areas of concern. Fansteel Answer in Opposition to the Request for Hearing (“Fansteel Answer”), at 42. In contrast to Fansteel, NRC Staff’s Response to the Request for Hearing dated November 5, 1999, declared that the “Request for Hearing establishes that Oklahoma has the requisite standing to participate as a party in any hearing concerning [the RRDP], and that Oklahoma has stated areas of concern germane to the challenged action.” NRC Response to Request for Hearing (“NRC Response”), at 20. Finding that Oklahoma did indeed have standing, and that Oklahoma specified areas of concern germane to the Proceeding, the Presiding Officer rejected Fansteel’s Answer and entered the Order on December 29, 1999, granting the Request for Hearing.<sup>2</sup>

## **II. ARGUMENT**

Beyond environmental and economic impacts to eastern Oklahoma and states downstream of Oklahoma along the Arkansas River, the decommissioning of the Fansteel Facility is critical. As recognized by the Presiding Officer, the Fansteel Facility is among the first to attempt decommissioning under the Commission’s new decommissioning rule,

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<sup>2</sup> Fansteel correctly notes that the Presiding Officer placed the informal hearing in abeyance. Fansteel Appeal, fn. 1, at 2. However, the informal hearing is being held in abeyance pending NRC Staff’s completion of both an environmental and safety review. Memorandum and Order (January 13, 2000) at 3.

10 C.F.R. Part 20, Subpart E. Memorandum and Order (January 13, 2000), at 3. This new rule, its interpretation, requirements, parameters, and actual implementation in the real world are unsettled. Thus, the precedential value of an informal hearing on the requirements of this new rule would be valuable to the Commission and its licensees.

The public is vitally interested in the Fansteel Facility, Exhibit 5, and will only perceive a decommissioning decision at the Fansteel Facility as fair and technically-supportable where it is granted the opportunity to participate in the decision-making process in a meaningful manner. The complex, technical issues surrounding decommissioning the Fansteel Facility are a high hurdle to true public participation. Moreover, individual members of general public would be hard-pressed to privately foot the bill of an informal hearing involving NRC Staff and Fansteel on these important issues, which affect the public's current and future health, safety, and welfare. For these reasons, Oklahoma must be recognized as parens patriae for its citizens and granted an opportunity to participate in the administrative process through an informal adjudication.

Recent regulatory experience demonstrates that it is essential that the correct regulatory decision be made at the outset of this Proceeding. Decisions concerning decommissioning of the Fansteel Facility must not be made in haste. Instead, the decommissioning decision must be made with full and careful consideration of the consequences, both short- and long-term.

This was not the case at the Shattuck Chemical Site in Denver, Colorado, a site, like the Fansteel Facility, contaminated by uranium, thorium, and radium. There, where a

remediation analogous to that proposed by Fansteel was actually implemented just a few short years ago, the U.S. Environmental Protection Agency has apparently all but determined that the environmental remedy selected for implementation (which includes an on-site, above-grade disposal cell) is not a sufficient long-term remedy to adequately protect the public's health, safety and welfare. Exhibit 6. The Atlas Corporation site on the banks of the Colorado River near Moab, Utah, where it was recently announced that radioactive wastes should be removed from close proximity to the Colorado River, provides yet another example for consideration. Exhibit 6. Previous regulatory experience on cleanups in situations similar to the Fansteel Facility, and the Commission's stated preference for decommissioning sites for unrestricted release, Radiological Criteria for License Termination, 62 Fed. Reg. 39058, 39069 (July 21, 1997), demand that the RRDP bear close scrutiny, under both the NRC's technical expertise and the public's watchful eye.

An informal hearing, such as Oklahoma has been granted, would materially assist NRC Staff and the Commission in making the critical decision about decommissioning the Fansteel Facility. Oklahoma's viewpoints would provide an important counter-balance to the views of Fansteel during this process.

**A. Fansteel Has Failed to Prove that the Presiding Officer Committed an Error of Law or Abuse of Discretion in Finding that Oklahoma Has Standing.**

A person requesting an informal hearing must demonstrate standing, taking into consideration (1) the nature of the requestor's right under the Atomic Energy Act to be

made a party to the proceeding; (2) the nature and extent of the requestor's property, financial, or other interests in the proceeding; and (3) the possible effect of any order that may be entered in the proceeding upon the requestor's interest. 10 C.F.R. § 2.1205(h)(1)-(3) (1999). In determining whether a requestor's interest may be affected by a licensing proceeding, NRC looks to judicial concepts of standing. 10 C.F.R. § 2.1205(h) (1999). Thus, a requestor's injury must arguably fall within the zone of interests sought to be protected by the statutes governing the proceeding (e.g., the Atomic Energy Act, 42 U.S.C. § 2011 et seq.). In the Matter of Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 N.R.C. 414, 423 (1997). A request for hearing must also allege injury-in-fact; the injury must be fairly traceable to the challenged action; and the injury must be redressable by NRC. Id.; Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

Fansteel only mounts a challenge to the Presiding Officer's findings as to two of the three required elements of constitutional standing: injury-in-fact and redressability. Fansteel thereby concedes causation, the second element of constitutional standing, and further concedes that Oklahoma's injuries-in-fact fall within the zone of interests of the Atomic Energy Act, 42 U.S.C. § 2011 et seq. As discussed below, Oklahoma is presumed to have standing under NRC precedent. Further, Fansteel has failed to prove that the Presiding Officer committed an error of law or an abuse of discretion in ruling that Oklahoma demonstrated injury-in-fact redressable in the informal hearing now pending before the Presiding Officer.

**1. The Request for Hearing Establishes that Oklahoma is Presumed to Have Standing Because the RRDP Has Been Determined to Involve a Significant Source of Radioactivity Producing An Obvious Potential for Offsite Consequences.**

To establish standing in proceedings involving materials licenses, petitioners must outline how impacts from the material involved in the licensing action can reasonably be assumed to accrue to the petitioner. Atlas Corp., 45 N.R.C. at 426. A presumption of standing based on geographic proximity may be applied in cases involving non power reactors where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences. In the Matter Georgia Inst. of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 N.R.C. 111, 116 (1995), citing In the Matter of Sequoyah Fuels Corp. and Gen. Atomics (Gore, Oklahoma Site), CLI-94-12, 40 N.R.C. 64, 75 n.22 (1994); Armed Forces Radiobiology Research Inst. (Cobalt-60 Storage Facility), ALAB-682, 16 N.R.C. 150, 153-54 (1982). NRC Staff has made this determination in relation to the RRDP.

Fansteel contends that Oklahoma cannot “compensate” for its failure to demonstrate injury-in-fact by relying on this presumption. Fansteel Appeal, fn. 7, at 13. In so doing, Fansteel ignores NRC Staff’s declaration that the disposal cell proposed in the RRDP “has an obvious potential for offsite radiological or environmental effects on Oklahoma’s interests because the cell will be in close proximity to State Highway 165 and the Arkansas River, as well as the state-operated McClellan-Kerr and Cherokee Gruber Wildlife Refuges.” NRC Response, at 8.



Oklahoma is therefore presumed to have standing due to its ownership of waters in the Arkansas River, OKLA. STAT. tit. 60, § 60, Oklahoma Water Resources Bd. v. Cent. Oklahoma Master Conservancy Dist., 464 P.2d 748 (Okla. 1968), which borders the Fansteel Facility and which is hydrologically and geologically connected to groundwater beneath the Fansteel Facility. Exhibits 1, 2, and 7. The presumption of standing must also be applied to Oklahoma due to its operation and management of the Webbers Falls Unit of the McClellan-Kerr Wildlife Refuge and the Cherokee Gruber Wildlife Refuge, each located in close proximity to the Fansteel Facility,<sup>3</sup> and due to Oklahoma's ownership, operation, and management of State Highway 165, which runs immediately adjacent to the Fansteel Facility. Exhibit 1.

Since the presumption of standing applies to Oklahoma, Fansteel's arguments as to Oklahoma's lack of constitutional standing fail, and in any event fail to demonstrate that the Presiding Officer committed an error of law or abuse of discretion. Even without the presumption of standing, however, the Request for Hearing demonstrates that approval of the RRDP will cause Oklahoma injuries-in-fact which are redressable in the informal hearing now pending before the Presiding Officer.

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<sup>3</sup> Part of the Webbers Falls Unit of the McClellan-Kerr Wildlife Refuge is directly downstream from the Fansteel Facility on the Arkansas River approximately two miles. Exhibit 8.

2. **Fansteel Has Failed to Prove that the Presiding Officer Committed an Error of Law or an Abuse of Discretion in Finding that the Request for Hearing Demonstrates Injuries-in-Fact.**

a. **Fansteel's Argument Ignores the Injury-in-Fact the Presiding Officer Determined Confers Standing Upon Oklahoma.**

The Commission "defers to the Presiding Officer's determinations regarding standing absent error of law or an abuse of discretion." In the Matter of Int'l Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-98-6, 47 N.R.C. 116, 117 (1998); In the Matter of Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), LBP-98-20, 48 N.R.C. 183 (1998); In the Matter of Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 N.R.C. 26, 32 (1998). Indeed:

[u]nless there has been a clear misapplication of the facts or law, the Licensing Board's judgment that a party has established standing is entitled to substantial deference. ... [The Commission is] not inclined to disturb a Licensing Board's conclusion that the requisite affected interest ... has been established unless it appears that the conclusion is irrational.

Georgia Inst. of Technology, 42 N.R.C. at 116 (emphasis added). Thus, it is Fansteel's burden to prove that the Presiding Officer's finding that Oklahoma demonstrated injury-in-fact was an error of law or an abuse of discretion. Fansteel has failed to meet this burden.

While the person requesting a hearing has the burden of establishing standing, the Presiding Officer must construe the petition in favor of that person. Georgia Inst. of Technology, 42 N.R.C. at 115; Atlas Corp., 45 N.R.C. at 416. In order to demonstrate

standing at this stage, Oklahoma does not have to prove the merits of its case. Warth v. Seldin, 422 U.S. 490, 500 (1975). Rather, in determining standing, it is incumbent upon the Presiding Officer to accept as true Oklahoma's material allegations. In the Matter of Georgia Inst. of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 N.R.C. 281, 286 (1995).

For the most part, Fansteel's arguments as to Oklahoma's injuries-in-fact are merely a regurgitation of the arguments Fansteel made in its Answer to the Request for Hearing, which were rejected by both the Presiding Officer and NRC Staff. Collectively, or individually, the injuries-in-fact demonstrated in the Request for Hearing show that Oklahoma has a "real stake" in the outcome of the Proceeding, which is the fundamental threshold for establishing standing. In the Matter of Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 N.R.C. 439, 447-48 (1979).

The principal tactic employed by Fansteel is to pick and choose among the injuries-in-fact demonstrated in the Request for Hearing, select certain injuries-in-fact it considers the weakest, and then attack them with the hope of tarring the whole of Oklahoma's injuries-in-fact. This maneuver is fundamentally flawed. The Order clearly sets forth the injuries-in-fact that the Presiding Officer determined confer constitutional standing upon Oklahoma. Order, at 8. Importantly, the arguments offered by Fansteel in Section I.B.(i)-(v) of its Appeal do not relate to the injuries-in-fact found by the Presiding Officer, and are therefore completely irrelevant. Fansteel Appeal, at 7-13. Nearly all of Fansteel's arguments as to injury-in-fact are simply surplusage. Its failure to address the

injuries-in-fact found by the Presiding Officer necessarily means that Fansteel failed to prove that the Presiding Officer committed an error of law or abuse of discretion. Specifically, Fansteel's most glaring omission is its failure to address the inevitable release of radioactive leachate from the disposal cell proposed in the RRDP into the waters of the Arkansas River. Fansteel Appeal, at 7-13.

As described in the Request for Hearing, the disposal cell will contain approximately 25,500 cubic yards of long-lived radioactive decommissioning wastes, DECOMMISSIONING PLAN, FANSTEEL, INC. - MUSKOGEE, OKLAHOMA at 2-1 (August 1999), and will be built directly upon native soils, without a liner and without a leachate collection system. 1 REMEDIAL DESIGN REPORT - STABILIZATION AND SOLIDIFICATION OF ABOVE-ACTION-LEVEL SOIL AND CONSTRUCTION OF CONTAINMENT CELL, FANSTEEL, INC. - MUSKOGEE, OKLAHOMA at 12 (August 1999). As described in the RRDP, the disposal cell cap will only work to "minimize" and will not obviate the intrusion of water into the disposal cell.<sup>4</sup> *Id.* at 12. Further, as described in Fansteel's "Treatability Study Report for Stabilization and Solidification of Above-Action-Level Soil," solidification of radioactive waste materials placed in the disposal cell will also not stop the creation of leachate, but will only work to retard these consequences. TREATABILITY STUDY REPORT FOR STABILIZATION AND SOLIDIFICATION OF ABOVE-ACTION-LEVEL SOIL, FANSTEEL,

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<sup>4</sup> Fansteel's contractor, Earth Sciences Consultants, Inc., has concluded that 193,383.85 gallons will leak through the bottom of the disposal cell on an annual basis. 2 REMEDIAL DESIGN REPORT - STABILIZATION AND SOLIDIFICATION OF ABOVE-ACTION-LEVEL SOIL AND CONSTRUCTION OF CONTAINMENT CELL, FANSTEEL, INC. - MUSKOGEE, OKLAHOMA Appendix at B.2.5-7 (August 1999).

INC. - MUSKOGEE, OKLAHOMA at 18 (August 1999). The leachate resulting from the disposal cell proposed by Fansteel will contain uranium and thorium. Id. A release of radioactive contaminants from the disposal cell to groundwater beneath the Fansteel Facility, and therefore into the Arkansas River, is inevitable.

Groundwater beneath the Fansteel Facility is vulnerable to surface contamination, OKLAHOMA WATER RESOURCES BOARD, TECHNICAL REPORT 99-1, STATEWIDE GROUNDWATER VULNERABILITY MAP OF OKLAHOMA at C-10 (1999), and is hydrologically and geologically connected to the Arkansas River. Exhibit 7. Contaminated groundwater from the disposal cell will flow to the south and east, directly into the Arkansas River. As such, radioactive contamination to groundwater at the Fansteel Facility from the disposal cell proposed in the RRDP will contaminate waters owned by Oklahoma. OKLA. STAT. tit. 60, § 60, Oklahoma Water Resources Bd. v. Cent. Oklahoma Master Conservancy Dist., 464 P.2d 748 (Okla. 1968).<sup>5</sup> Based on the above,

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<sup>5</sup> The groundwater collection system in place at the Fansteel Facility is only a temporary measure that is not designed to combat the problem of radioactive leachate from the disposal cell, DECOMMISSIONING PLAN, FANSTEEL, INC.-MUSKOGEE, OKLAHOMA at 2-23 (December 1998), and will not block the injury-in-fact to the Arkansas River. Indeed, groundwater flow from the disposal cell will run to the south and east, directly into the Arkansas River and missing the groundwater collection system, assuming it remains in place and is operated for the duration of the Commission's required regulatory timeframe. Moreover, Fansteel provides no financial assurance for the operation of a leachate collection system designed for the disposal cell. The disposal cell will also be placed directly over test boring locations (BH-1-98, BH-2-98, BH-3-98, B-9, B-10, B-11, and B-212) and groundwater monitoring wells (MW-52S and MW-56S), providing a direct pathway for contaminants to reach and contaminate groundwater at the Fansteel Facility. TREATABILITY STUDY REPORT FOR STABILIZATION AND SOLIDIFICATION OF ABOVE-ACTION LEVEL SOIL, FANSTEEL, INC. - MUSKOGEE, OKLAHOMA at Figure 2 (August 1999). Fansteel quips that Oklahoma is challenging its own well closure regulations, but misses the point, which is the incredibly poor location that Fansteel has "selected" for placement of the disposal cell. Serious consideration must be given to whether Oklahoma's well closure regulations were designed for disposal of long-lived radioactive waste and for the extremely long regulatory timeframe at issue in this Proceeding. Because of the surface and groundwater contamination issues caused by RRDP, the stakes are high.

the Presiding Officer correctly determined that Oklahoma demonstrated injury-in-fact, Order at 8, as did NRC Staff. NRC Staff Response, at 7. The “substantial deference” due the Presiding Officer, and Fansteel’s notable silence on this injury-in-fact, clearly reveals that Fansteel failed to meet its burden of proving error of law or abuse of discretion and that the Commission must affirm the Presiding Officer’s determination of injury-in-fact.

Fansteel argues that the Request for Hearing did not allege that radioactive emissions would exceed regulatory limits or indicate the concentrations or limits of radioactivity at issue.<sup>6</sup> See, e.g., Fansteel Appeal, at 8, 10, and 12. Fansteel’s strategy is in diametric opposition to well-established NRC precedent. A licensee’s claim that “regulatory limits” are not exceeded by offsite radiological releases from a facility is not sufficient to show that a petitioner lacks standing. Atlas Corp., 45 N.R.C. at 425. Relative to a threshold standing determination, even minor radiological exposures resulting from a proposed licensee activity can be enough to create the requisite injury-in-fact. Id.; Gen. Pub. Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 N.R.C. 143, 158 (1996).

As applied, Fansteel’s claims that Oklahoma’s injuries-in-fact are speculative or general because radioactive emissions would not exceed regulatory limits or radioactive concentrations for releases were not specified has been flatly rejected in prior NRC caselaw and must therefore fail. Neither the Presiding Officer, nor NRC Staff were led

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<sup>6</sup> In this regard, Fansteel oddly asserts that the disposal of naturally occurring radioactive materials, such as oil and gas drilling wastes, is not regulated in Oklahoma. This is simply untrue. See OAC 252:400-9-1 et seq.

astray by this argument. As the Presiding Officer's decision was in accordance with NRC precedent, the Commission must find that the Presiding Officer did not commit an error of law or abuse of discretion in this regard.

**b. Even Assuming the Presiding Officer Based His Determination of Injury-in-Fact Upon All Injuries-in-Fact Demonstrated in the Request for Hearing, Such Action is Not an Error of Law or Abuse of Discretion.**

Oklahoma has a duty to protect the general welfare of its citizens, and therefore an interest in protecting the health, safety, and welfare of its citizens, many of whom live, work, travel, or recreate at or near the Fansteel Facility.<sup>7</sup> As sovereign, Oklahoma is parens patriae, i.e., guardian and trustee for all of its citizens, and may act to prevent or repair harm to its quasi-sovereign interests. Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 258 (1972). In this regard, Oklahoma has a quasi-sovereign interest in the physical and economic health and well-being of its citizens. Alfred L. Snapp & Son v. Puerto Rico, 458 U.S. 592, 600-607 (1982). Indeed, it is well-established that states may appear before NRC to protect the interests of their citizens and their air, lands, waters, wildlife, and other natural resources. In the Matter of Int'l Uranium (USA) Corp. (Receipt of Material from Tonawanda, New York), LBP-98-21, 48 N.R.C. 137, 145 (1998); In the Matter of Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage

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<sup>7</sup> Further, Oklahoma's citizens frequent the Arkansas River adjacent to the Fansteel Facility, as well as the Webbers Falls Unit of the McClellan-Kerr Wildlife Refuge and the Cherokee Gruber Wildlife Refuge, for recreational purposes such as hunting, fishing, hiking, etc.

