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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

COMMISSIONERS:
Shirley Ann Jackson, Chair
Kenneth C. Rogers
Greta J. Dicus
Nils J. Diaz
Edward McGaffigan, Jr.

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

BRIEF IN SUPPORT OF PETITION FOR REVIEW FILED BY STATE OF OKLAHOMA

COMES NOW the Petitioner State of Oklahoma ex rel. Oklahoma Department of Wildlife Conservation (hereinafter referred to as "State" or "Petitioner"), through Assistant Attorney General Jeannine Hale, and submits the following Brief in Support of the State's request for Commission review of the decision of the Board in LBP 96-24 (Approval of Settlement Agreement between NRC staff and General Atomics):

INTRODUCTION

The State has previously filed requests for Commission review of two separate orders of the Atomic Safety & Licensing Board (hereinafter "Board"), each of which approved settlement agreements entered into by staff of the Nuclear Regulatory Commission ("NRC staff") and two entities - the named licensee, Sequoyah Fuels (SFC), and its parent company, General Atomics (GA). This Brief is filed in support of the State's Petition for Review of the Board's

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November 1996 Order in LBP 96-24, approving an agreement between NRC staff and the parent company General Atomics (hereinafter the "1996 Board Order") and is allowed by Commission Memorandum and Order (CLI-97-01) served January 22, 1997. Because of common issues and arguments concerning both the 1996 Board Order and the Board's previous order in LBP 95-18, 42 NRC 150 (hereinafter the "1995 Board Order" approving an agreement with SFC, the State requests that the Commission consider these matters together. The State hereby adopts by reference its previous pleadings, including the following pleadings filed by the State: Response to the Joint Motion of NRC Staff and General Atomics to Approve Settlement Agreement (filed 9/6/96 & including Exhibits 1-4), Petition for Review of the November 1996 order, Petition for Review of the Board's order in LBP95-18 and State of Oklahoma's Amicus Curiae Brief (filed 4/96).

The State's concerns with the Board's 1996 and 1995 Orders and the terms of the settlement agreements are, briefly summarized, that they: 1) are not consistent with applicable financial assurance requirements of NRC regulations in 10 CFR Part 40, 2) are not consistent with previous findings of the NRC Staff and Board in 1993, and that a change in these findings is not supported by information in the record, 3) that approval of the agreements is premature and inconsistent with NEPA requirements, 4) that the NRC has not demonstrated facts warranting nondisclosure of other available information which is necessary to evaluate the agreements, and 5) that the public interest has not been

adequately and considered and protected by the NRC staff and Board in these circumstances. The State requests that the Commission exercise the full extent of its jurisdiction and authority to ensure that there is an appropriate level of scrutiny of the settlement agreements and underlying information in this case and that their approval is in the public interest.

BRIEF HISTORICAL OVERVIEW

The Gore facility was operated by from 1970 until 1988 by Sequoyah Fuels Corporation ("SFC#1"), a wholly owned subsidiary of Kerr Mcgee (KM) under a license issued by NRC staff. KM was required by NRC license "to guarantee the proper decommissioning and reclamation of the facility". General Atomics v. U.S. Nuclear Regulatory Commission, 75 F.3d 536 (1996). In 1988, KM sold SFC#1 to General Atomics (GA), a privately held corporation (the resulting entity is referred to herein as "SFC"). This transaction was expressly approved by NRC, but the NRC did not require GA or SFC to provide a similar guarantee. SFC is owned by SF International(SFI), which is owned by Sequoyah Holding Corporation (SHC), which is owned by GA, which is owned by another GA-related entity: Id at 536. SFC is the entity named as licensee.

In 1988, the Oklahoma Water Resources Board began corresponding with NRC staff about 1) the failure of NRC staff to comply with requirements of Section 401 of the federal Clean Water Act, which operates to provide an opportunity for states to review applications for federal permits and require the inclusion in

federal permits of conditions necessary to meet state water quality requirements, and 2) about water quality concerns related to the Gore facility. See State's Response to Joint Motion For Approval of GA Agreement, Exhibit 2, including three letters. In 1990, SFC applied for license renewal - then later asked to withdraw that application. At that time, the State pointed out the 401 certification requirement, requested that NRC require compliance with financial assurance regulations to ensure that decommissioning would be fully funded and requested environmental studies. NRC staff did not require state 401 certification of the SFC license or submission of financial assurance at that time.

