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September 6, 1996

John C. Hoyle, Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

APPEAL OF INITIAL FOIA DECISION
96-A-012 C [96-286]
Rec'd 9-9-96

BY FAX: 301/415-1672

SUBJECT: Appeal From Initial FOIA Decision

Dear Mr. Hoyle:

On behalf of Native Americans for a Clean Environment ("NACE"), and pursuant to NRC regulations at 10 C.F.R. § 9.29, I hereby appeal the Nuclear Regulatory Commission's ("NRC's") August 2, 1996, denial decision in FOIA-96-286. That decision, which was made by Sandra M. Joosten, Executive Assistant to the Secretary, refused my request for a copy of Staff Requirements Memorandum ("SRM"), SECY-96-124, re: Financial Assurance for General Atomics Facilities (July 8, 1996). The decision alleges that the document is exempt from disclosure under Exemption 5 of the FOIA because it would inhibit the deliberative process. The decision also states that there are no reasonably segregable portions of the document, and therefore it is being withheld in its entirety.

Description of Known Information About Withheld Document

NACE, along with the Cherokee Nation, is an intervenor in an enforcement proceeding before the Atomic Safety and Licensing Board, in which General Atomics ("GA") and Sequoyah Fuels Corporation ("SFC") have contested a 1993 NRC enforcement order against them. The order requires GA and SFC to guarantee sufficient funding for the cleanup of the severely contaminated site of SFC's uranium processing operation. SFC and the NRC staff settled in 1995, and the Licensing Board approved the settlement. After about a year of negotiations, GA and the NRC staff recently submitted a proposed settlement agreement, which is pending before the Licensing Board.

During the past year, GA and the NRC staff repeatedly requested stays of discovery to provide them with more time to conduct settlement negotiations. Several of their motions for stays of

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discovery referred to the need to consider the impact of any proposed settlement between GA and the staff on the availability of decommissioning funds for GA's facilities in San Diego, California. For instance, in a May 6, 1996, joint motion for extension of the discovery stay, GA and the staff stated that:

As has been discussed in earlier proceedings before the Board, the resolution of this litigation may have a spillover effect on matters which are outside the scope of this proceeding and which are outside the jurisdiction of this Board. To reiterate, GA holds NRC licenses for a number of facilities in San Diego, California, including two TRIGA reactors, and hot cell and fuel fabrication facilities, for which GA has uncontested decommissioning liabilities. Any commitment of funds by GA to the Core facility in settlement of this proceeding may impact GA's responsibilities for its San Diego facilities. Any such impact must be weighed and considered by Staff not involved in the instant litigation, including Staff in the Office of Nuclear Reactor Regulation, as well as the Office of Nuclear Material Safety and Safeguards. Ensuring that the agency as a whole is aware of the larger picture involving GA has required, and continues to require, a significant amount of resources, and consequently, time. Thus, in addition to devoting energies to drafting settlement documents and negotiating final points, the Staff has been involved in focusing the agency as a whole on the various broader issues that the agency faces by reason of a settlement on the Sequoyah Fuels litigation. In particular, the agency must decide what may be appropriate courses of action if GA's voluntary contribution of resources to settle this litigation reduces its ability to comply fully with the regulations on financial assurance regarding the San Diego facility.

NRC Staff's and General Atomics' Joint Motion for Extension of Stay of Discovery Through June 14, 1996 at 2-3 (May 6, 1996) (emphasis added). In a subsequent discovery stay motion, GA and the staff represented that "the Commission has been provided a description of, and has until June 24, 1996, to object to the Staff's proposed course of action regarding the San Diego facilities." NRC Staff's and General Atomics' Joint Motion for Extension of Stay of Discovery Through July 1, 1996 at 2 (June 14, 1996).

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GA and the staff asserted that although the issues raised in the staff's correspondence with the Commission are "outside the scope" of the enforcement proceeding, they "must be resolved" before the proposed settlement between GA and the staff could be executed. *Id.* at 3. They also contended that "[b]y presenting to the Commission issues relating to the San Diego facilities, the Staff is not seeking any prejudgment of any matter currently in litigation, including any potential settlement that may be offered concerning the Sequoyah Fuels Gore facility." *Id.* at 2, note 3.