Installation), LBP-98-7, 47 N.R.C. 142, 169 (1998).<sup>8</sup> The Presiding Officer was right on the money in recognizing this interest. Order, at 7.

Fansteel fails to gain traction with its argument as to Oklahoma's injury-in-fact arising from inadequate financial assurance. The Request for Hearing establishes, in painstaking detail, the shortcomings of Fansteel's financial assurance. Request for Hearing, at 19-20, 35, 36-38, 39, 41-42. Indeed, these inadequacies were accepted by the Presiding Officer as an area of concern for adjudication. Order, at 12. There can be no doubt that poor or inadequate financial assurance for the Fansteel Facility virtually guarantees that the disposal cell cap will not be properly maintained and will quickly degrade, thereby reducing its effectiveness in preventing radioactive releases. Fansteel does not suggest otherwise.

Even operating sites with active maintenance budgets that utilize disposal cells such as that proposed by the RRDP encounter difficulties. Thus, Fansteel's failure to provide adequate financial assurance at a site to be passively maintained is truly problematic and will cause Oklahoma injury-in-fact, as alleged. Oklahoma clearly established the results of such a scenario in its discussion of the Lone Mountain facility in the Request for Hearing (also discussed below). Assuming, arguendo, that the Presiding

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<sup>8</sup> At issue in the Private Fuel Storage, L.L.C. matter was the licensure and construction of a facility to possess and store spent nuclear reactor fuel located on the reservation of the Skull Valley Band of the Goshute Indians, which is wholly within the borders of the State of Utah. In that case, the Presiding Officer found that the State of Utah had standing. "The State's asserted health, safety, and environmental interests relative to its citizens living, working, and traveling near the proposed facility and in connection with its property adjoining the reservation and the proposed transportation routes to the facility are sufficient to establish its standing in this proceeding." Private Fuel Storage, L.L.C., 47 N.R.C. at 169.



Officer did find that injury-in-fact arising from inadequate financial assurance demonstrated standing, construing the Request for Hearing in favor of Oklahoma and accepting the material allegations therein as true, it is evident that the Presiding Officer did not commit an error of law or abuse of discretion.

Incredibly, Fansteel proposes to place a permanent, radioactive waste disposal cell on the banks of the Arkansas River, a major river and substantial asset to Oklahoma, but buries its head in the sand when questioned about river migration. The RRDP wholly-failed to account for and address the probability of the Arkansas River migrating into the Fansteel Facility, which is likely due to the extreme lengths of time at issue in this matter.<sup>9</sup>

Over time, rivers change course.<sup>10</sup> As reflected by the alluvium and terrace deposits shown in Exhibit 7 (Exhibit 5 to the Request for Hearing), the course of the Arkansas River has varied widely over time. Over the extreme lengths of time at issue in this matter, migration of the Arkansas River is inevitable, and the probability of the Arkansas River shifting into the Fansteel Facility and the disposal cell proposed in the

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<sup>9</sup> Exhibit 7 demonstrates the inevitability of the Arkansas River's migration. Yellow coloring near the Arkansas River indicates alluvium and terrace deposits, which evidences the historic pathways of the Arkansas River. Obviously, the path of the Arkansas River has varied widely over time. Fansteel may attempt to rely upon U.S. Army Corps of Engineers dams, but such reliance is misplaced due to the extremely long regulatory timeframe at issue and the current trend toward removal of dams and allowing rivers to assume their natural course.

<sup>10</sup> For example, the Red River, which was originally specified as the boundary between Oklahoma and Texas, has changed its course so much that boundary disputes have arisen between Texas and Oklahoma during the relatively brief period since Oklahoma's statehood in 1907. Moreover, studies of the Mississippi River have demonstrated that in a comparatively short period of time, the course of the Mississippi River has shifted by many miles.

RRDP can in no way be said to be low. Migration of the Arkansas River into the disposal cell will erode the disposal cell structure and the matrix containing the long-lived radioactive waste contained therein.

Because the Arkansas River flows into the State of Arkansas and then into the Mississippi River, the RRDP presents significant and dire consequences, not only in Oklahoma, but throughout a very wide region. It is self-evident that a catastrophic failure of the disposal cell in this matter would immediately affect the air, land, waters, wildlife, and natural resources of Oklahoma, as well as the health, safety, and welfare of its citizens. Such a failure would also result in economic hardship from decreased recreational use and decreased tourism, the inability to use groundwater in the vicinity of the Fansteel Facility, the inability to use waters in the Arkansas River for private and public consumption, irrigation, and livestock, and a hindrance to the navigability of the Arkansas River (McClellan-Kerr Arkansas River Navigation System). Even assuming that the Presiding Officer relied upon this injury-in-fact in the Order, the Presiding Officer is bound to construe the Request for Hearing in favor of Oklahoma and to accept Oklahoma's allegations in this regard as true. It cannot be shown that such reliance would be an error of law or abuse of discretion.

In relation to the Webbers Falls Unit of the McClellan-Kerr Wildlife Refuge and the Cherokee Gruber Wildlife Refuge, operated by Oklahoma, Fansteel seems to hang its hat on the erroneous assertion that the Request for Hearing did not specify the distance from these Refuges to the Fansteel Facility. To the contrary, the Request for Hearing

clearly mapped out the locations of these Refuges in relation to the Fansteel Facility. Exhibit 8 (Exhibit 7 to the Request for Hearing). Indeed, part of the Webbers Falls Unit of the McClellan-Kerr Wildlife Refuge is only two miles directly downstream from the Fansteel Facility on the Arkansas River. Exhibit 8. Fansteel offers nothing to the Commission to show that Oklahoma does not receive revenues from tourism and recreation at these Refuges and on the Arkansas River. In determining standing, the Presiding Officer is bound to accept as true Oklahoma's material allegations. Georgia Inst. of Technology, 41 N.R.C. at 286.

Fansteel also attacks Oklahoma's demonstration of economic injury-in-fact arising from any approval of the RRDP. Fansteel's argument places great reliance on the fact that some of the Fansteel Facility will be decommissioned for unrestricted release. Fansteel misrepresents the focus of Oklahoma's injury-in-fact, which is the permanent removal of approximately 6-12 acres of the Fansteel Facility from all future economically-gainful use.

If approved, the RRDP will, by definition, render the disposal cell portion of the Fansteel Facility of no market value (or negative market value), and the remainder of the Fansteel Facility and real estate surrounding the Fansteel Facility of reduced market value. Oklahoma and its political subdivisions derive tax revenues from ad valorem taxation based upon the value of real property in Oklahoma. OKLA. STAT. tit. 68, § 2801 et seq. In this way, approval of the RRDP will destroy viable real property in Oklahoma, rendering it useless, worthless, and incapable of generating ad valorem tax revenue for

Oklahoma and its political subdivisions.<sup>11</sup> Additionally, as the Request for Hearing provided specific dollar amounts received from ad valorem taxation at the Fansteel Facility, Fansteel's argument as to lack of specificity rings hollow. In conclusion, assuming the Presiding Officer did find that this injury-in-fact demonstrated standing, construing the Request for Hearing in favor of Oklahoma and accepting the material allegations therein as true, it cannot be said that the Presiding Officer committed an error of law or abuse of discretion.

**3. Fansteel Has Failed to Prove that the Presiding Officer Committed an Error of Law or an Abuse of Discretion in Finding that Oklahoma's Injuries-in-Fact are Redressable Through the Presiding Officer's Denial, Modification, or Conditioning of the RRDP.**

In relation to the redressability component of constitutional standing, the Presiding Officer concluded that Oklahoma fully-satisfied this element since:

the State's alleged injuries to its interests, the harm to the citizens, and the potential injury to the environment at or near the Muskogee site, are all redressible by a Board decision favorable to the State's position such as the denial of the request for restricted release decommissioning.

Order, at 8. Fansteel, however, believes that the Request for Hearing failed to demonstrate redressability. Fansteel Appeal, at 13-15. The question is, therefore, whether the Presiding Officer committed an error of law or an abuse of discretion in

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<sup>11</sup> Decommissioning the Fansteel Facility for restricted release will lower ad valorem tax revenue for Oklahoma, whereas decommissioning the entire Fansteel Facility for unrestricted release would preserve the taxable value of the Fansteel Facility, the taxable value of real estate surrounding the Fansteel Facility, and the ability of the Fansteel Facility and surrounding real estate to generate ad valorem tax revenue for current and future generations.

finding that Oklahoma's injuries-in-fact are redressable by a decision of the Presiding Officer.<sup>12</sup> Well-established NRC precedent requires this question be answered in the negative.

To support its position on redressability, Fansteel offers only one argument, which is barred from consideration in this Appeal because Fansteel failed to raise it before the Presiding Officer.<sup>13</sup> Fansteel Answer, at 22-23. According to Fansteel, Oklahoma's injuries-in-fact are not redressable because decommissioning the Fansteel Facility for unrestricted release is unrealistic due to Fansteel's limited financial resources. Fansteel Appeal, at 13-15.

Unsurprisingly, Fansteel cites no caselaw or authority for the proposition that it is possible to be too poor to be sued. Any acceptance of Fansteel's proposition that a party's claimed lack of money means the redressability element of constitutional standing is lacking would lead to absurd, incongruous, and dangerous results. Under Fansteel's reasoning, an unsubstantiated assertion<sup>14</sup> that a party has no money would delete standing

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<sup>12</sup> It bears repeating that the Commission accords the Presiding Officer "substantial deference" in determinations of standing, except where the Presiding Officer "has clearly misapplied the facts or law." Private Fuel Storage, L.L.C., 48 N.R.C. at 32.

<sup>13</sup> Where a party fails to raise an argument before the Presiding Officer, it may not raise that argument before the Commission on appeal. In the Matter of Sequoyah Fuels Corp. and Gen. Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI 97-13, 46 N.R.C. 195, 221 (1997); In the Matter of Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-04, 49 N.R.C. 185, 1999 WL 137689 \*7, (1999). This argument must therefore be stricken from the record and cannot be considered by the Commission. Without waiving this argument, the merits of Fansteel's are addressed.

<sup>14</sup> Fansteel provided no evidence to the Presiding Officer on the issue of its financial status. As a major, publicly-traded corporation with facilities all over the United States and abroad, Fansteel's pleas of empty coffers ring hollow. For 1999, Fansteel's net sales were a healthy \$144,000,000. Fansteel, Inc. Press Release (January 27, 2000).

for every person that would take that party to court. This is not, and cannot be, the case. The redressability element of constitutional standing relates to the relief the tribunal is empowered to grant, not the financial abilities of the parties as Fansteel would have the Commission hold. There can be little doubt that the Presiding Officer is empowered to take action to redress Oklahoma's injuries-in-fact. "A presiding officer has the authority to approve, deny, or condition any licensing action that comes under his or her jurisdiction." Int'l Uranium (USA) Corp., 48 N.R.C. 137, 148 fn. 6. Oklahoma has established the presence of a case or controversy and is entitled to an informal hearing.

As part of its miscalculated theme on redressability, Fansteel erroneously insinuates that all Oklahoma seeks is decommissioning of the Fansteel Facility for unrestricted release. Fansteel Appeal, at 14. Fansteel's argument ignores the fact that the Request for Hearing demonstrates that conditioning, or modification, of the RRDP, as well as rejection of the RRDP, are each remedies that would redress its injuries-in-fact. Request for Hearing, at 24.

Additionally, the areas of concern accepted by the Presiding Officer also reflect the unstable foundation of Fansteel's argument. For example, one of the areas of concern accepted for adjudication is the insufficiency of the location, design, and construction of the disposal cell proposed in the RRDP. Order, at 13. Another area of concern accepted for adjudication is the insufficiency of the amount of financial assurance Fansteel proposes to leave behind for long-term custodianship, maintenance, and control of the Fansteel Facility. Order, at 12.

Thus, while some of Oklahoma's areas of concern accepted for adjudication relate to the eligibility of the Fansteel Facility for decommissioning for restricted release and whether the RRDP fulfills the requirements of 10 C.F.R. § 20.1403 (1999), many of the areas of concern accepted for adjudication relate to the manner in which decommissioning of the Fansteel Facility, as proposed in the RRDP, is carried out under 10 C.F.R. § 20.1403 (1999) and other NRC requirements. In either case, as the Presiding Officer correctly determined, it is not "speculative" that Oklahoma's injuries-in-fact are redressable, but likely that Oklahoma's injuries-in-fact are redressable. The analysis is simple. If the RRDP is rejected, modified, or conditioned, the injuries-in-fact sustained by Oklahoma due to approval and implementation of the RRDP will be redressed.

Oklahoma's injuries-in-fact encompass injuries to natural resources, injuries to air, land, and waters, injuries to scenic beauty, injuries to its citizens, and injuries to the financial and economic well-being of Oklahoma. Each of Oklahoma's injuries-in-fact is redressable through rejection, modification, or conditioning of the RRDP. It is not "speculative"<sup>15</sup> that the RRDP could be rejected, modified, or conditioned through an informal hearing. "A presiding officer has the authority to approve, deny, or condition

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<sup>15</sup> By focusing on "speculation" Fansteel may mean to suggest that Oklahoma's success on the merits is "speculative," but this is not the same as saying that remedies are "speculative." "The redressability element of Article III ... does not prevent a court from hearing a case which may ultimately be unsuccessful." Community Nutrition Inst. v. Block, 698 F.2d 1239, 1249 (D.C. Cir. 1983). Thus, whether Oklahoma ultimately succeeds on the merits is of no import to the standing analysis. Cleveland County Ass'n For Gov't by the People v. Cleveland County Bd. of Comm'rs, 142 F.3d 468, 472 (D.C. Cir. 1998). As the Presiding Officer has the authority to approve, deny, or condition any licensing action that comes under his or her jurisdiction, Int'l Uranium (USA) Corp., 48 N.R.C. at 148 fn. 6, the remedies available to Oklahoma through this Proceeding are not "speculative," and therefore the redressability element of constitutional standing is fully-satisfied.

any licensing action that comes under his or her jurisdiction.” Int’l Uranium (USA) Corp., 48 N.R.C. at 148 fn. 6. Importantly, the Commission has recognized that modification or rejection of requests for license amendments redresses asserted injuries. See In the Matter of Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-98-21, 48 N.R.C. 185 (1998); In the Matter of Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), LBP-98-20, 48 N.R.C. 87, 93 (1998).

Fansteel asserts that potential remedies would not eliminate Oklahoma’s injuries-in-fact because, without approval of the RRDP, Oklahoma’s alleged injuries-in-fact would linger as the Fansteel Facility would remain contaminated with radionuclides. Fansteel Appeal, at 14. This variation on Fansteel’s redressability theme misses the mark. First, Fansteel assumes that decommissioning for restricted release, as proposed in the RRDP, is the only decommissioning option; as we know, however, the RRDP could be rejected, modified, or conditioned. Secondly, Fansteel’s argument is word-play, dependent upon a mischaracterization of the available remedies and issues. The issue is not whether the Fansteel Facility will be decommissioned. Rather, the issue is the manner and method of decommissioning the Fansteel Facility, and the injuries-in-fact accruing to Oklahoma as a result of Fansteel’s proposal in the RRDP.



**B. Fansteel's Arguments Relating to Areas of Concern are not Properly Before the Commission as They Do Not Relate to Whether the Request for Hearing Should Have Been Denied in its Entirety as Required by 10 C.F.R. § 2.1205(o).**

Fansteel's Appeal attempts to smuggle three issues outside of the defined scope of this appeal to the Commission for consideration. The language of 10 C.F.R. § 2.1205(o) (1999), bars such a maneuver by providing that:

[i]f a request for a hearing or a petition for leave to intervene is granted, parties other than the requestor or petitioner may appeal that action within ten (10) days of service of the order on the question whether the request for a hearing or the petition for leave to intervene should have been denied in its entirety.

(Emphasis added). Thus, the only issue properly before the Commission at this stage is whether the Request for Hearing should have been denied in its entirety. Despite the clear restrictions on the scope of Fansteel's appeal, Fansteel attempts to sneak certain issues into its appeal that, even in a light most favorable to Fansteel, do not relate to whether the Request for Hearing should have been denied in its entirety.

Section II of Fansteel's Appeal is fundamentally six arguments, each one attacking only a limited portion of the Order admitting an area of concern for adjudication. None relate to whether the Request for Hearing should have been denied in its entirety, but rather are an attempt to piecemeal this litigation and to confuse the proper scope of Fansteel's appeal to the Commission. None of these issues are properly before the Commission.

The Commission purposely limited the scope of an appeal at this early stage of the Proceeding, and should strike all of those portions of Fansteel's Appeal that are outside of the limited scope of this appeal set by 10 C.F.R. § 2.1205(o). (1999). At a minimum, the arguments and issues identified in Section II of Fansteel's Appeal must be disregarded.<sup>16</sup>

**C. The Presiding Officer Correctly Determined that Oklahoma's Areas of Concern Meet the Requirements of 10 C.F.R. § 2.1205(e)(3).**

**1. The Request for Hearing Specified Areas of Concern in Detail Surpassing the Required "Minimal Information to Ensure That the Areas of Concern are Germane to the Proceeding."**

As the Commission knows, the threshold showing for areas of concern at this early stage of the Proceeding "is low." Int'l Uranium (USA) Corp., 48 N.R.C. at 142. In ruling on any request for hearing, the Presiding Officer must determine whether the specified areas of concern are germane to the subject matter of the proceeding. 10 C.F.R. § 2.1205(h) (1999). Areas of concern must fall "generally" within the range of matters that are properly subject to challenge in the proceeding, 54 Fed. Reg. 8269, 8272 (Feb. 28, 1989), and must be rational. In the Matter of Babcock and Wilcox Co. (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-94-12, 39 N.R.C. 215, 217 (1994).

Fansteel's attack on the Presiding Officer's determination that the Request for Hearing specified areas of concern germane to the Proceeding is replete with arguments

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<sup>16</sup> Without waiving this argument, the merits of Fansteel's contentions on these issues are addressed below.

that the Request for Hearing lacked sufficient detail. See, e.g., Fansteel Appeal, at 21-23, 31-32. Despite Fansteel's efforts to the contrary, at this early stage of the above-captioned matter, Oklahoma is not required to put forth an exhaustive exposition in support of the issues it wishes to litigate. In the Matter of Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-94, 36 N.R.C. 149, 154 (1992). A comprehensive statement of issues (resembling the merits of Oklahoma contentions), such as that demanded by Fansteel, must only be provided at a later date. 10 C.F.R. § 2.1233(c) (1999); In the Matter of Combustion Eng'g, Inc. (Hematite Fuel Fabrication Facility), LBP-89-23, 30 N.R.C. 140, 147 (1989). Identification of an area of concern need only be specific enough to allow the Presiding Officer to ascertain whether or not the matter sought to be litigated is relevant to the subject matter of the Proceeding. In the Matter of Sequoyah Fuels Corp., LBP-94-39, 40 N.R.C. 314, 316 (1994).