Investigations begun in 1990 revealed groundwater and soil contamination at the Gore facility. In 1992, SFC ceased operations. In August 1993, EPA issued a RCRA Administrative Order on Consent to SFC. In October, 1993, the NRC staff caused an order to be issued which held that both SFC and GA were jointly and severally responsible and directed them to file financial assurance in the amount of $86 million - the only available estimate of decommissioning casts. The 1993 Order essentially found that sources of revenue from the Converdyn agreement did not provide the required assurance under 10 CFR 40.36, that revenue from the Converdyn agreement and other sources were unlikely to be sufficient to cover the costs of decommissioning beyond SFC's proposed alternative, and that since SFC was apparently not able to cover the total costs of decommissioning, GA (based upon the parent company's "de facto" control over SFC's business and other

theories) should be held liable for any shortfall. GA and SFC appealed the 1993 Order. The NRC staff thereafter entered into the two settlement agreements with GA and SFC that are the subject of the current proceedings pending before the Commission.

To date, no financial assurance has been filed in accordance with NRC regulations. The NRC staff have commenced the process for environmental review required by the National Environmental Policy Act (NEPA), 10 CFR Part 51 and other regulations regarding decommissioning at the Gore facility but no draft EIS has been released. Pollutants such as fluoride, nitrates, ammonia, uranium, radium 226, TSS, silver, mercury, zinc, arsenic, lead, barium, magnesium, organic compounds such as 1,1,1-trichloroethane, chloroform, methylene chloride, trifluoromethane, pH and others may be found in the Gore facility's wastewater discharges to Oklahoma surface waters, and/or in soils or in groundwater underlying at the site, and/or in surface impoundments at the site. Decommissioning processes will physically disturb portions of surface areas at the site and likely result in changes in storm water and process wastewater constituents. Other issues are presented by groundwater contamination such as migration of pollutants and contaminated soils. Decommissioning may take eight to ten years to complete. See, e.g., joint EPA-State Notice and Fact Sheet of Nov. 18, 1996, for discharge permit OK0000191 and state-permitted surface impoundments. The State of Oklahoma and its citizens have interests which have been and will be directly affected by the Board Orders, NRC staff actions, settlement agreements, and

decommissioning-related activities at the Gore facility.

ARGUMENT

The public interest will be affected by the total funding available for decommissioning, financial assurance required for such funding, the choice of decommissioning alternatives, the pollutants and associated risks which are addressed by the selected plan, and the actions of NRC staff and Commission related thereto. Since the State is pre-empted from regulating certain of these pollutants, NRC decisions related to the Gore facility must be based upon adequate factual information, include a thorough review in compliance with NEPA, be made in compliance with the APA and other applicable laws, and must include careful consideration of the public interest and the interests of affected states.

The NRC Staff apparently concede that the two settlement agreements do not provide the type of financial assurance for total costs of decommissioning required by NRC regulations at 10 CFR 40.36 - ie., assurance in one of the forms required by the rule- prepayment, surety, insurance or other guarantee, or external sinking fund with a backup surety. See 60 Fed. Reg. 38235, 7/26/95, statement of Background for rulemaking to clarify the regulations. The Board's 1995 and 1996 Orders, likewise do not require compliance with 40 CFR 40.36.

I. THE BOARD'S ORDER IS BASED UPON A FINDING OF MATERIAL FACT WHICH IS IN ERROR AND CONFLICTS WITH A 1993 FINDING OF THE SAME FACT

As previously stated, the 1993 Order found that sources of revenue from the Converdyn agreement did not provide the required assurance under 10 CFR 40.36, that revenue from the Converdyn agreement and other sources were unlikely to be sufficient to cover the costs of decommissioning beyond SFC's proposed alternative, that SFC was apparently not able to cover the total costs of decommissioning, and that GA (based upon the current company's "de facto" control over SFC's business and other theories) should be held liable for any shortfall. In essence, the NRC staff's 1993 Order essentially amounts to a finding as to one very important material fact: that adequate financial assurance for decommissioning at the Gore facility had not been demonstrated by circumstances and facts at that time. In order to support a different finding, that there is now adequate financial assurance for funding decommissioning to completion as required by law, the settlement agreements and Board Orders must set forth adequate information to show how the situation has changed. The agreements and orders fail to do so.