On July 11, 1996, GA and the NRC staff presented a joint motion for approval of a settlement in the contested enforcement proceeding. NRC Staff's and General Atomics' Joint Motion for Approval of Settlement Agreement. The motion asserted, *inter alia*, that "because GA holds NRC licenses for facilities in San Diego, California, and thus has regulatory financial obligations with respect to those facilities, consideration had to be given to any impact a settlement in this proceeding might have on GA's responsibilities with respect to the California facilities." *Id.* at 2. GA and the staff also continued to assert "that matters involving the California facilities are outside the scope of this proceeding and the jurisdiction of this Board." *Id.*, note 3.

Argument

The justification given by Ms. Joosten for withholding the SRM is that "[d]isclosure of predecisional information would tend to inhibit the open and frank exchange of ideas essential to the deliberative process." Based on the information given by the staff and GA about the issues addressed in the SRM, this rationale does not apply to the SRM. GA's decommissioning funding obligations with respect to its San Diego facilities is uncontested, and thus there is no pending decision or deliberative process in which the Commission is engaged at those facilities. Thus, there is no ongoing deliberative process for the San Diego facilities which could be compromised by the release of the SRM.

To the contrary, the SRM appears to give final instructions to the staff regarding the distribution of decommissioning funding for those facilities. It is well-established that Exemption 5 does not protect such instructions from disclosure. Schlefer v. United States, 702 F.2d 233 (D.C. Cir. 1983) (holding that

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authoritative opinions by agency's chief counsel, which affected agency's relationship with public and were binding on agency staff, were not exempt.) Here, the SRM apparently constitutes the NRC's instructions to its own staff regarding the disposition of funding for GA's contaminated nuclear facilities in California. Such instructions directly affects public health and welfare and therefore should be disclosed to the public.

To the extent that the NRC's denial decision was based on the rationale that the SRM is predecisional to the outcome of the SFC-GA enforcement proceeding, that rationale is also without merit. As described by GA and the staff, the issues raised in the SAM have nothing to do with the SFC case. They are "outside the scope" of the proceeding and "beyond the jurisdiction" of the Licensing Board. In addition, the staff and GA have explicitly stated that they are not seeking Commission "prejudgment" of the SFC-GA enforcement proceeding. Thus, if the staff's and GA's characterization of the SAM issues is correct, the SRM could hardly be predecisional to the Commission's deliberations in the enforcement case.

Even if the SRM does discuss the GA-NRC staff settlement, and can be characterized as part of the Commission's deliberations in the disposition of the enforcement proceeding before the Licensing Board, the SRM must be released. As the ultimate judges in this proceeding, the Commission may not make secret decisions about issues material to the outcome of the pending enforcement proceeding, based on secret information conveyed by the staff and GA in illegal ex parte contacts. As the U.S. Court of Appeals for the D.C. Circuit has observed, such ex parte contacts are:

offensive in two fundamental respects: (1) They violate the basic fairness of a hearing which ostensibly assures the public a right to participate in agency decisionmaking [footnote omitted], and (2) they foreclose effective judicial review of the agency's final decision. [footnote omitted].

National Small Shipments, Etc. v. ICC, 590 F.2d 345, 351 (D.C. Cir. 1978). The agency must "inquire into the nature and source of all ex parte communications had in this controversy and to assure that any material so communicated is subjected to adversarial review at the hearing." Id. Accord, State of North Carolina, Environmental Policy Institute v. EPA, 881 F.2d 1250, 1258 (4th Cir. 1989), quoting United States Lines, Inc. v. Federal

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Maritime Commission, 584 F.2d 519, 540, 542 (D.C. Cir. 1978) ("Only through disclosure of ex parte communications may we protect the public's 'right to participate meaningfully in the decisionmaking process' and 'the critical role of adversarial comment in ensuring proper functioning of agency decisionmaking and effective judicial review.'") To remedy the fundamental taint to the fairness of the proceeding caused by such ex parte contacts, you must, at the very least, disclose the SRM and all information on which it was based. See 10 C.F.R. 2.781(f).

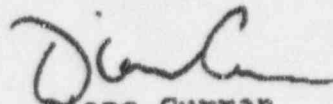
Conclusion

For the reasons discussed above, the SRM and all related documents should be released to the public. NACE requests that you give prompt attention to this request, because the information in the SRM may bear on the proposed GA-NRC staff settlement, which NACE and the Cherokee Nation have opposed and which is now under consideration by the Licensing Board.

Because this appeal may bear on the pending enforcement proceeding before the Atomic Safety and Licensing Board, I have also mailed copies to the parties to that proceeding, as well as the Commissioners.

I look forward to receiving your response within twenty working ten days, as required by the FOIA.

Sincerely,


Diane Curran

cc: Lance Hughes, Director, NACE
Service list, ASLB enforcement proceeding