Thus, the rule to be applied in this case is that the Request for Hearing's statement of areas of concern need only "identify" its areas of concern by providing "minimal information to ensure that the areas of concern are germane to the proceeding." Babcock and Wilcox Co., 39 N.R.C. at 217. An area of concern is germane if it is relevant to whether the RRDP should be denied or conditioned, In the Matter of Hydro Resources, Inc., LBP-98-9, 47 N.R.C. 261, 280 (1998), or if it has a "nexus" to the RRDP. Int'l Uranium (USA) Corp., 48 N.R.C. at 142. As applied, the level of detail in Oklahoma's areas of concern far surpassed this standard. Oklahoma stated its areas of concern in far

greater detail than that necessary for the Presiding Officer to make his determination.<sup>17</sup> The level of detail was sufficient for the Presiding Officer; the level of detail was sufficient for NRC Staff. Unsurprisingly, only Fansteel complains of the level of detail, although it has had no difficulty in attacking the merits of Oklahoma's areas of concern to date.

Fansteel's reading of the regulations governing informal adjudications is patently unreasonable and contrary to the intent of Subpart L. Fansteel would require Oklahoma to present the merits of its areas of concern within thirty days of the Notice, and without access to the hearing file. As even Fansteel is aware, a person requesting an informal adjudication "need not set forth all of their concerns until they have been given access to the hearing file." In the Matter of Babcock and Wilcox Co., (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-94-4, 39 N.R.C. 47, 52 (1994). As of the date of this Counter-Statement, Oklahoma has still not had access to the hearing file, nor will it for quite some time.<sup>18</sup>

Under the Notice, Oklahoma had only thirty days within which to request a hearing. Exhibit 4. It could not be known if, or when, NRC Staff would complete

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<sup>17</sup> The standard on the level of detail necessary for statements of areas of concern hinges directly on the Presiding Officer. Therefore, if the Presiding Officer determines that areas of concern are germane to the Proceeding, then, as a matter of law, the level of detail meets the requirements of 10 C.F.R. § 2.1205(e)(3) (1999). Moreover, only the Presiding Officer can make this subjective determination, thus, just as in determinations of standing, the Commission should accord the Presiding Officer "substantial deference" and not inquire into these matters *de novo*. Private Fuel Storage, L.L.C., 48 N.R.C. at 32; Int'l Uranium (USA) Corp., 47 N.R.C. at 117; Northeast Nuclear Energy Co., 48 N.R.C. 183.

<sup>18</sup> NRC Staff has until February 29, 2000, to compile and serve the hearing file on Oklahoma. Memorandum and Order (January 13, 2000), at 3.

administrative review of the RRDP, thereby clearing the path for publication of the Notice. Without knowing whether or when NRC Staff would accept the RRDP for technical review, and whether or when the Notice would be published, it is inherently inequitable to require those requesting hearings to make their full case within only thirty days. Combustion Eng'g, Inc., 30 N.R.C. at 147. Despite running afoul of NRC precedent, this is the way Fansteel would have the Commission read the requirements of Subpart L.

Fansteel's argument is an attempt to inject requirements for "contentions" in Subpart G proceedings into the analysis of "areas of concern" in this Subpart L informal adjudication. A review of NRC caselaw reveals that Fansteel's strategy of applying an overly-burdensome standard to areas of concern is a worn-out strategy that has been rejected in the past and should not be well-taken by the Commission in the instant case. See, e.g., Combustion Eng'g, Inc., 30 N.R.C. at 147; Babcock and Wilcox Co., 39 N.R.C. at 52; Hydro Resources, Inc., 47 N.R.C. at 280.

The record clearly reflects that Fansteel's strategy derives from its intent to attack Oklahoma's areas of concern on their merits. Indeed, throughout the early stages of this informal adjudication, Fansteel has consistently attempted to litigate the merits of Oklahoma's areas of concern.<sup>19</sup> This strategy is squarely without merit, has been rejected

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<sup>19</sup> Fansteel was repeatedly chided for this tactic in the Order, but persists in this untenable strategy. See, e.g., Order, at 11 and 12.

in the past, and should be so rejected by the Commission.<sup>20</sup>

The rule that a person requesting an informal adjudication “need not set forth all of their concerns until they have been given access to the hearing file,” Babcock and Wilcox, 39 N.R.C. at 52, clearly evidences the Commission’s position on this issue and the impropriety of Fansteel’s position.

Moreover, “by expressing concerns comparable to certain of the matters dealt with by the Staff in its SER or EA, [a requestor] has fulfilled the requirement for germaneness.” Combustion Eng’g, Inc., 30 N.R.C. at 147. Throughout the Order, the Presiding Officer correctly determined that the areas of concern accepted for adjudication mirror many of the matters that NRC Staff tackle during technical review. See, e.g., Order, at 11-12, and 13. Thus, Oklahoma’s areas of concern fulfill the requirement for germaneness.

**2. A “Regulatory Basis” Exists for All Areas of Concern Accepted for Adjudication by the Presiding Officer.**

As required by the case Babcock and Wilcox Co., 39 N.R.C. 215, a “regulatory basis” exists for each and every area of concern that the Presiding Officer accepted for adjudication. Oklahoma’s areas of concern relate directly to the RRDP and whether the RRDP complies with the regulatory requirements applicable to the decommissioning of sites under 10 C.F.R. § 20.1403 (1999) and other NRC requirements.

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<sup>20</sup> See, e.g., Int’l Uranium (USA) Corp., 48 N.R.C. at 146-47 (writing “[a]lthough both ISUA and the Staff have attempted to show that the State’s concerns are without merit, the merits of these concerns are not within my jurisdiction at this point in the proceeding.”); Hydro Resources, Inc., 47 N.R.C. at 280 (writing “[i]t is not necessary to determine the merits of a concern to determine that it is germane”).

It is Fansteel's burden to demonstrate that decommissioning the Fansteel Facility for restricted release is appropriate, 62 Fed. Reg. 39058, 39069 (July 21, 1997), and as specifically alleged in detail in the Request for Hearing, for numerous reasons the RRDP fails to meet this burden. A number of Oklahoma's areas of concern, therefore, directly relate to the most fundamental issues in the Proceeding, namely whether the RRDP meets the criteria required by the Commission before the Fansteel Facility may be decommissioned for restricted release under 10 C.F.R. § 20.1403 (1999). Each area of concern is rational and directly relevant to the amendment to Source Materials License No. SMB-911 requested by Fansteel, and relates directly to matters within the scope of the hearing as defined in the Notice. Exhibit 4.

For example, one area of concern accepted by the Presiding Officer for adjudication relates to whether the RRDP adequately demonstrates that further reductions in residual radioactivity necessary to comply with 10 C.F.R. § 20.1402 (1999) (relating to unrestricted use) would result in net public or environmental harm or are not being made because the residual levels associated with restricted conditions are as low as reasonably achievable ("ALARA"). Order, at 10-11. Under NRC's regulations, the Fansteel Site is appropriate for license termination under restricted conditions only if the RRDP makes this required demonstration. 10 C.F.R. § 20.1403(a) (1999). As discussed in detail in Section II.C.4., below, the ALARA analysis in the RRDP is seriously flawed and fails to comply with regulatory requirements and guidance such as 10 C.F.R. § 20.1403(a), Radiological Criteria for License Termination, 62 Fed. Reg. 39058, 39069 (July 21,

1997), and Draft Regulatory Guide DG-4006, Demonstrating Compliance with the Radiological Criteria for License Termination (August 1998). There is a “regulatory basis” for adjudicating this area of concern, and Fansteel cannot seriously contend otherwise.

A separate example is the Presiding Officer’s acceptance of Oklahoma’s area of concern relating to whether the financial assurance proposed by Fansteel in the RRDP is insufficient to enable an independent third party to assume and carry out responsibilities for long-term custodianship, control, and maintenance of Fansteel Facility as required by 10 C.F.R. § 20.1403(c) (1999). Order, at 12. Inadequate funding for activities has been held to be a germane area of concern. Hydro Resources, Inc., 47 N.R.C. at 282.

As discussed in detail in Section II.C.7., below, Fansteel assumes that the annual cost of long-term custodianship, maintenance, and site control is \$7,300 per annum, a figure which is preposterously low and clearly reveals the danger of the RRDP. Exhibit 9. Examples of items not included in Fansteel’s financial assurance calculations are many items that directly bear upon the funds necessary for any long-term stewardship, maintenance, and control of the Fansteel Facility, such as: repair of the disposal cell; replacement of the disposal cell; realistic costs for repair of the disposal cell cap; replacement of the disposal cell cap; short- and long-term testing, analysis, and monitoring of disposal cell performance; repair of groundwater monitoring systems; replacement of groundwater monitoring systems; future remediation, decontamination, and decommissioning; additional cleanup in the event radiological criteria are not met



and residual radioactivity at Fansteel Facility poses a significant threat to public health and safety; collection and remediation of radioactive leachate from the disposal cell; engineered barrier replacement; emergency planning and training; site security; funding for enforcement of institutional controls; and the costs of preventing the migration and flow of the Arkansas River into the disposal cell at the Fansteel Facility. Certainly, there is a “regulatory basis” for adjudicating Oklahoma’s area of concern as to Fansteel’s failure to provide the financial assurance for long-term custodianship, maintenance, and control of the Fansteel Facility required by 10 C.F.R. § 20.1403(c) (1999).

In conclusion, all of Oklahoma’s areas of concern are relevant to whether the RRDP should be denied, modified, or conditioned, Hydro Resources, Inc., 47 N.R.C. at 280, and all have a “nexus” to the RRDP. Int’l Uranium (USA) Corp., 48 N.R.C. at 142. Moreover, Oklahoma specified areas of concern comparable to the matters dealt with by NRC Staff in its technical and environmental reviews, and has thereby fulfilled the requirement for germaneness. Combustion Eng’g, Inc., 30 N.R.C. at 147. Each of the areas of concern accepted by the Presiding Officer for adjudication relates to the eligibility of the Fansteel Facility for decommissioning for restricted release, and whether the RRDP fulfills the requirements of 10 C.F.R. § 20.1403 (1999), or the manner in which decommissioning of the Fansteel Facility, as proposed in the RRDP, is carried out. Nothing could be more germane to the Proceeding. Alleged failures to satisfy applicable regulatory requirements, such as those specified by Oklahoma in the Request for Hearing, are admissible as areas of concern. Hydro Resources, Inc., 47 N.R.C. at 281-82. Each

area of concern hinges on a regulatory requirement, consequently, a “regulatory basis” exists for each area of concern. Babcock and Wilcox Co., 39 N.R.C. at 217.

**3. Oklahoma’s First Area of Concern is a Matter of Construction and Interpretation of a Regulatory Provision and is Germane to the Proceeding.**

Fansteel attempts to obscure Oklahoma’s first area of concern by charging that it is an attempt to “challenge” 10 C.F.R. § 20.1403. Fansteel Appeal, at 20-21. To the contrary, Oklahoma’s first area of concern is strictly a matter of interpretation and construction of 10 C.F.R. § 20.1403. In its Request for Hearing, Oklahoma lodged no constitutional, statutory, or other attacks upon 10 C.F.R. § 20.1403, or its promulgation. The Presiding Officer correctly noted that this area of concern is not a “challenge,” Order, at 10, because Oklahoma is not challenging 10 C.F.R. § 20.1403 at this stage of the Proceeding. Fansteel’s arguments are wholly without merit.

Fansteel’s argument is little more than an attempt to litigate the merits of Oklahoma’s first area of concern before the Commission. Clearly, this is improper. See, e.g., Int’l Uranium (USA) Corp., 48 N.R.C. at 146-47; Hydro Resources, Inc., 47 N.R.C. at 280. Moreover, Fansteel’s argument in no way relates to whether the Request for Hearing should have been denied in its entirety. 10 C.F.R. § 2.1205(o) (1999). The Commission should disregard Fansteel’s arguments and set Oklahoma’s first area of concern for informal hearing.<sup>21</sup>

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<sup>21</sup> Throughout its appeal, Fansteel cites In the Matter of Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), LBP-99-46, 1999 WL 1267277 (December 16, 1999). See, e.g., Fansteel Appeal, at 17,

**4. Oklahoma's Second Area of Concern, Relating to Failure to Demonstrate ALARA or Net Public or Environmental Harm as Required by 10 C.F.R. § 20.1403(a), Raises Material Claims and Was Specified in Detail Surpassing the Required "Minimal Information to Ensure That the Areas of Concern are Germane to the Proceeding."**

Under the Commission's rules, the Fansteel Facility is appropriate for license termination under restricted conditions only if Fansteel demonstrates that further reductions in residual radioactivity necessary to comply with 10 C.F.R. § 20.1402 (relating to unrestricted use) would result in net public or environmental harm or are not being made because the residual levels associated with restricted conditions are ALARA. 10 C.F.R. § 20.1403(a). As alleged in detail in the Request for Hearing, the RRDP wholly fails to demonstrate either of these conditions as required by the Commission's regulations, and therefore the Fansteel Facility is not acceptable for license termination under restricted conditions.

Citing Hydro Resources, Inc., 47 N.R.C. at 281-82, NRC Staff determined that this area of concern is germane to the Proceeding, stating "[b]y challenging the validity of Fansteel's ALARA study, Oklahoma has stated an area of concern germane to the challenged action." NRC Response, at 11. The Presiding Officer also determined that Oklahoma's area of concern was germane to the Proceeding. Order at 10-11. A

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18, 23, 24, 25, and 30. In that matter, the presiding officer, like the Presiding Officer in this Proceeding, found that Oklahoma had standing. In relation to areas of concern, Oklahoma is aggrieved by certain decisions made by the presiding officer in the Sequoyah Fuels Corp. matter, but cannot appeal pursuant to 10 C.F.R. § 2.1205(o), until later. The Presiding Officer in this Proceeding correctly analyzed all areas of concern in the Request for Hearing.

“regulatory basis” exists for adjudicating this area of concern, consequently, the Request for Hearing presents a material, litigable claim.

Left with little to argue, Fansteel resorts to its old standby argument - lack of detail. Contrary to Fansteel’s assertions, Oklahoma provided amply detail. As established by the Request for Hearing, in Fansteel’s “Summary Report ALARA Analysis Residential and Industrial Scenarios,” and again in the RRDP, Fansteel attempts to demonstrate that residual radioactivity from the disposal cell will be reduced to a level that is ALARA.

However, Fansteel’s ALARA analysis contains serious flaws. For example, Fansteel used an incorrect figure for population density that is an order of magnitude less than both the population density of the area surrounding the Fansteel Facility and NRC’s acceptable input parameter for population density set forth in its Draft Regulatory Guide DG-4006, Demonstrating Compliance with the Radiological Criteria for License Termination (August 1998). Further, Fansteel utilized an excessively low figure for the area of the disposal cell (13,823.5m<sup>2</sup>), whereas a more accurate figure (ranging between 24,281m<sup>2</sup> (6 acres) and 48,562m<sup>2</sup>(12 acres)), should have been used.<sup>22</sup> Moreover, use of the monetary discount figures of 3% and 7% is not appropriate in relation to the Fansteel Facility as the radioactive constituents that Fansteel proposes to place in the disposal cell,

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<sup>22</sup> In its HELP Model analysis, Fansteel assumes an area for the disposal cell of 6.75 acres, which is far greater than the figure it used in its ALARA analysis. 2 REMEDIAL DESIGN REPORT STABILIZATION AND SOLIDIFICATION OF ABOVE-ACTION-LEVEL SOIL AND CONSTRUCTION OF A CONTAINMENT CELL, FANSTEEL, INC. - MUSKOGEE, OKLAHOMA at B.2.5-6 (August 1999).

namely uranium and thorium, are long-lived radionuclides that will not significantly decay in 1,000 years. Additionally, Fansteel used a figure for the “concentration” input in its ALARA analysis relating to thorium, established in Appendices G through L of its “Summary Report ALARA Analysis Residential and Industrial Scenarios,” that is indistinguishable from the background, but provided no justification whatsoever for utilizing such a blatantly unrealistic figure. See 1 REMEDIATION ASSESSMENT, FANSTEEL, INC. - MUSKOGEE, OKLAHOMA at 4-24 (1993).

Fansteel also incorrectly calculated the cost side of the ALARA analysis. Ignoring Draft Regulatory Guide DG-4006, Fansteel included the values for long-term maintenance<sup>23</sup> and NRC review as “costs.” Draft Regulatory Guide DG-4006 clearly demonstrates that these figures are to be calculated as “benefits.” Fansteel made the same mistake with property values, but compounded the problem by inserting the value of the portion of the Fansteel Facility to be decommissioned for restricted release. Rather, as set forth in Draft Regulatory Guide DG-4006, property values are to be considered on the “benefit” side of the equation, and real estate agents are to be consulted to determine the effect of decommissioning for restricted release on property values. Fansteel also overstated the amount it would cost to decommission the Fansteel Facility for unrestricted release.

Lastly, Fansteel’s entire ALARA analysis is entirely too simplified to be of any analytical value. Values such as litigation expenses, lost tax revenues (ad valorem tax,

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<sup>23</sup> A figure that is abhorrently low. This is discussed below in Section II.C.7.

sales tax, employment tax, etc.), current and future land use, the cultural, historic, recreational, industrial, and ecologic value of the land surrounding the Fansteel Facility, and the unreasonable decay period associated with the radioactive wastes at the Fansteel Facility, as well as the substantial risks that will accrue from disposal of long-lived radioactive wastes at the Fansteel Facility, all must be included in any meaningful and accurate ALARA analysis.

Fansteel certainly failed to include in its ALARA analysis the potential value (societal, economic, etc.) to the State of Oklahoma, and its political subdivisions, of the unrestricted use of all of the Fansteel Facility. Radiological Criteria for License Termination, 62 Fed. Reg. 39058, 39069 (July 21, 1997). In its ALARA analysis, Fansteel also failed to account for the costs of restricting the flow of the Arkansas River into the disposal cell (which could be an astronomical, continuing expense), and failed to account for opportunity costs to the State of Oklahoma through losing the option to allow the Arkansas River to follow its natural course. Fansteel's ALARA analysis is nothing but a "straw man" created to justify a cheap and ineffectual decommissioning.<sup>24</sup>

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<sup>24</sup> There will be an incremental cost to society whatever decommissioning option is implemented. Moving the radioactive material at the Fansteel Facility to an appropriate "off-site" disposal site will necessarily translate into some transportation costs. What Fansteel has carefully and purposely ignored in its ALARA analysis is that if the material is permanently disposed of on the Fansteel Facility, there will be considerable costs and impacts to Oklahoma and others, including permanent loss of use of desirable real estate, potential exposure of residents, contamination of groundwater and other state resources, problems associated with the interaction of the Arkansas River and the disposal cell, and radon emissions. Because of the extremely long half-life of this material, these impacts will continue ad infinitum. Thus, the RRDP is superficially attractive. If the radioactive wastes at the Fansteel Facility were properly disposed of at an appropriate "off-site" facility, long-term impacts, and their associated costs, would be minimized. An appropriate "off-site" disposal location will have been selected, and approved by regulators, for its suitability, usually in an arid region, with no impact on groundwater, and little or no potential exposure to the public. On

Obviously, the Request for Hearing provided ample detail, and Fansteel's argument to the contrary is meritless.

Fansteel circuitously reasons that since it conducted an ALARA analysis consistent with NRC guidance, and since its "analysis demonstrates compliance with the regulation, there is no issue to contest in this proceeding." Fansteel cites no authority for its proposition that a licensee's naked assertion that it complied with regulatory requirements or guidance means that no area of concern germane to the Proceeding can be specified. It is, of course, Fansteel's compliance with 10 C.F.R. § 20.1403(a), and with other applicable rules, requirements, and guidance governing ALARA analyses, that is at issue. Alleged failures to satisfy applicable regulatory requirements are admissible as areas of concern. Hydro Resources, Inc., 47 N.R.C. at 281-82. Moreover, failures to conform with guidance can serve as the basis of an area of concern. Int'l Uranium (USA) Corp., 48 N.R.C. at 143 (writing "[w]hen proffering concerns to be admitted in a proceeding, an intervention petitioner may rely on Staff guidance to allege that an application is deficient...").