A reading of the GA Agreement's preliminary recitations (the "whereas" provisions) may be enlightening for some purpose, but these provisions don't state any facts adequate to show how this material fact has now changed. The settlement agreements' other provisions likewise fail to provide any reliable information to show a change in circumstances. The GA Agreements' statements that "General Atomics and SFC believe that SFC's net assets and net revenues...will provide adequate capital resources...to complete

environmental remediation and decommissioning", that litigation may dissipate financial resources, that "it is in the public interest that General Atomics retain the financial capability to meet certain other decommissioning obligations", and similar statements (See, e.g., GA Agreement at p. 4), are mere allegations, unsupported by necessary documentation of supporting facts. Further, such allegations are irrelevant and/or immaterial to a determination of the issue of whether there is now adequate financial assurance which complies with NRC regulatory requirements. The Board's 1996 Order erroneously relies on these self-serving allegations of the parties to the agreement and the belief that the NRC staff's interests are equivalent to the "public interest" and are entitled to complete deference. The NRC staff's interest as a party to the agreement and the public interest are not necessarily the same - e.g., the public interest includes interests not represented by NRC staff such as the interests of affected states and others who may eventually bear the health effects and financial burdens resulting from a lack of financial assurance and an unfunded cleanup, interests regarding pollutants outside the NRC's jurisdiction but nevertheless affected by the decisions, etc. The agreement's recitations and circumstances tend to show that NRC staff involved in these disputes had interests in reaching a "cease-fire" which were not those of the public at large - e.g., individual desires in reducing their workload. It is therefore not appropriate to give the NRC staff's position complete deference. Rather, the Board and

Commission must provide some independent evaluation of the public interest.

The Commission should determine whether there is an adequate documentation of facts in the record which support a different finding than that reached in the 1993 Order - whether there are facts demonstrating that there is now adequate financial assurance to cover the total costs of decommissioning, an amount likely in excess of $86 million dollars. The facts and information made available to the public do not provide an adequate documentation to support this finding. Based upon publicly available information, it appears that the parties have not presented any such documentation - there is no new security interest provided, no insurance, no external sinking fund out of SFC/GA control, no other equivalent guarantee in an amount covering the total costs in the minimum amount of $86 million.. There is no new documentation of facts which support a change of position to the effect that the Converdyn agreement or other sources now provide the requisite financial assurance. The NRC staff did not submit any additional factual information with its Joint Motion filed with the Board, nor did the Board's order approving the GA agreement set forth any findings of fact, which reflect a change in SFC assets or circumstances, or a change in legal requirements for financial assurance, since the 1993 order. Without this, there is no justification or basis presented in the record as a basis for deviating from the earlier finding of the NRC 1993 order. The Commission must therefore conclude that the Board's order approving

the GA agreement makes a finding of material fact which is both clearly erroneous in view of information in the administrative record and contrary to the earlier 1993 finding that there is no adequate financial assurance.

II. THE AGREEMENTS AND BOARD ORDERS DO NOT ADEQUATELY PROTECT THE PUBLIC INTEREST

The settlement agreements are in sharp contrast to the financial assurance requirements reflected in 10 C.F.R. 40.36 and are not consistent with the provisions of the Atomic Energy Act, including 42 USC 2201(x). The regulations refer to methods of financial assurance which provide "assurance" in the form of a security instrument, insurance, etc., and require this assurance in the total amount of estimated decommissioning costs. The public interest in obtaining full decommissioning is protected under the regulations by having a secured-type interest in the licensee's assets or an equivalent form of financial assurance, not under the licensee's control, for the total costs. In contrast, no such assurance or its equivalent is provided in the agreements. The agreements provide for a lump sum payment by GA equal to about 10 % of the estimated total cost of decommissioning by on-site disposal and provide that SFC will commit its "**net revenues**". SFC is left free to reduce these "net" revenues and its net worth, by incurring new debts, paying off old debts, paying debts to GA, releasing GA from existing agreements, transferring assets and income to related entities or by whatever other means. The SFC

"commitment", primarily Conversyn revenues, are left in SFC's complete control and is not reflected by any security instrument. The NRC, the State and the public are left in the position of essentially being "unsecured creditors" of the SFC estate.

NRC staff, GA and SFC have failed to provide any facts to support a finding that financial assurance in the form required by the regulations, or an equivalent method, is unavailable. The only facts apparent are that GA and SFC won't agree to voluntarily provide such a method of financial assurance, place their assets or income in a sufficient amount in outside control or even allow public disclosure of financial statements of the licensee. This is not sufficient to justify a departure from 40 CFR 40.36. The settlement agreements further forego the opportunity to secure the public's interests in available SFC assets by way of a judgment lien or by future legal proceedings against GA. The NRC staff have exceeded their authority in the settlement agreements by failing to require compliance with financial assurance requirements in 40 CFR 40.36 or in an equivalent manner, by failing to provide justification for the waiver of this requirement and by violating due process rights protected by the APA and federal law. The federal APA, 5 USC Section 553, contains requirements relating to rulemaking which include public notice and opportunity for comment. NRC regulations on financial assurance may not be amended or repealed without compliance with the requirements of the APA. The NRC staff may not achieve the same result as would be achieved by amending the NRC regulations to

include an exception for SFC and GA, by virtue of the contested settlement agreements. The NRC staff do not have the authority to amend these regulations or avoid compliance with procedural requirements meant to ensure adequate public participation and due process. Financial assurance is required in the full amount of estimated decommissioning costs and in an appropriate form to secure the public's interests against other competing claims and risks. The settlement agreements and the Board's approval of them without notice to all affected states and citizens, without disclosure of adequate information, and without providing justification for the waiver of the public's rights to financial assurance in a secured form, is not consistent with due process requirements .