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the other hand, approval of the RRDP will have an immense impact on Oklahoma. Being labeled as a "radioactive waste site" will adversely effect Oklahoma and its political subdivisions. By leaving the radioactive waste on site as a source for additional groundwater contamination, there will be no opportunity for groundwater impacts to attenuate. The burden of preventing interaction with the Arkansas River will be an ongoing necessity, as will the maintenance of the cap and disposal cell.

**5. Oklahoma's Third Area of Concern, Relating to Errors in the RRDP's Dose Modeling, is Germane to the Proceeding.**

The Presiding Officer correctly ruled that Oklahoma's third area of concern, relating to errors in the RRDP's dose modeling, was germane. Order, at 11. NRC Staff also determined that Oklahoma specified an area of concern in this regard. NRC Response, at 11. Fansteel, however, asserts that Oklahoma's area of concern as to dose modeling errors is not germane to the Proceeding, which is the clearest evidence yet of Fansteel's intention to litigate the merits of Oklahoma's areas of concerns at this early stage of the Proceeding. Fansteel's problem is not that Oklahoma did not specify this area of concern in detail, but rather that Oklahoma did not provide Fansteel with fodder to attack the merits of this area of concern.

All that is required is that Oklahoma "identify" areas of concern by providing "minimal information to ensure that the areas of concern are germane to the proceeding." Babcock and Wilcox Co., 39 N.R.C. at 217. An area of concern is germane if it is relevant to whether the RRDP should be denied or conditioned, Hydro Resources, Inc., 47 N.R.C. at 280, or if it has a "nexus" to the RRDP. Int'l Uranium (USA) Corp., 48 N.R.C. at 142. The level of detail in Oklahoma's third area of concern was sufficient for the Presiding Officer, Order, at 11; the level of detail was sufficient for NRC Staff. NRC Response, at 11. Only Fansteel complains of the level of detail. Oklahoma's area of concern is germane to the Proceeding because it was supported by factual statements and, when proved during the merits-phase of the informal hearing, Fansteel's application to amend Source Materials License No. SMB-911, as embodied in the RRDP, will have to



be denied, conditioned, or modified. Alleged failures to satisfy applicable regulatory requirements are admissible as areas of concern. Hydro Resources, Inc., 47 N.R.C. at 281-82.

Additionally, Oklahoma's area of concern relating to Fansteel's dose modeling fulfills the germaneness requirement "by expressing concerns comparable to certain of the matters dealt with by the Staff in its SER or EA, [a requestor] has fulfilled the requirement for germaneness." Combustion Eng'g, Inc., 30 N.R.C. at 147. Without question, NRC Staff will analyze Fansteel's dose modeling during its technical review, and Fansteel does not suggest otherwise.

As previously discussed, Fansteel's reading of the regulations governing informal adjudications is contrary to the intent of Subpart L. Fansteel would require Oklahoma to present the merits of this area of concern within thirty days of the Notice, without access to the hearing file. While Fansteel has had months, perhaps even years, to perform dose modeling, it expects Oklahoma to present the merits of its area of concern as to Fansteel's dose modeling within thirty days after publication of the Notice. The inequities of these arguments have been quashed in the past, and should be disregarded here as well. A person requesting an informal adjudication "need not set forth all of their concerns until they have been given access to the hearing file." Babcock and Wilcox, 39 N.R.C. at 52. As of the date of this Counter-Statement, Oklahoma has not even had access to the hearing file, nor will it for quite some time.

**6. Oklahoma's Fourth Area of Concern, Relating to Institutional Controls and Long-Term Custodianship under 10 C.F.R. § 20.1403, Presents a Litigable Issue Germane to the Proceeding.**

The Presiding Officer correctly ruled that Oklahoma's fourth area of concern, relating to the RRDP's failure to demonstrate legally enforceable institutional controls, as required by 10 C.F.R. § 20.1403(b), was germane to the Proceeding. The RRDP scarcely devotes two-thirds of a page to the institutional controls proposed for long-term custodianship of the Fansteel Facility, DECOMMISSIONING PLAN, FANSTEEL, INC.-MUSKOGEE, OKLAHOMA 2-9 (August 1999), and yet Fansteel cannot understand, or believe, how anyone could have a "concern" about institutional controls at the Fansteel Facility.

In particular, Oklahoma's fifth area of concern asserted that the institutional controls proposed in the RRDP cannot reasonably be expected to be effective for the near term or for the lengths of time at issue in the Proceeding. The RRDP completely fails to map out institutional controls and long-term custodial care of the Fansteel Facility. For example, maintenance and replacement of the disposal cell, rip-rap, rolling the clay liner, fence, etc., are not addressed. As alleged, inadequate maintenance and inadequate institutional controls at the Fansteel Facility will directly impact the TEDE, a factor that Fansteel has not accounted for in the RRDP. Request for Hearing, at 34 and 35.

Amazingly, Fansteel argues that identification of a long-term custodian at the Fansteel Facility is not an issue germane to the Proceeding, despite representing to NRC and the public that this is exactly what Fansteel proposes for Fansteel Facility.

DECOMMISSIONING PLAN, FANSTEEL, INC.-MUSKOGEE, OKLAHOMA at 2-9 (August 1999). NRC Staff agrees with Oklahoma that failure to identify a long-term custodian is problematic and germane to the Proceeding. NRC Staff Response, at 13. Even to this day, Fansteel has yet to identify a long-term custodian of the Fansteel Facility, which is a variable that bears directly on the acceptability of the Fansteel Facility for restricted release because of its implications on the legal enforceability of physical controls, and whether TEDE dose limits are met. Fundamentally, the identity of a long-term custodian for the Fansteel Facility is especially important as the RRDP represents Fansteel's plan to have a long-term custodian in control of the site without identifying the long-term custodian.<sup>25</sup> Moreover, in light of Fansteel's assertedly dire financial status, Fansteel cannot be trusted as the long-term custodian of the Fansteel Facility. The RRDP provides absolutely no insight into, and makes no provision for, long-term custodial care of the Fansteel Facility. It is simply not addressed in any meaningful manner.

As part of its argument, Fansteel asserts that a long-term custodian need not be identified under 10 C.F.R. § 20.1403. This argument ignores the complexities of this issue. As set forth in the Order, the Presiding Officer has accepted Oklahoma's area of concern relating to errors in TEDE dose modeling. Order, at 11. These errors cast

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<sup>25</sup> The RRDP proposes institutional controls based on property rights and physical controls such as fences, monitoring, and site inspection. Physical controls and their maintenance can be used to meet the requirement of 10 C.F.R. § 20.1403(b) (1999) to demonstrate legally enforceable institutional controls when the physical controls are used in combination with an instrument that permits legal enforcement of the physical controls. DG-4006, Demonstrating Compliance with the Radiological Criteria for License Termination (August 1998) at § 4.1, p.33. The RRDP, however, proposes an unidentified custodian to carry out the proposed physical controls after license termination. While it is permissible for the licensee to perform the maintenance and control function, Fansteel does not propose to perform this function on its own behalf.

serious doubts as to the accuracy of Fansteel's dose modeling, and Oklahoma does assert the very real possibility that errors in dose modeling would render unsupportable Fansteel's assertions that TEDE from residual radioactivity distinguishable from background would not exceed 100 mrem per year. Request for Hearing, at 34. In the event that TEDE from residual radioactivity distinguishable from background exceeds 100 mrem per year, it is undeniable that Fansteel is required to provide for durable institutional controls, including identification of a long-term custodian. 10 C.F.R. § 20.1403(e).

Fansteel attempts to persuade the Commission by arguing that Oklahoma desires for a demonstration that institutional controls will be effective for 1,000 years. Of course Oklahoma desires for institutional controls at the Fansteel Facility to be effective for the regulatory timeframe at issue. However, for the reasons set forth above, and as alleged in the Request for Hearing, the institutional controls proposed by Fansteel in the RRDP cannot be expected to be effective for even the "near term." Request for Hearing, at 35. The Commission wisely requires Fansteel to demonstrate, at a minimum, the effectiveness of institutional controls for the "foreseeable future," Radiological Criteria for License Termination, 62 Fed. Reg. 39058, 39070 (July 21, 1997), however Fansteel has failed to do so. This area of concern is most definitely germane to the Proceeding.

**7. The Presiding Officer Correctly Determined that Oklahoma's Fifth Area of Concern, Relating to the RRDP's Failure to Provide Sufficient Financial Assurance to Enable an Independent Third Party to Maintain and Control the Fansteel Facility under 10 C.F.R. § 20.1403(c), is Germane to the Proceeding.**

Finding that Oklahoma detailed a number of considerations not taken into account by Fansteel that may increase the amount of money needed for long-term stewardship, maintenance, and control of the Fansteel Facility, the Presiding Officer determined that Oklahoma's fifth area of concern, relating to Fansteel's failure to comply with NRC's financial assurance requirements, 10 C.F.R. § 20.1403(c), was germane to the Proceeding. Order, at 12. The Fansteel Facility is acceptable for license termination under restricted conditions only if Fansteel provides sufficient financial assurance to enable an independent third party to control and maintain the Fansteel Facility. 10 C.F.R. § 20.1403(c).

As set forth in the RRDP, Fansteel erroneously assumes that the annual cost of long-term custodianship, maintenance, and site control is \$7,300.00 per annum.<sup>26</sup> Exhibit 9. The Request for Hearing established that Fansteel failed to include many indispensable items in its financial assurance calculations, such as repair of the disposal cell; replacement of the disposal cell; realistic costs for repair of the disposal cell cap; replacement of the disposal cell cap; short- and long-term testing, analysis, and

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<sup>26</sup> In light of the long-lived radioactive isotopes, the amount of radioactivity, the characteristics of the residual radioactivity, and the site-specific exposure scenarios, pathways, and parameters at the Fansteel Facility, this amount of money is clearly insufficient to enable an independent third party to assume and carry out responsibilities for control and maintenance of Fansteel Facility as required by 10 C.F.R. § 20.1403(c).

monitoring of disposal cell performance;<sup>27</sup> repair of groundwater monitoring systems; replacement of groundwater monitoring systems; future remediation, decontamination, and decommissioning; additional cleanup in the event radiological criteria are not met and residual radioactivity at Fansteel Facility poses a significant threat to public health and safety; collection and remediation of leachate from disposal cell; engineered barrier replacement; emergency planning and training; site security; funding for enforcement of institutional controls;<sup>28</sup> and the costs of preventing the migration and flow of the Arkansas River into the disposal cell at the Fansteel Facility.<sup>29</sup> Exhibit 9. As areas of concern relating to inadequate financial assurance are germane to the Proceeding under

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<sup>27</sup> Inadequate cell cap maintenance could result in a total effective dose equivalent ("TEDE") greater than 100 mrem per year. Further, long-term monitoring is essential toward any determination as to whether, and what type of, maintenance or repair is needed. Without long-term monitoring, long-term control and maintenance is illusory.

<sup>28</sup> Financial assurance is required so that the long-term custodian can control and maintain the Fansteel Facility. 10 C.F.R. § 20.1403(c) (1999). Without adequate funding from Fansteel, a custodian will not be able to enforce institutional controls, which is an indispensable part of controlling and maintaining the Fansteel Facility.

<sup>29</sup> It is imperative that the principal of the long-term custodianship trust fund to be created by Fansteel be adequate so that it is never necessary to deplete the trust fund corpus to take care of annual commitments. Interest alone on the corpus of the trust fund created by Fansteel must be sufficient to fund all long-term costs of controlling and maintaining the Fansteel Facility. Further, Fansteel has failed to make any provision in the long-term control budget for unforeseen problems, acts of God, or other force majeure events. Moreover, as no long-term custodian for the Fansteel Facility has been identified, the sufficiency of the financial assurance proposed by Fansteel relating to long-term site control and maintenance cannot be known; the sufficiency of any financial assurance relating to long-term site control and maintenance depends upon the nature and identity of the long-term custodian of the Fansteel Facility. As an example of the germaneness of Oklahoma's area of concern relating to inadequate financial assurance, disposal cells 12 and 13 at the Lone Mountain Facility near Waynoka, Oklahoma (a hazardous waste disposal facility) each recently sustained damage due to heavy rain. The disposal cell caps were approximately one year old. It is estimated that the cap on disposal cell 12 will cost as much as \$750,000.00 to repair, and the cap on disposal cell 13 will cost as much as \$1,500,000.00 to repair. Costs such as these at the Fansteel Facility would render long-term maintenance and control of the Fansteel Facility an impossibility. Exhibit 10.

NRC caselaw, Hydro Resources, Inc., 47 N.R.C. at 282, the Presiding Officer clearly did not commit an error of law or abuse of discretion in accepting Oklahoma's fifth area of concern for adjudication. Fansteel generally argues that Oklahoma's fifth area of concern does not present a litigable question, is impermissibly vague and speculative, lacks a rational basis, and/or is duplicative. Fansteel Appeal, at 30-31. As set forth in more detail below, these assertions are without merit.

**a. Fansteel's Allegations that Costs Cannot Be Litigated in this Proceeding is an Impermissible Attack on the Merits of Oklahoma's Area of Concern.**

Fansteel's first specific claim is that certain costs cannot be litigated in an informal adjudication. Fansteel Appeal, at 30-31. For instance, according to Fansteel, costs such as emergency planning and training,<sup>30</sup> enforcement of institutional controls, and disposal cell replacement are not required by NRC's financial assurance regulations. Fansteel Appeal, at 30. Fansteel offers no authority for this assertion, and does not propound any theory as to how such costs are reasonably excluded from the financial assurance necessary to enable an independent third party to control and maintain the Fansteel Facility. 10 C.F.R. § 20.1403(c). Obviously, Fansteel's assertions in this regard, are an attempt at early litigation of the merits of Oklahoma's areas of concern. It will be the Presiding Officer's duty to determine the scope and application of 10 C.F.R. §

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<sup>30</sup> Interestingly, Fansteel offers "provision for . . . emergency response" in the RRDP with one hand, but takes it away with the other by not providing financial assurance for such activities. DECOMMISSIONING PLAN, FANSTEEL, INC.-MUSKOGEE, OKLAHOMA at 2-9 (August 1999). Now, in its appeal, Fansteel says the issue of emergency planning and training is not germane to the Proceeding. Obviously, it is.

20.1403(c) to the Proceeding, and whether such costs are necessary for long-term stewardship, control, and maintenance of the Fansteel Facility. This will occur, as it must, when Oklahoma, Fansteel, and NRC Staff present their cases to the Presiding Officer.<sup>31</sup>

Employing a similar strategem, Fansteel attempts to argue against financial assurance for leachate collection and remediation. Fansteel first indicates that the disposal cell is designed to prevent leachate and that there is no leachate collection system to operate. Then, however, Fansteel argues that Fansteel has a groundwater collection system, which will intercept leachate from the disposal cell, but that this groundwater collection system is not a part of this Proceeding and therefore, is not germane to the Proceeding.

Trying hard to cover all the bases, Fansteel misses the mark. As described in Fansteel's "Treatability Study Report for Stabilization and Solidification of Above-Action-Level Soil," the disposal cell will create leachate containing uranium and thorium.

#### TREATABILITY STUDY REPORT FOR STABILIZATION AND SOLIDIFICATION OF ABOVE-

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<sup>31</sup> Again, Fansteel's argument is an attempt to inject requirements for "contentions" in Subpart G proceedings into the analysis of "areas of concern" in this Subpart L informal adjudication. This is a worn-out strategy that has been rejected in the past and should not be well-taken by the Commission in the instant case. See, e.g., Combustion Eng'g, Inc., 30 N.R.C. at 147; Babcock and Wilcox Co., 39 N.R.C. at 52; Hydro Resources, Inc., 47 N.R.C. at 280. Throughout the early stages of this informal adjudication, Fansteel has consistently attempted to litigate the merits of Oklahoma's areas of concern. This strategy is squarely without merit, has been rejected in the past, and should be so rejected by the Commission. See, e.g., Int'l Uranium (USA) Corp., 48 N.R.C. at 146-47 (writing "[a]lthough both ISUA and the Staff have attempted to show that the State's concerns are without merit, the merits of these concerns are not within my jurisdiction at this point in the proceeding."); Hydro Resources, Inc., 47 N.R.C. at 280 (writing "[i]t is not necessary to determine the merits of a concern to determine that it is germane").



ACTION-LEVEL SOIL, FANSTEEL, INC. - MUSKOGEE, OKLAHOMA at 18 (August 1999). Additionally, Fansteel attempts to rely on a groundwater collection system at the Fansteel Facility, all the while ironically maintaining that this groundwater collection system is not germane to the Proceeding. Reliance on this groundwater collection system is misplaced. Fansteel has readily admitted that this groundwater collection system is strictly temporary. Moreover, the groundwater collection system will not collect leachate from the disposal cell. Even assuming that it will operate for the full regulatory timeframe at issue in this Proceeding, the groundwater collection system is placed to the east and northeast of the disposal cell, while groundwater flow with radioactive leachate from the disposal cell will flow to the south and east of the disposal cell into the Arkansas River, thereby doing an end run around the groundwater collection system cited by Fansteel.

Moreover, as the lack of a leachate collection system has been accepted as an area of concern germane to the Proceeding, any lack of financial assurance necessary for an independent third party to operate and maintain such a system, as alleged by Oklahoma, must also be an area of concern germane to the Proceeding.

**b. Fansteel's Allegations That Certain Costs are Impermissibly Vague, Speculative, and/or Not Rationally Related to the Challenged Action are Meritless.**

In direct contravention to the finding by the Presiding Officer in the Order that Oklahoma's fifth area of concern is germane to the Proceeding, Order, at 12, and despite

NRC Staff's position that Oklahoma's fifth area of concern is germane to the Proceeding, NRC Response, at 14-18, Fansteel attacks Oklahoma's fifth area of concern on the basis of it lacking detail. Fansteel's principal argument is that Oklahoma's areas of concern were not specific, and therefore failed to meet the requirements of 10 C.F.R. § 2.1205(e)(3) (1999).

Yet again, Fansteel's argument is just an attempt to inject requirements for "contentions" in Subpart G proceedings into the analysis of "areas of concern" in this Subpart L informal adjudication. Fansteel's strategy of attempting to apply an overly-burdensome standard to areas of concern has been rejected in the past and should not be well-taken by the Commission in the instant case. See, e.g., Combustion Eng'g, Inc., 30 N.R.C. at 147; Babcock and Wilcox Co., 39 N.R.C. at 52; Hydro Resources, Inc., 47 N.R.C. at 280.

Fansteel's strategy derives from its intent to attack Oklahoma's areas of concern on their merits. Fansteel has consistently attempted to litigate the merits of Oklahoma's areas of concern. This strategy has been rejected in the past, and should be rejected by the Commission. See, e.g., Int'l Uranium (USA) Corp., 48 N.R.C. at 146-47 (writing "[a]lthough both ISUA and the Staff have attempted to show that the State's concerns are without merit, the merits of these concerns are not within my jurisdiction at this point in the proceeding."); Hydro Resources, Inc., 47 N.R.C. at 280 (writing "[i]t is not necessary to determine the merits of a concern to determine that it is germane").

Fansteel does specifically, and erroneously, argue that Oklahoma did not explain why the amount of financial assurance that Fansteel proposes for disposal cell repair is inadequate. Oklahoma did explain its position in this regard by citing to previous regulatory experience at the Lone Mountain facility in Oklahoma, where disposal cell repairs due to one rainfall event will require huge sums of money to repair. Request for Hearing, at fn. 22 and 25 (and Exhibit 10 thereto); Exhibit 10. In contrast, Fansteel intends to walk away from the Fansteel Facility leaving only \$1,000 per year for disposal cell cover repair. Exhibit 9.

Fansteel also sets its sights on financial assurance for migration of the Arkansas River. Fansteel would like to rid itself of this problem by simply asserting to the Commission that it is not “credible” that the Arkansas River could migrate into the Fansteel Facility. Fansteel Appeal, at 31. However, due to the extreme lengths of time at issue in this matter, migration of the Arkansas River is not only “credible,” it is inevitable. If Fansteel wants to place a radioactive waste disposal cell on the banks of the Arkansas River, then it must be required to provide financial assurance to address the problem of river migration. As everyone knows, rivers change course over time. For good reason, the Presiding Officer determined that this area of concern was germane, Order, at 12, as did NRC Staff. NRC Staff Response, at 15.

Similarly, Fansteel attacks the notion that it must provide financial assurance for Acts of God and force majeure events. While the events themselves, or at least how they will transpire, are difficult to perceive, it is certain that during the 1,000 year regulatory

timeframe at issue in this Proceeding, major, catastrophic events will occur that involve the Fansteel Facility, the radioactive waste disposal cell proposed in the RRDP, and the public's health, safety and welfare. Without doubt, an independent third party in charge of maintenance and control of the Fansteel Facility will have to respond to these events, but, under Fansteel's proposed financial assurance, will have no funding to do so. Such a scenario leads to dire possibilities, such as: (1) no response to catastrophic events; (2) depletion of the trust fund corpus to respond to catastrophic events; or (3) taxpayer funded response to catastrophic events. All of these scenarios are entirely untenable, yet exactly what Fansteel proposes.

All of Fansteel's merits-based arguments must be handled in the informal adjudication, rather than attempting to force the Commission to make individual rulings on whether Fansteel's financial assurance is adequate.

**c. Fansteel's Position as to Duplication of Costs is Without Merit.**

The final prong of attack on Oklahoma's fifth area of concern is the dubious assertion that "Oklahoma improperly inflated its claims by duplicating costs" rendering the Presiding Officer's decision that Oklahoma's fifth area of concern was germane to the Proceeding erroneous. Fansteel Appeal, at 32. Fansteel's argument is merely an attempt to cloud a simple issue.

Fansteel wholly-failed to include financial assurance for even the most basic elements of long-term custodianship, control, and maintenance of the Fansteel Facility.

Just a glimpse at the RRDP reveals conclusively that Fansteel neglected to include financial assurance for repair of the disposal cell and replacement of the disposal cell. Repair and replacement are not a single item, as any reference dictionary will demonstrate. Funding for disposal cell replacement must be provided for and in place in the event of a catastrophic event (or normal wear and tear over time rendering maintenance ineffective) at the Fansteel Facility. Moreover, the mode or mechanism for providing such financial assurance (whether it be by insurance, performance bonds, etc.) is equally as important as its existence.

Over the regulatory timeframe at issue, the range of catastrophic events and their likelihood are substantial. For example, it must be assumed that a 1,000 year flood will occur at the Fansteel Facility, or that the Probable Maximum Flood will occur at the Fansteel Facility. Fansteel is required by 10 C.F.R. § 20.1403(c) to provide financial assurance to cover damage to the disposal cell under these scenarios, but has failed to do so in the RRDP. Failure to require financial assurance for such events is most assuredly a failure to provide sufficient financial assurance to enable an independent third party to control and maintain the Fansteel Facility. 10 C.F.R. § 20.1403(c).

Attempts to obscure the issue of financial assurance by referencing Fansteel's obligations for two years after completion of the RRDP must be disregarded. Apparently, Fansteel expects an independent third party to provide its own funding for groundwater monitoring and disposal cell performance testing, analysis, and monitoring, because Fansteel has provided absolutely no funding for such custodianship, control, and

maintenance activities. Either that, or Fansteel has decreed that such activities shall not occur. Without question, these items, as well as all financial assurance items identified by Oklahoma in the Request for Hearing, are necessary for an independent third party to control and maintain the Fansteel Facility, but Fansteel ignored them. Without doubt, there is a "regulatory basis" for adjudicating these issues, therefore the informal hearing must proceed.

**8. NRC Staff's Environmental Review of the RRDP Under the National Environmental Policy Act Does Not Supersede Oklahoma's Right to an Informal Hearing as Guaranteed by the Atomic Energy Act.**

Fansteel's most labored argument is that the Presiding Officer erroneously accepted as germane Oklahoma's sixth area of concern relating to the design and location of the proposed containment cell by failing "to take into account that Oklahoma, as an interested State, will have multiple opportunities in the 10 C.F.R. Part 51 environmental review process to address its alleged concerns with respect to the adequacy of containment cell design and location." Fansteel Appeal, at 33.<sup>32</sup> Apparently, it is Fansteel's position that Oklahoma's ability to participate in NRC's National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. ("NEPA") review of the RRDP,

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<sup>32</sup> Once again, Fansteel presents this argument to the Commission, but failed to make it to the Presiding Officer. Under NRC precedent, where a party fails to raise an argument before the Presiding Officer, it may not raise that argument before the Commission on appeal. Sequoyah Fuels Corp. and Gen. Atomics, 46 N.R.C. at 221; Commonwealth Edison Co., 49 N.R.C. 185. This argument must therefore be stricken from the record and cannot be considered by the Commission.

supercedes Oklahoma's right to an informal hearing in this Proceeding under the Atomic Energy Act, 42 U.S.C. §§ 2011 et seq. This argument is frivolous.

As the Commission is aware, pursuant to 42 U.S.C. § 2239(a)(1)(A), in any proceeding under Title 42, Chapter 23 of the United States Code for the granting, suspending, revoking, or amending of any license, NRC shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. Oklahoma is a "person" under the Atomic Energy Act, the definition of which includes "any State or any political subdivision of, or any political entity within a State." 42 U.S.C. § 2014(s). As described in detail in the Request for Hearing, Oklahoma has numerous property, financial, sovereign, and other interests that will be affected by the results of the Proceeding and the license amendment sought by Fansteel for the decommissioning of the Fansteel Facility as proposed in the RRDP. Oklahoma is therefore entitled to a hearing as guaranteed by the Atomic Energy Act, 42 U.S.C. § 2239(a)(1)(A).

Fansteel's argument is bereft of any supporting legal authority because it ignores the well-known fact that NEPA is a procedural statute, requiring administrative agencies to consider environmental issues in the decision-making process. Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1112 (1971). NEPA contains no substantive, technical requirements relating to the design, construction, and location of radioactive waste disposal cells, or any other matters raised in any of Oklahoma's areas of concern, and Fansteel does not suggest otherwise. The

only forum for adjudicating whether the RRDP meets applicable technical requirements is in the informal hearing granted by the Presiding Officer in the Order.

Fansteel's argument also assumes that an environmental impact statement will be prepared in relation to the RRDP. While Oklahoma believes that a full and complete environmental impact statement is required in relation to the RRDP, at this time it would appear that NRC Staff has not made this determination. A close reading of Exhibit 2 to the Fansteel Appeal reveals only that NRC Staff "expects" to prepare an environmental impact statement. Certainly, a mere "expectation" under a procedural, environmental statute cannot supplant Oklahoma's right to an informal adjudication under the Atomic Energy Act, 42 U.S.C. §§ 2011 et seq.

### **III. CONCLUSION**

The Presiding Officer correctly determined that Oklahoma has standing and correctly ruled that Oklahoma specified areas of concern that are germane to the subject matter of this Proceeding.

The arguments offered by Fansteel in Section I.B.(i)-(v) of its Appeal do not relate to the injuries-in-fact found by the Presiding Officer to confer standing upon Oklahoma, and are therefore completely irrelevant. As a matter of law, therefore, Fansteel's arguments relating to the injuries-in-fact demonstrated by Oklahoma in the Request for Hearing wholly-fail to prove that the Presiding Officer committed an error of law or an abuse of discretion.



Under well-established NRC precedent, Oklahoma's injuries-in-fact are redressable through the Presiding Officer's power to modify, reject, or condition the RRDP. Redressability, in this regard, is likely and not speculative in any way. Certainly, Fansteel's avowed and unsubstantiated dire financial straits, an argument not raised before the Presiding Officer and which must be rejected for that reason under NRC precedent, has no bearing on the Presiding Officer's power to modify, reject, or condition the RRDP. In any event, the Presiding Officer's decision was not an abuse of discretion or error of law, and the "substantial deference" the Commission affords the Presiding Officer requires affirmation of the Order.

The areas of concern accepted by the Presiding Officer for adjudication bear directly upon whether the RRDP complies with applicable NRC rules, regulations, and guidance, which are issues germane to this Proceeding. Fansteel's arguments as to requisite detail for areas of concern is a worn-out strategy, rejected time and again in NRC precedent, and which must be rejected here. Oklahoma's areas of concern were stated in ample detail, giving the Presiding Officer far more than the required "minimal information to ensure that the areas of concern are germane to the proceeding." Babcock and Wilcox Co., 39 N.R.C. at 217. Fansteel's remaining arguments on specific areas of concern are outside the limited scope of the appellate process set by the Commission at this stage of the process in 10 C.F.R. § 2.1205(o) (1999), and must be rejected. Even if not rejected on this basis, Fansteel's arguments are without merit. Like determinations of standing, presiding officers' decisions on issues of areas of concern should receive

"substantial deference." However, even without such a deferential standard, under well-established NRC precedent, the Order must be affirmed.

Oklahoma hereby prays the decision of the Presiding Officer embodied in the Order be affirmed and an informal hearing held so that Oklahoma has the opportunity to present evidence to show why the decommissioning of the Fansteel Facility proposed in the RRDP is not in compliance with U.S. Nuclear Regulatory Commission regulations, and to detail the dangerous consequences that would result from any approval of the RRDP and the resulting amendment to Source Materials License No. SMB-911.

Respectfully Submitted,

**OFFICE OF THE OKLAHOMA  
ATTORNEY GENERAL**

  
\_\_\_\_\_  
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Dated: February 2, 2000

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2<sup>nd</sup> day of February, 2000, a true and correct copy of the foregoing Counter-Statement in Opposition to Fansteel, Inc.'s Appeal, was transmitted by first class U.S. mail, with sufficient postage prepaid and affixed, to the following:

The Honorable Richard A. Meserve,  
Chairman  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

The Honorable Nils J. Diaz,  
Commissioner  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

The Honorable Greta Joy Dicus,  
Commissioner  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

The Honorable Edward McGaffigan, Jr.,  
Commissioner  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

The Honorable Jeffrey S. Merrifield,  
Commissioner  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Administrative Judge Thomas S. Moore  
Presiding Officer  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Administrative Judge Thomas D. Murphy  
Special Assistant  
Atomic Safety and Licensing Board Panel  
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Rulemakings and Adjudications Staff  
U.S. Nuclear Regulatory Commission  
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Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Executive Director for Operations  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

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USNRC

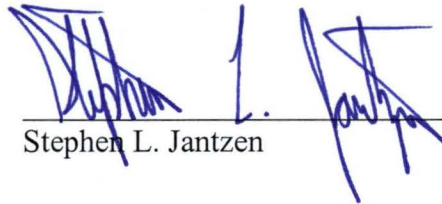
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\_\_\_\_\_  
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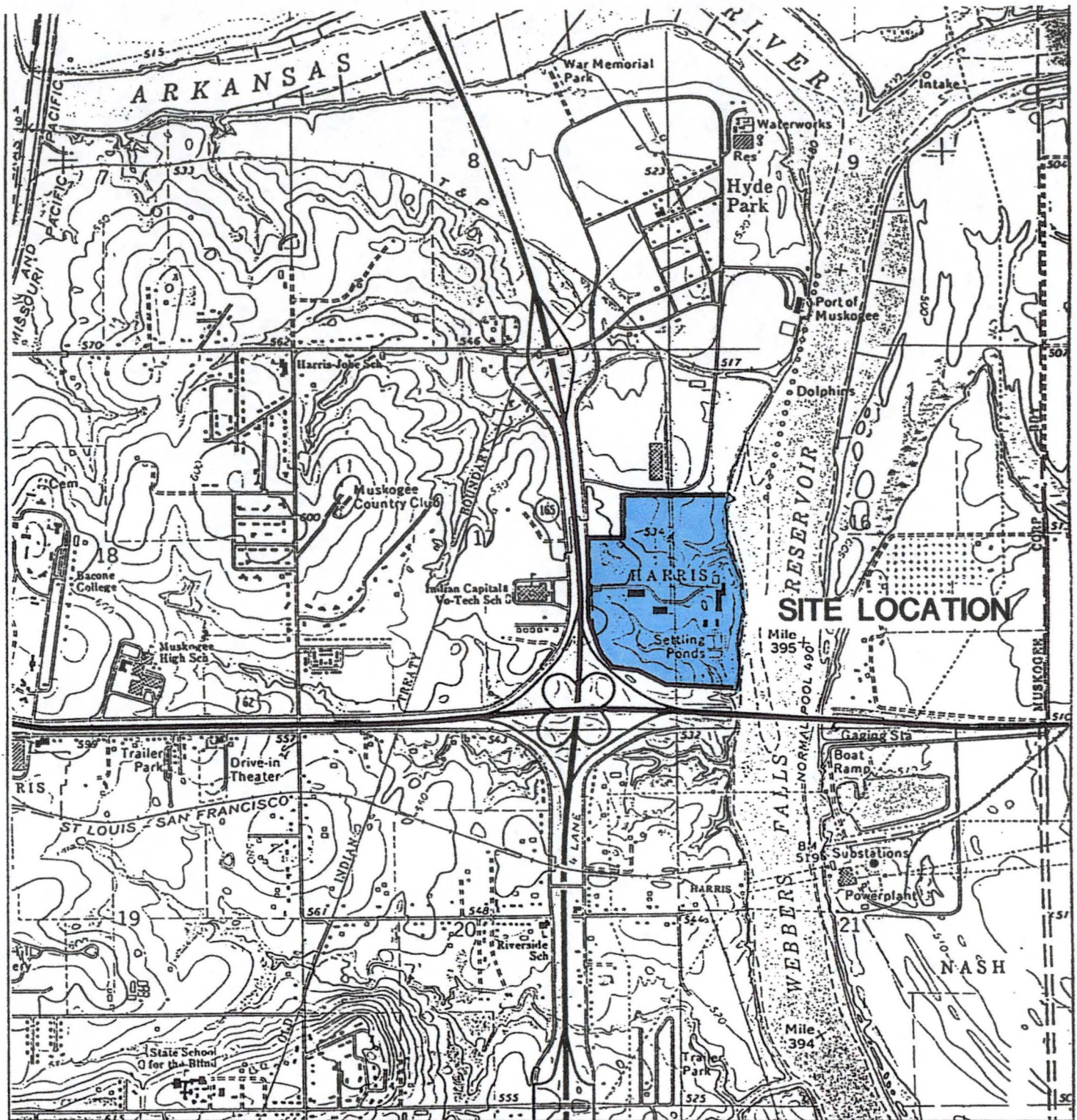


FIGURE 1

SITE LOCATION MAP

REFERENCE

USGS 7.5-MIN TOPOGRAPHIC QUADRANGLE  
NORTHEAST MUSKOGEE, OKLAHOMA  
DATED 1974  
SCALE 1:24000.



APPROVED *[Signature]* 12/17/11

CHECKED *[Signature]* 12/27/11

DRAWN JWK/061593

DRAWING NUMBER

0111-A11



Earth Sciences Consultants, Inc.

REVISION	DATE	DESCRIPTION



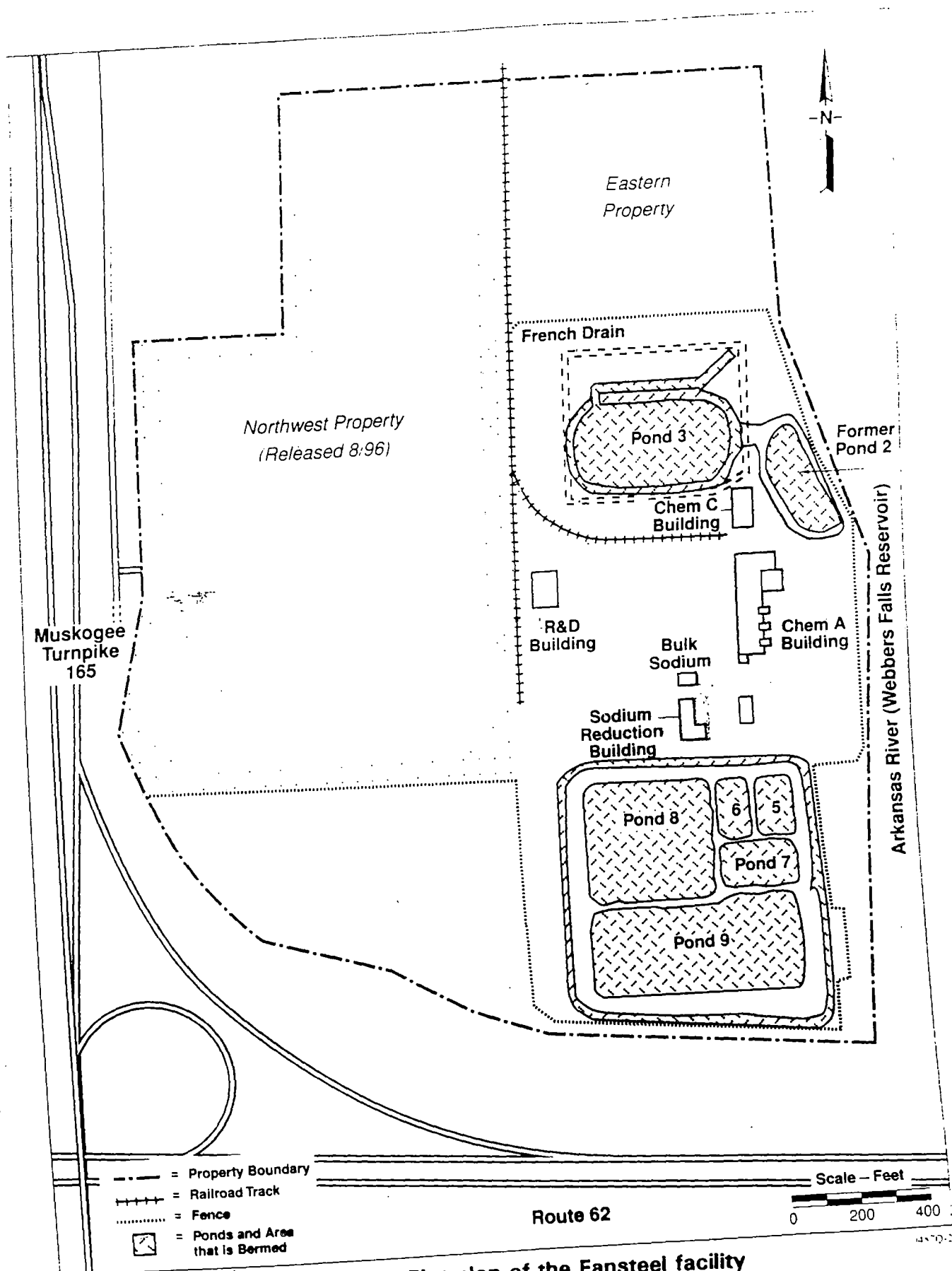


Figure 1.1 Plot plan of the Fansteel facility





UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

April 16, 1999

Stephen L. Jantze

RECEIVED

APR 16 1999

ATTORNEY GENERAL'S  
OFFICE

MEMORANDUM TO:

Theodore S. Sherr, Chief  
Licensing and International  
Safeguards Branch  
Division of Fuel Cycle Safety  
and Safeguards, NMSS

THRU:

Charles Erneigh, Section Chief  
Licensing Section  
Licensing and International  
Safeguards Branch  
Division of Fuel Cycle Safety  
and Safeguards, NMSS

*M. Adams Dr.*  
4/16/99

FROM:

Michael E. Adjodha  
Licensing Section  
Licensing and International  
Safeguards Branch  
Division of Fuel Cycle Safety  
and Safeguards, NMSS

*M. Adjodha*

SUBJECT:

SUMMARY OF FANSTEEL MEETING

On April 13, 1999, representatives of Fansteel, Inc., met with the Division of Fuel Cycle Safety and Safeguards (FCSS) and the Division of Waste Management (DWM) staff at the Nuclear Regulatory Commission (NRC) headquarters in Rockville, Maryland. The individuals attending the meeting are listed on the attachment.