The Board's order approving the GA settlement and the actions of the NRC staff are not consistent with the public interest in having available adequate information to evaluate the agreements. The Board Order and NRC actions have kept GA and SFC financial statements and information confidential, even as to other governmental agencies, without justification. The burden is on NRC staff to show a justification for withholding financial information which may be critical to an evaluation of the agreements for consistency with the public interest. NRC staff have not shown how release of information supplied by GA due to the enforcement action will impair its ability to obtain such information from non-licensees in the future. Release of the information supplied by Sequoyah Fuels in financial statements can

not possibly harm its future competition-related interests.

The NRC staff cite 10 CFR 2.790 as justification for the nondisclosure. However, the staff and the Board Orders fail to provide the information and analysis required by 10 CFR 2.790(b)(3) & (4). These provisions allow the Commission to release financial information if there is no rational basis for withholding it or if the right of the public to be fully apprised of the proposed action outweighs the demonstrated concern for protection of a competitive position. Furthermore, the Commission may allow disclosure to the State and persons directly concerned to inspect such information subject to any appropriate protective measures.

III. APPROVAL OF THE AGREEMENTS AT THIS TIME IS CONTRARY TO REQUIREMENTS OF THE NATIONAL ENVIRONMENTAL POLICY ACT

It is premature to finally determine who is responsible to pay decommissioning costs and in what amount, and bar further action by the NRC staff, when the decision process for determining these costs has just begun. The National Environmental Policy Act (NEPA), 42 USC 4332(C), implementing NRC regulations in 10 CFR Part 51, CEQ regulations and applicable case law, require that the NRC undertake a meaningful analysis of available decommissioning alternatives prior to deciding on which one will be selected. The consideration and analysis of information about "irreversible and irretrievable commitments of resources" associated with alternatives pursuant to NEPA Section 4332(C)(v) is rendered meaningless if an alternative is selected and resources have been committed prior to completion of the NEPA process.

Approval of the settlement agreements gives official approval to depletion of SFC and GA assets and resources which might otherwise be available. The settlement agreements' terms result in a situation likely to render other alternatives impractical or infeasible and are not consistent with the purposes or mandates of NEPA. For example, the NEPA process is undermined by approval of the agreements which are based upon estimated costs of on-site disposal of contaminated soils. It is unlikely that other more costly alternatives will be given serious consideration by NRC staff during the NEPA process, when a less expensive alternative has already received final Commission "approval" by virtue of a settlement which funds the cheaper alternative, where the licensee does not have adequate assets to fund a more expensive alternative, action against the parent company is barred by the agreement and there is no other funding source.

The NEPA process for evaluation of decommissioning alternatives at the SF facility should be allowed to proceed in an unbiased manner, to ensure proper consideration of costs and benefits to the public, human health and the environment. At a minimum, prior to selection of the decommissioning alternative, unless adequate financial assurance is provided, the Commission should not approve any agreement, or otherwise approve of actions, which transfer or dispose of property or assets which could fund decommissioning, result in new liabilities or debts which may deplete decommissioning funds, transfer assets or property to GA or Kerr-McGee or other potentially responsible entities, or

otherwise prejudice the likelihood of completion of site decommissioning.

Perhaps the alternatives for fulfilling requirements related to financial assurance should be evaluated in conjunction with the NEPA process, since funding and selection of the technical methodology and requirements are intricately related.

IV. ALL STATES AND MEMBERS OF THE PUBLIC AFFECTED BY PROPOSED SETTLEMENT AGREEMENTS SHOULD BE GIVEN NOTICE AND AN ADEQUATE OPPORTUNITY TO COMMENT

The GA settlement agreement indicates that other GA obligations were considered. GA does not deny that it has NRC-licensed facilities in both Oklahoma and other states, or that funding available for decommissioning or other obligations at these facilities will be directly affected by the settlement agreement relating to the Gore facility. The public interests at stake, the potential for significant adverse effects on other states and citizens, and due process considerations warrant notice and a meaningful opportunity to comment be given to others likely to be directly affected. The settlement agreements with GA and SFC, and other information disclosed to intervenors via FOIA request, indicate that the financial capabilities of the settling parties were a major factor influencing the NRC decision and settlement terms; that the parties' financial capabilities are inadequate to fully comply with NRC financial assurance requirements under the regulations (10 C.F.R. 40.36), pay decommissioning and other costs, and meet other mandatory requirements; and that NRC and the

parties to the agreements relied upon this "confidential" financial information to allocate the resources available between the states and facilities. Beyond this, it is impossible for the state or the public to present further evidence as to the impacts on these other states or to make the necessary evaluation as to whether the allocation of resources effected by the agreements is truly in the public interest, since pertinent information has been withheld.

If GA indeed holds licenses to facilities in other states where 10 CFR 40.36 or other financial assurance requirements have not been met already, it is probable that its resources are inadequate to fully fund decommissioning of all sites in these multiple states, so a decision by NRC which allocates those resources necessarily will cause adverse impacts to one or more States and sites. Such an allocation effectively determines important public health and safety issues related to the environmental cleanup and the necessity for the state or others to take action to protect the public interests at the sites not fully funded. All affected States and members of the public should be given notice, adequate information and a meaningful opportunity to comment in such situations. This is certainly a major federal action affecting the human environment subject to NEPA which deserves full analysis of alternatives.

Since the outcome of this proceeding is likely to have significant environmental and financial impacts on the State's resources and the resources of affected citizens, the public

interest requires disclosure of information underlying the agreements to the States and persons directly affected. If decommissioning costs are not covered by the licensee and parent company, the costs will be borne by the public: by payment of federal or state funds for cleanup or enforcement action to obtain cleanup, by risks and effects on public health and natural resources caused by remaining contamination, by burdens on local communities and/or private landowners. These real public interests, particularly in health and safety, far outweigh any interest that GA or SFC may have in withholding financial information to secure a competitive edge and speculative profits which might be received. The Commission should require full public disclosure of financial information necessary to evaluate these impacts on the public interests, or provide for an in camera review or other appropriate mechanism to allow review by representatives of all affected states and citizens.

WHEREFORE, the State of Oklahoma requests that the Commission make the following findings, conclusions and orders:

1) that the financial assurance requirements of NRC regulations in 10 CFR 40.36 apply to the Gore facility and decommissioning thereof, and that the regulations do not provide for a waiver of these requirements in the present case;

2) that the record does not contain adequate information to support a finding of material fact different than that of the 1993 Order, i.e., that adequate financial assurance for completion of

decommissioning at the Gore facility has not been provided;

3) that the record does not contain adequate information to support a finding that the settlement agreements or other circumstances provide financial assurance for the total costs of decommissioning that are equivalent to a secured interest in real property, insurance, or other equivalent method affording a similar level of protection of the public's interest;

4) that the record does not contain adequate information to support a finding of compliance with public notice and due process requirements for amendment or waiver of financial assurance regulations, impairment of the public interest in having a secured-type form of assurance, or allowing meaningful participation by directly affected states and citizens;

5) that the requirements of NEPA apply to NRC decisions related to selection of a decommissioning alternative at the Gore facility, that the NEPA process has not been completed, and that approval of the settlement agreements at this time and in this manner is not consistent with NEPA and the requirements of implementing regulations, since an irretrievable and irreversible commitment of resources or other actions may result in making potential alternatives less feasible or impossible;

6) that approval of the settlement agreements at this time and in this manner is not in the public interest;

7) that the Boards' Orders approving such settlement agreements with Sequoyah Fuels and General Atomics are reversed;

8) that SFC, GA and related entities are ordered to refrain from

taking any action, pending resolution of this matter, which might result in the loss or transfer of assets available for decommissioning or financial assurance , without first applying to the Commission for approval thereof;

9) that the NRC staff provide notice to the state of California and other affected states;

10) that the NRC staff provide access by representatives of the State designated by counsel herein, to any information relied upon to show adequate financial assurance for decommissioning, that the state be allowed an adequate time to review, evaluate and comment upon such information prior to final approval of any settlement agreement; and

11) that any action to approve settlement agreements, establish financial responsibility or take other actions which may preclude or harm consideration of all appropriate decommissioning alternatives shall be stayed until completion of the NEPA process.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF MAILING OR DELIVERY

I certify that I mailed a true and correct copy of the forgoing by overnight mail to the Commission, Administrative Law Judges, and Secretary for docketing, and by first class mail, postage prepaid to all others listed below, this 11th day of February 1997, addressed as follows:

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