The purpose of the meeting was to discuss the deficiencies identified in the NRC's request for additional information (RAI) letter dated March 31, 1999, regarding Fansteel's plans for decommissioning their site.

Representatives of Fansteel sought guidance from the NRC staff on each of the questions raised in the RAI. The NRC staff provided necessary clarifications for Fansteel.

Through the course of the meeting, the following was agreed upon:

- separate decommissioning plans will be submitted for an SDMP plan and for a containment cell plan,
- Fansteel will respond to the RAI by late May or early June with the SDMP plan and a few weeks following with the containment cell plan,
- the Quality Assurance Project Plan (QAPP) needs to be summarized but need not be submitted for plan approval,
- the decommissioning plans will be revised to definitively state that there are no mixed wastes, and
- Fansteel will remove reference to MARSSIM in the SDMP plan, in conformance with NUREG-5849.



The follow-up action items were as follows:

- the NRC will provide an answer to Fansteel on whether or not their financial assurance funding plan needs to be split,
- Fansteel needs to incorporate the results of the 1993 Remedial Assessment into the decommissioning plan,
- Fansteel needs to have some procedures available of how decontaminated sites will not be re-contaminated, and
- Fansteel will need to submit to the NRC a letter requesting for an extension of time beyond the 30 days specified in the March 30, 1999, RAI.

John Hunter, Fansteel Plant Manager, stated that the containment cell is an essential part of their overall plan for decommissioning the site.

The duration of meeting was approximately two hours.

Docket 40-7580  
License SMB-911

Attachment: As stated

cc: Mr. John J. Hunter  
Corporate Manager of Process Engineering  
and Facilities Construction  
Fansteel, Inc.  
Number Ten Tantalum Place  
Muskogee, OK 74403-9296

**Meeting with  
Fansteel, Inc.,**

**Date: April 13, 1999**

**Place: O-16B6**

<b>Name</b>	<b>Organization</b>	<b>Phone Number</b>
Michael E. Adjodha	NRC/NMSS/FCSS	301-415-8147
Mary Adams	NRC/NMSS/FCSS	301-415-7249
Stephen L. Jantzen	Oklahoma Atty. General	405-521-3921
Joseph Harrick	Earth Sciences Consultants	724-733-3000
M. Dave Tourdot	Earth Sciences Consultants	724-733-3000
Gerry Williams	Earth Sciences Consultants	724-733-3000
Keith Mahosky	Earth Sciences Consultants	724-733-3000
John J. Hunter	Fansteel, Inc.	918-687-6303
John Englert	Kirkpatrick & Lockhart	412-355-8331
Chuck Emeigh	NRC/NMSS/FCSS	301-415-7836
Larry Bell	NRC/NMSS/DWM	301-415-7302
Leslie Fields	NRC/NMSS/FCSS	301-415-6267
Ronald B. Uleck	NRC/NMSS/DWM	301-415-6722
John Hickey	NRC/NMSS/DWM	301-415-7234
Louis Carson	NRC/RIV/DNMS	817-860-8221
Garrett Smith	NRC/NMSS/FCSS	301-415-8118

**Attachment**

sub nom *Kirk v. Mullen*, 749 F.2d 297 (6th Cir. 1984).

Consequently, Judge Randall recommended that if the Deputy Administrator determines that the DEA precedent remains viable, Respondent's DEA Certificate of Registration should be revoked.

The Deputy Administrator agrees with Judge Randall that the plain language of U.S.C. 824(a)(3) states that a DEA registration may be revoked if a registrant's state authorization is revoked, suspended, or denied by competent state authority. However, this leaves DEA in a dilemma since pursuant to 21 U.S.C. 823(f), DEA can only register a practitioner if he is authorized by the state to handle controlled substances, and there is no provision in the statute to deal with situations where a practitioner is no longer authorized by the state, yet his state registration was not revoked, suspended, or denied.

Since state authorization was clearly intended to be a prerequisite to DEA registration, Congress could not have intended for DEA to maintain a registration if a registrant is no longer authorized by the state in which he practices to handle controlled substances due to the expiration of his state license. Therefore, it is reasonable for DEA to interpret that 21 U.S.C. 824(a)(3) would allow for the revocation of a DEA Certificate of Registration where, as here, a registrant's state authorization has expired.

Therefore, the Deputy Administrator concludes that Respondent is not currently authorized to handle controlled substances in New Mexico, and that consistent with DEA precedent, DEA cannot maintain his registration in that state.

Since DEA does not have the authority to maintain Respondent's DEA registration because he is not currently authorized to handle controlled substances in New Mexico, the Deputy Administrator concludes that it is unnecessary to determine whether Respondent's DEA registration should be revoked based upon the other grounds alleged in the Order to Show Cause.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104, hereby orders that DEA Certificate of Registration BL 1242750, previously issued to William D. Levitt, D.O., be, and it hereby is, revoked. The Deputy Administrator further orders that any pending applications for renewal of such registration, be, and they hereby

are, denied. This order is effective October 14, 1999.

Dated: August 24, 1999.

Donnie R. Marshall,

Deputy Administrator.

[FR Doc. 99-23668 Filed 9-13-99; 8:45 am]

BILLING CODE 4410-09-M

## NATIONAL CREDIT UNION ADMINISTRATION

### Sunshine Act Meetings

**TIME AND DATE:** 2:30 p.m., Thursday, September 16, 1999.

**PLACE:** Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, Virginia 22314-3428.

**STATUS:** Open.

#### MATTERS TO BE CONSIDERED:

1. Proposed Amendment to IRPS 99-1: Establishing Low-Income Member Service Requirement.
2. Two (2) Requests from Federal Credit Unions to Convert to Community Charters.
3. Request from a Corporate Federal Credit Union for a National Field of Membership Amendment.
4. Request for a Merger of Two Corporate Federal Credit Unions.
5. Proposed Rule: Amendment to Part 701, NCUA's Rules and Regulations, Share Overdraft Accounts.
6. Proposed Rule: Amendments to Parts 724 and 745, NCUA's Rules and Regulations, Individual Retirement Accounts in Puerto Rico Federal Credit Unions.
7. Board Resolution to Clarify Board Policy and Agency Procedures on Community Charter Conversions as per IRPS 99-1.

**RECESS:** 3:45 p.m.

**TIME AND DATE:** 4:00 p.m., Thursday, September 16, 1999.

**PLACE:** Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, Virginia 22314-3428.

**STATUS:** Closed.

#### MATTERS TO BE CONSIDERED:

1. Administrative Action under Part 704 of NCUA's Rules and Regulations. Closed pursuant to exemption (8).
2. Two (2) Personnel Matters. Closed pursuant to exemptions (2) and (6).

**FOR FURTHER INFORMATION CONTACT:** Becky Baker, Secretary of the Board, Telephone (703) 518-6304.

Becky Baker,

Secretary of the Board.

[FR Doc. 99-24036 Filed 9-10-99; 1:01 pm]

BILLING CODE 7535-01-M

## NUCLEAR REGULATORY COMMISSION

[Docket No. 40-7580]

### Notice of Consideration of Amendment Request for Construction of a Containment Cell at Fansteel Facility in Muskogee, Oklahoma and Opportunity for Hearing

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of consideration of amendment request for construction of a containment cell at Fansteel Facility in Muskogee, Oklahoma and opportunity for hearing.

The U.S. Nuclear Regulatory Commission (the NRC) is considering an amendment to Source Material License No. SMB-911, issued to Fansteel, Inc. (the licensee), for construction of a low-level, radioactive waste (LLW) disposal cell (containment cell) onsite at Fansteel's facility in Muskogee, Oklahoma. The containment cell would be used for permanent disposal of Fansteel's own LLW, i.e., contaminated soil and soil-like materials, generated from past and current metal recovery operations at the Muskogee, Oklahoma facility. The licensee requested the amendment in a letter dated August 13, 1999.

The Fansteel site is in active operation for the recovery of tantalum, niobium, scandium, uranium, thorium, and other metals of commercial value from process waste residues. Process waste residues and contaminated soil at the Fansteel site are the result of past operations involving acid digestion of foreign and domestic ores and slags containing natural uranium and thorium. The licensee is not scheduled to terminate License SMB-911 until after 10 to 12 years of additional waste residue reprocessing.

The contaminated soil onsite consists of over 0.68 million cubic feet of soil and soil-like material, e.g., building rubble, that are contaminated with natural uranium and thorium. Metal recovery operations are not feasible on this large volume of dilute, contaminated soil; therefore, these materials require disposal at an appropriate LLW disposal facility. The licensee has proposed to construct a containment cell, located at the southwest of the Fansteel property for disposal of its LLW. In accordance with the NRC's criteria for license termination (10 CFR 20.1403), the containment cell area would, after completion of disposal, be released for restricted use and be subject to long-

term monitoring, maintenance, and surveillance.

The proposed containment cell is to be buried beneath the surface and is comprised of a monolith and an engineered cover. The monolith consists of solidified, contaminated soil and rubble. The solidification process involves mixing the contaminated materials with cement and hydrated calcium chloride, forming a solid, concrete-like monolith. The monolith is to be protected from the surface environment by means of an engineered cover, comprising layers of sand, gravel, riprap (crushed stone), and soil.

Approval of the proposed action would permit Fansteel to excavate the cell area, create the waste monolith, cover the monolith, and release the site area for restricted use under 10 CFR 20.1403.

Prior to the issuance of the proposed action, the NRC will have made findings required by the Atomic Energy Act of 1954, as amended, and the NRC's regulations. These findings will be documented in a Safety Evaluation Report and an Environmental Assessment or Environmental Impact Statement (if necessary). If the proposed action is approved, it will be documented in an amendment to SMB-911.

The NRC hereby provides that this is a proceeding on an application for amendment of a license falling within the scope of Subpart L, "Informal Hearing Procedures for Adjudication in Materials Licensing Proceedings," of NRC's rules and practice for domestic licensing proceedings in 10 CFR part 2. Pursuant to § 2.1205(a), any person whose interest may be affected by this proceeding may file a request for a hearing in accordance with § 2.1205(d). A request for a hearing must be filed within thirty (30) days of the date of publication of the **Federal Register** notice.

**The request for a hearing must be filed with the Office of Secretary either:**

1. By delivery to the Docketing and Service Branch of the Secretary at One White Flint North, 11555 Rockville Pike, Rockville, MD 20852-2738, between 7:45am and 4:15pm, federal workdays; or

2. By mail or telegram addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Attention: Rulemaking and Adjudication Staff.

In addition to meeting other applicable requirements of 10 CFR part 2 of the NRC's regulations, a request for a hearing filed by a person other than an applicant must describe in detail:

1. The interest of the requester in the proceeding;

2. How the interest may be affected by the results of the proceeding, including the reasons why the requestor should be permitted a hearing, with particular reference to the factors set out in § 2.1205(h).

3. The requester's areas of concern about the licensing activity that is the subject matter of the proceeding; and

4. The circumstances establishing that the request for a hearing is timely in accordance with § 2.1205(d).

In accordance with 10 CFR 2.1205(f), each request for a hearing must also be served, by delivering it personally or by mail to:

1. The applicant, Fansteel, Inc., Number Ten Tantalum Place, Muskogee, OK, 74403-9296; Attention: Mr. John J. Hunter; and

2. The NRC staff, by delivering to the Executive Director for Operations, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852-2738, or by mail, addressed to the Executive Director for Operations, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

Questions with respect to this action should be referred to NRC's project manager for Fansteel, Inc., Michael Adjodha, at (301) 415-8147 or by electronic mail at meal@nrc.gov.

For further details with respect to this action, the application for amendment request is available for inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC 20555.

For the Nuclear Regulatory Commission.

Dated at Rockville, Maryland, this 8th day of September, 1999.

**Theodore S. Sherr,**

*Chief, Licensing and International Safeguards Branch, Division of Fuel Cycle Safety and Safeguards, NMSS.*

[FR Doc. 99-23905 Filed 9-13-99; 8:45 am]

BILLING CODE 7590-01-P

## NUCLEAR REGULATORY COMMISSION

### Applications for Licenses To Export Nuclear Material

Pursuant to 10 CFR 110.70 (b) "Public notice of receipt of an application", please take notice that the Nuclear Regulatory Commission has received the following application for an export license. Copies of the application are on file in the Nuclear Regulatory Commission's Public Document Room located at 2120 L Street, NW, Washington, DC.

A request for a hearing or petition for leave to intervene may be filed within 30 days after publication of this notice in the **Federal Register**. Any request for hearing or petition for leave to intervene shall be served by the requestor or petitioner upon the applicant, the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington DC 20555; the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555; and the Executive Secretary, U.S. Department of State, Washington, DC 20520.

In its review of the applications for licenses to export nuclear grade graphite and heavy water as defined in 10 CFR part 110 and noticed herein, the Commission does not evaluate the health, safety or environmental effects in the recipient nation of the material to be exported. The information concerning the application follows.

### NRC EXPORT LICENSE APPLICATION

Name of Applicant, date of application, date received, application no.	Description of items to be exported	Country of destination
Cambridge Isotope Laboratories, Inc., 08/30/99, 08/31/99, XMAT0398.	Heavy Water to Canada for upgrading.	Canada.

Dated this 8th day of September 1999, at Rockville, Maryland.

For the Nuclear Regulatory Commission.

**Janice Dunn Lee,**

*Director, Office of International Programs.*

[FR Doc. 99-23904 Filed 9-13-99; 8:45 am]

BILLING CODE 7590-01-P

## POSTAL RATE COMMISSION

[Docket No. C99-4; Order No. 1260]

### Complaint Concerning Bulk Parcel Return Service Fee

**AGENCY:** Postal Rate Commission.

**ACTION:** Notice of a new complaint docket.

**SUMMARY:** The Commission is instituting a docket to consider a complaint regarding the consistency of the \$1.75 fee for Bulk Parcel Return Service (BPRS) fee with postal law and policies. It is also authorizing settlement discussions and discovery. These steps will foster expeditious consideration of issues raised in the complaint.

**DATES:** Participants may explore the potential for settlement until September

## Muskogee Phoenix

## Don't dump nuclear waste close to rivers

The Arkansas and Illinois rivers are vital state resources that should be protected from the threat of further contamination — particularly from nuclear waste.

So we support Oklahoma Attorney General Drew Edmondson's opposition to dumping low-level radioactive waste at two sites — one in Muskogee, the other outside of Gore — near those rivers.

The Muskogee site "may injure the health, safety and welfare of Oklahoma's citizens, who rely upon waters in the Arkansas River for drinking, irrigation and livestock uses, and may injure Oklahoma's natural resources, including its air, land, waters and wildlife," the Attorney General's Office warned in a document it filed with the federal Nuclear Regulatory Commission.

Many of those concerns apply to the proposed Illinois River site, too.

Dumping radioactive waste where it potentially could contaminate rivers is not acceptable. The companies involved and the federal nuclear board should find other, safer sites.

Editorials in "Editorially Speaking" are the institutional opinions of the Muskogee Daily Phoenix's six-member Editorial Board. Columns, commentaries, letters and cartoons on the Opinion Page are the views of their respective writers and artists and do not necessarily reflect the opinions of the Editorial Board.

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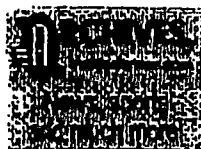
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## EPA officials say 3 firms want Shattuck waste

Companies plan to make nuclear fuel rods

By Berny Morson  
Denver Rocky Mountain News Staff Writer

The mound of radioactive soil in a south Denver neighborhood could become part of nuclear fuel rods, Environmental Protection Agency officials said Thursday.

The EPA's Washington office has heard from three companies that want to use the waste at the defunct Shattuck Chemical Co. site, 1805 S. Bannock Street, said Tim Fields, the EPA's second-in-command. He declined to name the firms but said they are from Colorado, Utah and New Mexico.

People who live near the waste pile have been begging the EPA for more than a decade to do something about the stuff.

If the offer by private firms to make Denver's biggest environmental headache go away seems too good to be true -- it may well be, EPA officials warned.

"This stuff is not gold," said Jim

September 13, 1999  
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Rocky Ford

Hanley of the EPA's Denver office. He is looking into the possibility that the soil could have commercial uses.

The companies will want to be paid to haul the soil away, Hanley said. That might be cheaper than the EPA or some other agency hauling the stuff to a dump in Utah, the other alternative, but it's not free, he said.

Still, the fact that the EPA is considering the idea shows that "ingenuity is possible" at the federal agency, said Jack Unruh, a leader of area residents who are fighting to be rid of the mound.

"It's just a matter of whether you have a reason to be ingenious," he said, referring to the pressure from Colorado's elected officials to solve the problem.

The Shattuck site was contaminated by processing of radium and other materials earlier this century. The company was allowed to bury the waste on-site, even though waste from 10 similar Denver sites was hauled to the Utah dump.

The material was mixed with flyash to create a mound about one story high.

Fields was in Denver on Thursday to meet with neighborhood residents and officials of state and city health agencies about the Shattuck problem. He has promised a report by November on what to do with the site.

Fields said the waste is not a threat to the neighborhood in the immediate future. But a private firm hired to analyze the site is not convinced the agency gave enough consideration to long-term problems such as pollution of groundwater.

**September 10, 1999**

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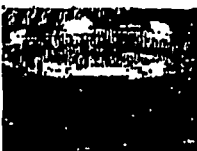
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## Expert says cap at waste site to last 15 years

EPA official disputes original estimate given Overland residents about Shattuck project

By Berny Morson  
 Denver Rocky Mountain News Staff Writer

A clay cap designed to contain radioactive dirt on a South Denver site will last 15 years at most, not 200 years as the public was promised, the Environmental Protection Agency's top disaster expert warned Saturday.

And the cap contains no monitors to tell officials when the cap has started letting water drip into the radioactive waste below, warned Joseph Laforanara, the director of the EPA's Environmental Response Team.

"One indication (of cracking) is if you see weeds growing out of it," he said.

Laforanara said state-of-the-art monitors could cost as much as hauling the radioactive material away - precisely the remedy residents of the surrounding Overland neighborhood have been demanding for a decade.

Laforanara's comments came during an all-day hearing before EPA ombudsman Robert Martin, who is investigating why the defunct S.W. Shattuck Co. was allowed to bury low-level radioactive waste at its operating site in the middle of the working class neighborhood northeast of Santa Fe Boulevard and East Evans Avenue.

September 20, 1999

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Similar waste from 10 other sites and Rocky Flats was taken to a remote dump in Utah.

Martin will report to Tim Fields, the EPA's second in command, who has promised a decision in November on what to do with the waste.

In addition to Laformara, Martin heard from area residents who said local EPA officials ignored their pleas to remove the waste.

Deb Sanchez, who can see the waste site from her kitchen window, said local EPA officials told her repeatedly that the radioactive material is safe.

"I love this country, I believe in the Constitution," she said. "But I can no longer trust what my government tells me."

Sanchez's neighbor, Helene Orr, said residents were treated as an "irritant" when they tried to make their case to local EPA officials and the Colorado Health Department. Meanwhile, the same officials met privately with Shattuck's attorneys, who made the case for burial.

Documents released by the EPA under pressure from U.S. Sen. Wayne Allard show numerous contacts between the regulators and Shattuck lawyer John Faught in 1991, when the agency and the Colorado Health Department agreed to let the company bury waste in the city.

The documents "corroborate what we felt -- that we had been lied to continuously," Orr said. She said her trust in government is undermined "when you have an agency that sits in the back room with polluters and has an attitude toward our community."

Rhoda Whitehead said the mound was permitted "just for the greed and selfishness of the few, not for the welfare of the environment."

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Shattuck officials did not attend the hearing, despite repeated invitations, said Hugh Kaufman, Martin's investigator. Faught said earlier that EPA records are sufficient to explain how the decision was made to bury the waste.

EPA officials said earlier they were not swayed by meetings with Faught.

EPA Regional Director William Yellowtail said Saturday he empathizes with people who want the waste removed, but studies now in progress will determine the next step.

"What we need now is science," he said after the hearing. "Probably people are impatient with that. But where we are now is, we're going to have to find a scientific justification to trigger what these folks (the residents) want, which is removal."

The Shattuck site was contaminated by processing of radium and other heavy metals earlier in the 20th century.

Lawyers for Shattuck, a subsidiary of the giant Solomon Brothers Co. of New York, favored on-site burial because it was cheaper than shipping it to Utah. Shattuck or the parent firm was required to pay for the remedy.

Shattuck lawyers also feared they would share liability if the Utah burial site were someday found in violation of environmental laws.

The EPA and the Colorado Health Department allowed the company to mix the waste with cement and flyash and pile it on the site. The mound of waste was covered with a clay cap and large rocks. It was surrounded by a chainlink fence topped with barbed wire.

At the Saturday hearing, Laforanara, the emergency management expert, said the mound is not dangerous -- yet.

"I wouldn't lose any sleep over it today," he said.

But in a few years, tiny cracks will develop in the clay cap, he said. In the winter, water will get into the cracks and freeze, eventually breaking up the clay.

At that point water will be able to drip into the radioactive material and carry it into the groundwater below, he said.

No one will know when that process begins because there are no monitors, he said. But it will be in five to 15 years, not a minimum of 200 years as required by federal clean up laws, he said.

Laformara said a study is needed to determine the exact cost of monitors, but it won't be cheap.

Much of the mound may have to be opened to put the monitors in. And then there's maintenance for 200 years.

"It's not a minimum wage person," he said of the workers who maintain sophisticated monitors.

How those costs compare with shipping the stuff to Utah is unclear.

Craig Thorley of Envirocare, the Utah burial firm, estimated the job could be done for \$15 million. Later he said that figure assumes the cement with which the waste is mixed doesn't have to be broken up with jackhammers.

Laformara said the area needs at least 17 more wells to monitor groundwater, a recommendation made earlier by the U.S. Geological Survey. The site is surrounded by 12 wells.

Data from those wells is inconclusive as to whether pollution in the water is getting better or worse since the cap was installed, Laformara said.

*September 19, 1999*

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## Shattuck cap is vulnerable, 2nd study says

By Berny Morson

Denver Rocky Mountain News Staff Writer

An independent study group is the second to warn that a clay cap may not be able to contain a radioactive waste pile in south Denver.

Water could get through the cap and wash the material into groundwater and, eventually, the South Platte River, according to a report by the engineering firm SC&A, Inc.

The report comes one week after the Environmental Protection Agency's top disaster expert warned that the cap will start disintegrating in 15 years at most, not the 200 years the public was promised.

John Darabaris of SC&A's Denver office said Tuesday the two assessments of the cap were reached independently.

The EPA approved burying the waste at the defunct Shattuck Chemical Co., 1805 S. Bannock St. Similar waste from 10 other sites was shipped to Utah for burial.

Residents of the Overland neighborhood have argued for more

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than a decade that the material should be moved.

The SC&A report was commissioned by the EPA as part of a required five-year review of pollution sites. Top EPA officials say the report is among items they will consider in deciding whether the material must be moved.

The cap was constructed by the Shattuck Co., which still owns the property.

Shattuck attorney John Faught said the cap followed designs approved by the EPA and the Colorado Health Department.

"Shattuck has done the job it was ordered to do," Faught said.

But the SC&A report says the cap was designed with a computer model that underestimated the ability of water to get through the clay. The model is no longer used.

If a large amount of snow falls on the cap, then melts, it could pass through the cap, carrying radioactive material into the soil below, the report says.

**September 29, 1999**

**advocate says**

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The Denver Post

## EPA confirms its call to move Shattuck waste

By Mark Eddy  
Denver Post Environment Writer

**Dec. 24** - The Environmental Protection Agency on Thursday took another major step toward moving the Shattuck radioactive waste out of Denver when it officially changed its recommendation for cleanup from onsite disposal to offsite.

The action - reversing a Superfund cleanup decision after the work has been completed - is unheard of, said Barry Levene, head of the Denver office's Superfund department.

"It's pretty significant," Levene said. "This is one of the first times - if not the only time - in the country that a remedy decision has been changed because of new information."

Tim Fields, EPA's national head of the Superfund program, announced in November that the agency had decided the waste must be shipped off the six-acre plot at 1805 S. Bannock St. Thursday's action legally opens the record of decision, which is the legal document that dictates the cleanup.

The EPA will take public comment through at least Feb. 1 on three options: leaving the waste in place but installing more monitoring wells; substantially revamping the current remedy; and moving the waste to a licensed disposal facility - the EPA's preferred alternative. A final decision is expected in March or April, Levene said.

The waste should have been moved seven years ago, said neighbors, who since 1992 have been fighting to force the EPA to move the more than 50,000 cubic yards of dirt contaminated with uranium, radium and heavy metals.

"It's the way it should have been handled in the beginning," said Bob Sperling, one of a large group of determined residents who ultimately helped force the EPA to Thursday's action. "What's being done now would have been the appropriate action in the initial decision."

The EPA's plan is to build a dome over the monolith to contain dust. The rock-and-clay cap would be removed and the concrete and flyash monolith entombing the contaminated dirt would be chipped apart. A conveyor belt would transfer the rubble to trucks or railcars.

Essentially, the EPA is back where it was in 1991, when it said that moving the waste was the preferred cleanup method. A year later, the agency shocked residents and city officials when it said the waste would remain in place.

Nearby residents immediately began their fight to force the EPA to move the waste. They were joined by city officials and eventually by Sen. Wayne Allard, R-Colo., and Rep. Diana DeGette, D-Colo.

It's not likely the EPA will change its preferred alternative this time, Levene said.

"We do know a lot more today than we knew last time. We had a panel of scientific experts come in and look at the cleanup," Levene said.

Those experts concluded that while there was no short-term danger to human health, the monolith was most likely not sufficient for the long term. One expert said the clay cap could begin to deteriorate within 15 to 20 years.

The land was used by Shattuck Chemical Co. - now owned by Citigroup - from the 1920s until the early 1980s to process radium. During the processing, chemicals leaked into the dirt and contaminated it with uranium, radium and thorium - which remain radioactive and a health threat for thousands of years - as well as heavy metals.

Shattuck spent \$26 million to build the monolith and isn't willing to pay the estimated \$21 million to move the waste now, said John Faught, the lawyer representing Citigroup and Shattuck.

"It's clear to us that this is a political decision, and being a political decision, there's no basis to ask Shattuck to pay a second time," Faught said. While city officials are pleased the process is moving forward, they're wary, said Theresa Donahue, Denver's manager of environmental health.

"We will be very involved in providing comments to ensure this time the preferred alternative moves forward - unlike what happened in 1991," she said.

Language in the document released Thursday is already proving controversial. The document states that leaving the waste onsite would protect human health and the environment.

That means Shattuck shouldn't have to pay to move chip apart the monolith and move it, Faught said.

But the city's not buying that, Donahue said.

Leaving the waste onsite "would violate the law; it doesn't meet legal requirements," she said.

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## First legal step taken in Shattuck cleanup

EPA files to reverse decision to store waste

By Berny Morson  
 Denver Rocky Mountain News Staff Writer

The Environmental Protection Agency Thursday took the first legal step in removing radioactive waste from Denver's Overland Park Neighborhood.

EPA officials in November promised Colorado elected leaders that the waste will go. The agency's 1991 decision allowing the defunct Shattuck Chemical Co. to bury the material at the 5.8-acre site has been under continuous fire from the neighborhood.

In its action Thursday, the EPA issued a formal proposal reversing the 1991 decision. The proposal will be the subject of formal hearings, with a final EPA decision by March.

Removal would take three to four years and would cost an estimated \$20 million, the proposal says.

Just how the material would be dug up and shipped -- and where it will go -- is still to be determined, said Barry Levene, who oversees Superfund projects at the EPA's Denver office. Some of the details will become part of the bidding process among companies that want to haul the stuff away.

Levene said he would like work to begin by late summer or fall.

December 30

Geomagnetic sun storms could wreak havoc on Earth

Newest atomic clock unveiled in Boulder in time for new year

Man held after shot fired in KUSA lobby

Y2K missile attack won't occur, Russian vows

Poll: Coloradans cautious on Y2K

Report: 1 in 3 teens smoke

2000 to evoke varied responses

FBI opens command post in Denver as Y2K nears

Girl, 13, shot to death while playing with firearm

Hoarding under way for Y2K

E-470 traffic and revenue accelerate

Deal with mall expected to ease Boulder parking pinch



The waste was left behind by metals processing from 1917 to 1984.

**Webb says drug abuse disturbing**

Overland Neighborhood resident Jack Unruh said Thursday's action "does a good job of getting the process started" of removing the material.

**Would-be robber killed in holdup**

**Koby joins investment firm**

John Faught, an attorney for Shattuck, noted that the new plan acknowledges that burying the material on the site was adequate to protect public health. That issue will become important in the expected legal battle between Shattuck and the EPA over who pays to remove the material.


**U.S. attorney's office nets \$31 million in fines**

Contact Berny Morson at (303) 892-5072 or [morsonb@rockymountainnews.com](mailto:morsonb@rockymountainnews.com).

***December 24, 1999***

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## Water Safety Concerns Spurred Cleanup Plan

Saturday,  
January 15, 2000

BY JIM WOOLF  
THE SALT LAKE  
TRIBUNE

MOAB -- Utah officials have haggled for years over what to do about the Atlas uranium mill tailings. But it wasn't until the Metropolitan Water District of Southern California got involved that the U.S. Department of Energy was willing to act.

On Friday, DOE Secretary Bill Richardson made his plan for moving the tailings pile official, addressing the fears of Los Angeles water officials that the water supply for millions of Southern Californians would be threatened if the 10.5 million tons of radioactive dirt were left on the flood plain of the Colorado River.

Californians won't be the only ones to benefit from Richardson's plan. The Northern Ute tribe in Utah will receive 84,000 acres in a land exchange to pay for moving the tailings. Richardson said it would be the largest voluntary return of land to American Indians in the lower 48 states in more than a century.

Last year, the U.S. Nuclear Regulatory Commission (NRC) decided to leave the dirt where it is and simply cover it with a protective cap of rock and soil. But water officials in California, Nevada and Arizona disagreed with the decision.

"Sixty-five percent of our water comes from the Colorado River," said Phillip Pace, chairman of the powerful Metropolitan Water District of Southern California.

NRC studies showed that toxic metals, solvents and radioactive material in the tailings pile would



U.S. Energy Secretary Bill Richardson points to an old Atlas uranium mill tailings pile (flat area) near Moab that will be cleaned up under a plan unveiled Friday. The deal includes returning 84,000 acres to the Northern Ute tribe, one of the biggest givebacks of American Indian land in U.S. history. (Mickey Krakowski/The Associated Press)



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continue to seep into the Colorado. Contamination levels would be extremely low, but downstream users worried about the long-term consequences of drinking the water.

So the water users joined with Utah's political leaders, who also opposed the NRC proposal, to request that the tailings be moved to a disposal site farther from the river. In addition, they asked DOE to do the work since that agency has cleaned up 22 other abandoned uranium mills around the country.

"We're doing this for our children, our grandchildren and generations to come," explained Pace:

Richardson gave them what they wanted Friday. He announced that DOE will request legislative approval to take control of the Atlas site and then request funding to move the waste to a specially constructed disposal site somewhere away from the river. The Grand County Council wants to see the tailings shipped by rail to a previously identified disposal site about 18 miles north of Moab, said Council Chairwoman Kimberly Schappert.

Before arriving in Moab, Richardson met with leaders of the Northern Ute tribe in Fort Duchesne to announce plans to give them 84,000 acres of land in Naval Oil Shale Reserve No. 2, located east of the Green River and adjacent to the existing Uintah and Ouray Reservation.

One stipulation of the transfer is that the tribe will return to DOE about 8 percent of any royalties it receives from oil and gas development on the land. The money will be used to help pay for cleaning up the Atlas site. Another stipulation is that the tribe will cooperate with the U.S. Bureau of Land Management to preserve a 75-mile-long section of the Green River through Desolation and Gray canyons. The east side of the popular canyon is owned by the tribe.

"Today we are doing the right thing," said Richardson. "The right thing for the environment, the right thing for the Utes, the right thing for the state of Utah and the right thing for the American people." The land, which is believed to contain oil-rich shale deposits, was given to the Utes in 1882.

He offered special praise for two Utahns: Gov. Mike Leavitt for helping to move the projects along, and actor and filmmaker Robert Redford for inspiring in him an "environmental ethic."

Utah Rep. Chris Cannon predicted that convincing Congress to approve the land transfer to the Utes would be "very simple."

Finishing the Atlas cleanup will be more challenging, he said. While having the Clinton administration's support is "critical," Cannon said, many problems need to be resolved in Congress.

For example, Cannon anticipates opposition from some key lawmakers to allowing DOE to take control of the Atlas cleanup. Some members of Congress

don't want to see DOE given any more responsibilities, he said.

Cannon also predicted a long struggle convincing Congress to come up with the estimated \$300 million needed to clean up the Atlas site.

Rep. George Miller, senior Democrat on the House Resources Committee and a California resident, issued a statement Friday praising Richardson's decision on the Atlas issue and offering his help at solving the remaining problems.

"I look forward to reviewing the specifics of this proposal and working with the Secretary and my colleagues to ensure that the Department of Energy is given the tools and resources to ensure the safety of drinking water for millions of Americans," said Miller.

Despite the obstacles, Cannon was optimistic the Atlas site will be cleaned up one day. Pointing toward the tailings pile, he predicted: "That won't be there in 10 or 15 years."

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**MAPS SHOWING PRINCIPAL GROUND-WATER RESOURCES  
AND RECHARGE AREAS IN OKLAHOMA:**

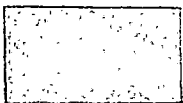
**SHEET 1 — UNCONSOLIDATED ALLUVIUM AND TERRACE DEPOSITS**

Compiled by  
Kenneth S. Johnson  
Oklahoma Geological Survey

1983

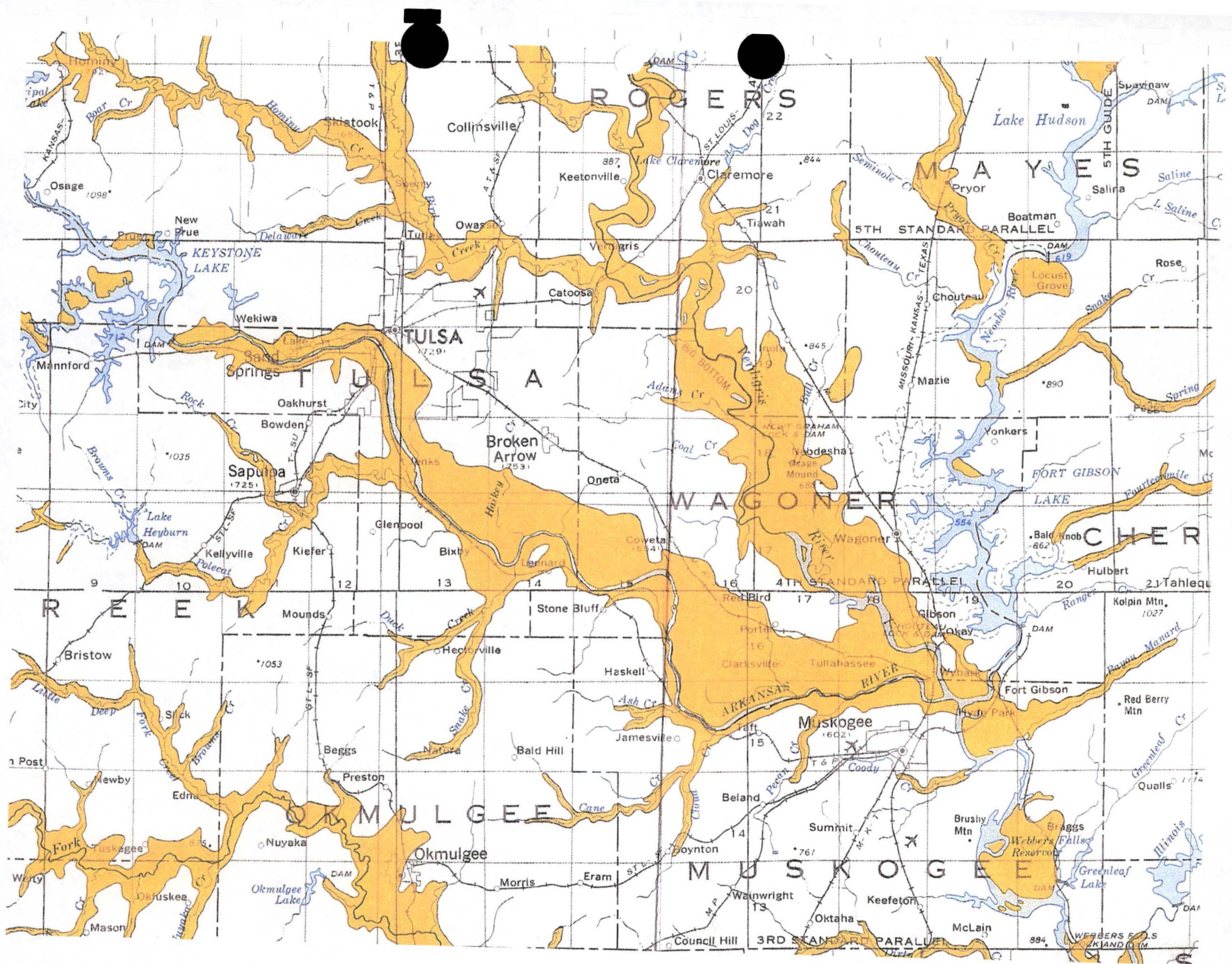
SECOND PRINTING, 1993

## EXPLANATION

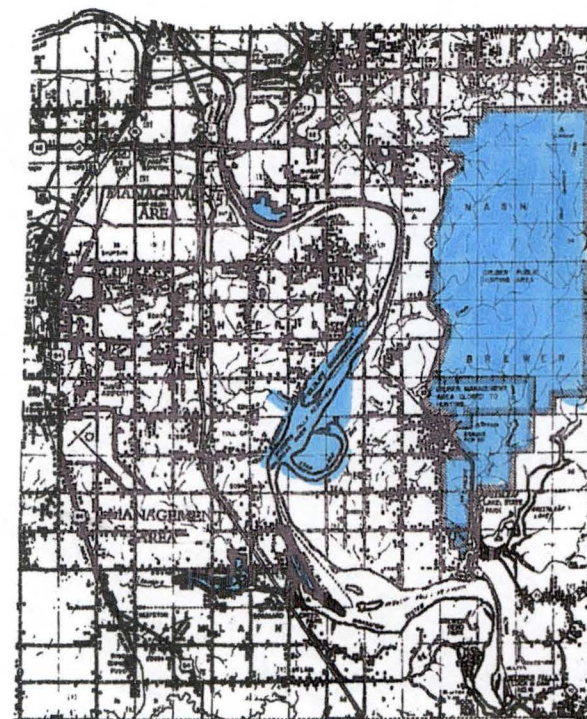
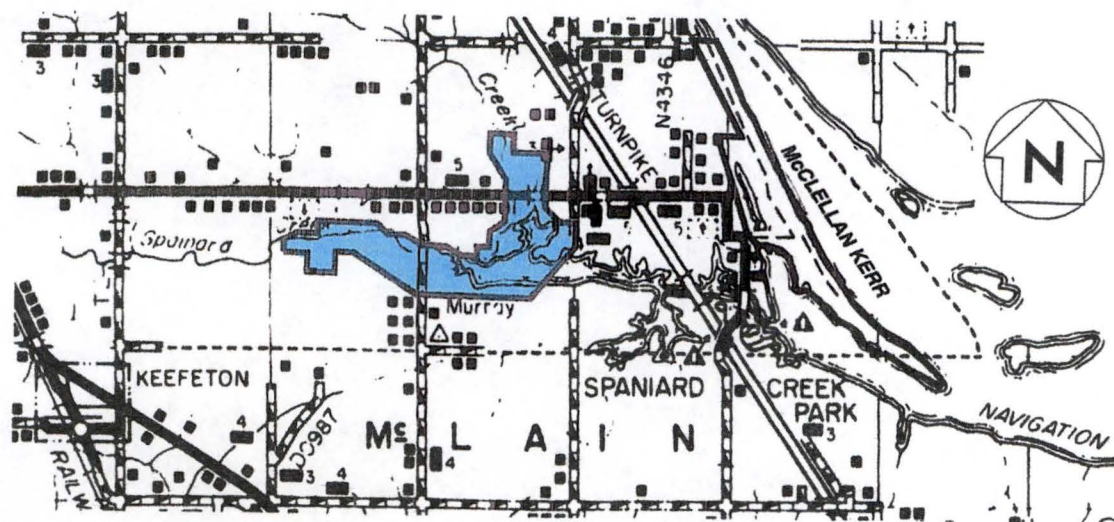
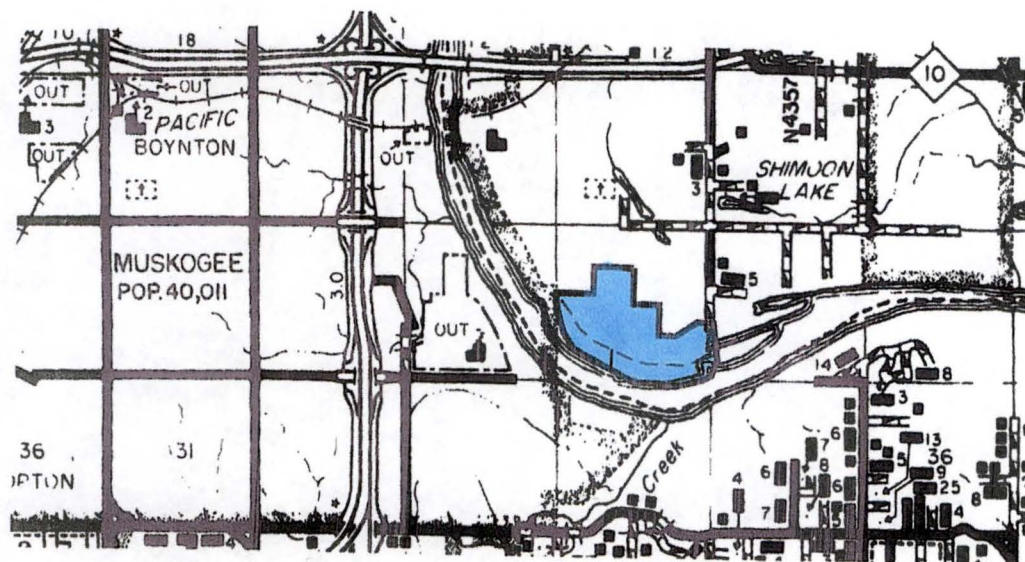


**Alluvium and Terrace Deposits (Quaternary in age).** Unconsolidated deposits of sand, silt, clay, and gravel that occur along or adjacent to modern and ancient rivers and streams. Thickness generally ranges from 10 to 50 ft. (locally as much as 100 ft.). Wells generally yield 10 to 500 gpm of water (locally several thousand gpm), and most water is of good quality (less than 1,000 mg/L). Recharge areas are essentially the same as distribution of the alluvium and terrace deposits.

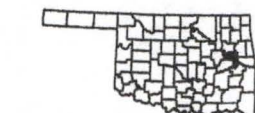






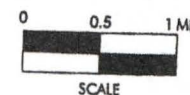


VICINITY MAP

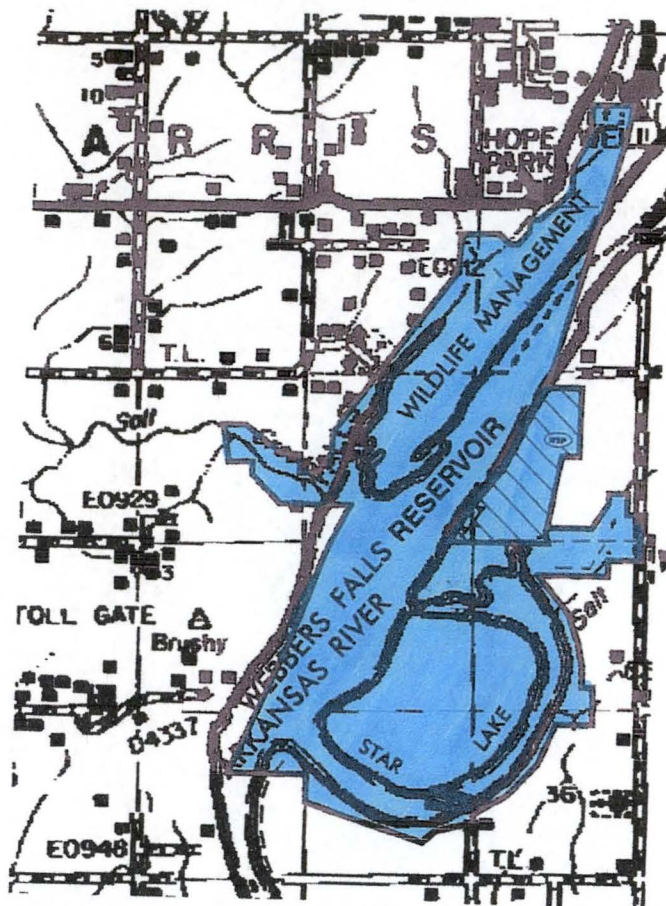


LOCATION: MUSKOGEE COUNTY

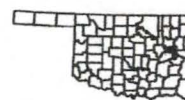
# **McCLELLAN-KERR** **WEBBERS FALLS UNIT** (SHEET 1 OF 3)



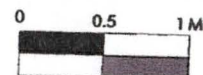




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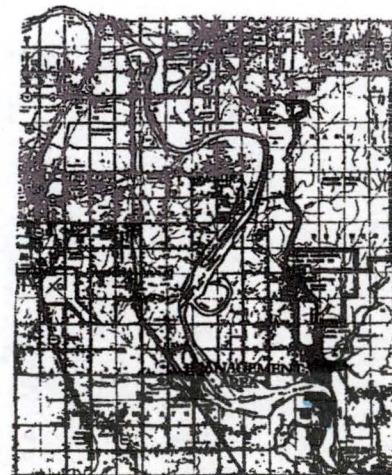
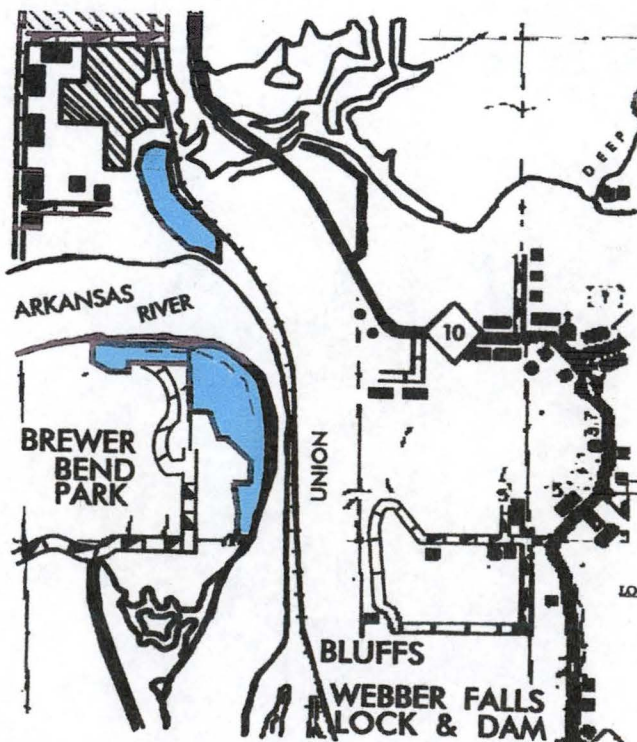


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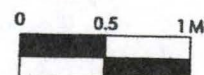
**McCLELLAN-KERR**  
**WEBBERS FALLS UNIT**  
 (SHEET 2 OF 3)



VICINITY MAP



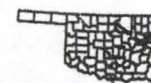
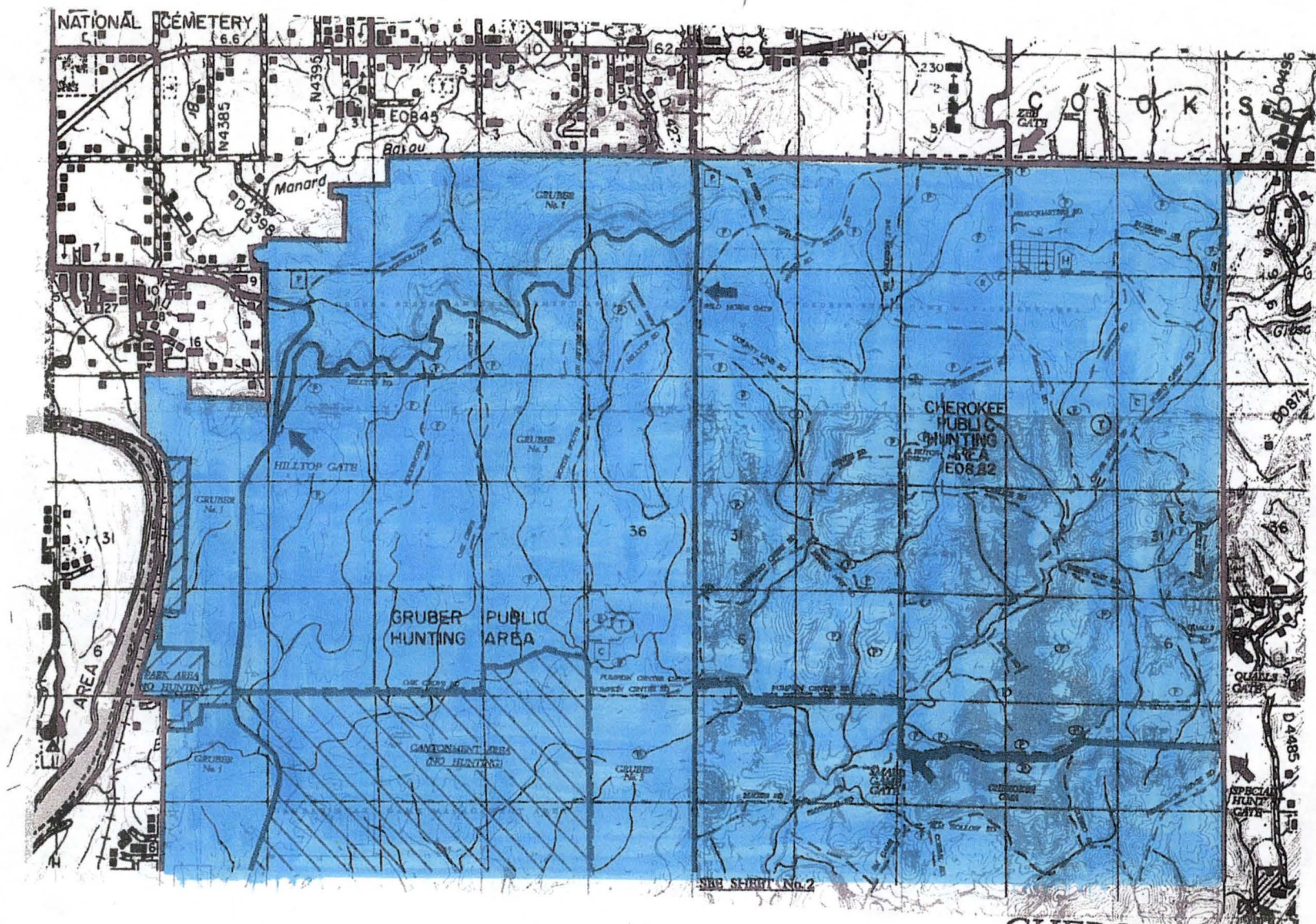
LOCATION: MUSKOGEE COUNTY



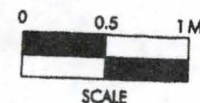
SCALE

**McCLELLAN-KERR**  
**WEBBERS FALLS UNIT**  
 (SHEET 3 OF 3)





LOCATION: MURKIN & CHEROKEE CO.



CHEROKEE GRUBER  
(SHEET 1 OF 2)





**Table 3**  
**Decommissioning Funding Plan**  
**Cost Estimating Table for Financial Assurance**  
**Fansteel Inc.**  
**Muskogee, Oklahoma**

Item	Quantity	Unit	Unit Cost	Total Cost
13a. Diversion Ditch	7000	square yards	\$1.28	\$8,960
13b. Erosion Control	5000	square yards	\$0.72	\$3,600
<b>Total Cost</b>				<b>\$3,190,510</b>
E. Final Radiation Survey				
1. Survey Activities				
1a. Survey Team	3000	man-hours	\$25	\$75,000
1b. Oversight	500	man-hours	\$75	\$37,500
2. Laboratory	NA	NA	lump sum	\$20,000
<b>Total Cost</b>				<b>\$132,500</b>
F. Site Stabilization - Long Term Monitoring (4)	1	each	\$ 365,000	\$365,000
<b>Total Decommissioning Funding Cost</b>				<b>\$4,694,890</b>

- (1) NA = not applicable
- (2) Procurement costs for special equipment included in Item A.9 - Administration and Management
- (3) Investigation costs include 1000 hours of field technicians @ \$25/hr and 1000 hours of specialized technical support @ \$50/hr
- (4) Costs included in this Item are as follows:
- 365,000 cash bond discounted at 2% to yield \$7300/year to cover the following yearly maintenance expenses:
  - Groundwater monitoring - 2/year @ \$400/occ. = \$800/year
  - Reporting - 2/year @ \$400/occ. = \$800/year
  - Grass Mowing - 4 months @ \$500/month = \$2,000/year
  - Fencing Repair - \$1,200/year
  - Cell cover repair - \$1,000/year
  - Environmental Consultant - 20hr/yr @ \$75/hr = \$1,500/yr

W:\3789ze\vp\table3.xls





West Slope - Landfill Cell 12  
July 15, 1998





- } Type V Filter
  - } Granular Filter
  - } Liner/Drainage Net/Fabric
  - } Compacted Clay
  - } Slide Materials
- July 15, 1998





LANDFILL CELL 13 CLOSURE  
SLIPPAGE ON EAST SLOPE

FIGURE

1





LANDFILL CELL 13 CLOSURE  
OBSERVED SURFACE CRACKING





LANDFILL CELL 13 CLOSURE  
VERTICAL CRACKING IN  
SOIL COVER MATERIAL

FIGURE

3





LANDFILL CELL 13 CLOSURE  
SOIL ACCUMULATION AROUND  
PERIMETER CAP TOE

FIGURE

4





LANDFILL CELL 13 CLOSURE  
GEOTEXTILE FABRIC IN SOIL ACCUMULATION  
AROUND PERIMETER OF CAP TOE

FIGURE  
5



OFFICE OF ATTORNEY GENERAL  
STATE OF OKLAHOMA

February 2, 2000

Office of the Secretary  
Rulemakings and Adjudications Staff  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Re: **In the Matter of Fansteel, Inc. (Muskogee, Oklahoma Facility), U.S. Nuclear  
Regulatory Commission, Docket No. 40-7580-MLA, ASLBP No. 00-772-01-  
MLA**

Sir or Madam:

Enclosed please find an original State of Oklahoma's Counter-Statement in Opposition to Fansteel, Inc.'s Appeal, and three (3) conformed copies thereof, prepared for filing with the U.S. Nuclear Regulatory Commission in the referenced matter.

Upon receipt, please return the remaining file-stamped copy of the enclosed Counter-Statement in Opposition to Fansteel, Inc.'s Appeal to this office in the self-addressed, stamped envelope enclosed for that purpose.

Should you have any questions, please do not hesitate to call.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen L. Jantzen", written over a horizontal line.

STEPHEN L. JANTZEN  
ASSISTANT ATTORNEY GENERAL

SLJ/jr  
Enclosures



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**February 2, 2000**  
**Page 2**

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