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BEFORE THE

NUCLEAR REGULATORY COMMISSION

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In the Matter of Revision of  
Orders to Modify Licenses,  
American Nuclear Corp., et al.

Docket No. 40-4492

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MEMORANDUM IN SUPPORT OF  
ENVIRONMENTAL DEFENSE FUND'S  
STANDING TO INTERVENE

On December 2, 1985, the Environmental Defense Fund (EDF) filed a timely motion to intervene in the above-captioned proceeding, on behalf of itself and its members. In that petition to intervene, EDF stated that it has over 1,000 members in the states of Colorado, Utah, New Mexico, and Wyoming. EDF further averred that substantial numbers of its members live, work, travel, and recreate in proximity to licensed uranium mills, including those mills located in Utah and Wyoming. Finally, EDF averred that the health, safety, and environment of its members and of the public at large would be adversely affected by a Commission decision to weaken or eliminate the ground water detection monitoring programs that are at issue in this proceeding.

EDF is submitting this supplemental memorandum of law, and the attached declaration of Daniel F. Luecke, to further substantiate its standing to intervene in this proceeding as of right, on behalf of itself and its members. As is demonstrated

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herein, EDF clearly has standing to intervene. Moreover, even if the standards for intervention as of right were not satisfied, the applicable standards for discretionary intervention have been satisfied. Accordingly, EDF urges that its petition to intervene as a full party be granted.

#### A. INTRODUCTION

The Commission has long held that judicial concepts of standing are to be applied in determining whether a petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right pursuant to section 189 of the Atomic Energy Act of 1954. Metropolitan Edison Co., CLI-83-25, 18 NRC 327, 332 (1983). Thus, a petitioner must demonstrate injury in fact and an interest arguably within the zone of interests protected by the statute. Id. However, the Commission also has stated that, in practical terms, residence near a licensed facility, coupled with allegations of threatened injury to the human health, safety, or the environment of petitioner "is sufficient to establish the interest necessary to intervene in" a license proceeding. Philadelphia Electric Co., LBP-82-43A, 15 NRC 1423, 1435 (1982); Cleveland Electric Illuminating Co., LBP-81-24, 14 NRC 175 (1981). Finally, an organization such as EDF must demonstrate that it has standing to intervene on behalf of its members. See Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977).

B. EDF HAS STANDING TO INTERVENE AS OF RIGHT

1. EDF Members Live, Work, and Travel Near Licensed Mills and Would Be Adversely Affected By Commission Action to Weaken the EPA Standards

As the attached declaration of Mr. Luecke establishes, members of EDF live throughout the Rocky Mountain West. Over 1,000 members live in the States of Colorado, Utah, Wyoming, and New Mexico -- the States where most of the nation's uranium production occurs. Moreover, a number of EDF members live and work near, and would be adversely affected by any decision by the Commission to enforce requirements for ground water protection at licensed facilities that are less stringent in any respect than are the operative standards issued by the Environmental Protection Agency. 40 C.F.R. Part 192.

For example, EDF members, including Dr. Dilley, live in Canon City, Colorado, which is only a few miles from the Cotter Corporation uranium mill. Other EDF members live and work in Pueblo, Colorado, which is approximately forty (40) miles downstream on the Arkansas River. It is by now well established that concentrations of molybdenum at 16.7 mg/l, measured at a well approximately 8,000 feet from the mill "are evidence of pollution from a point source in the tailings pond." Environmental Protection Agency, 1 Environmental Impact Statement for Standards for the Control of Byproduct Materials from Uranium Ore Processing at D-12 (1983). The Environmental Protection Agency's (EPA) ground water protection standards were designed to prevent such environmental contamination, and to provide a mechanism for remedial action in cases where ground water contamination occurs.

Conversely, the licensees that are parties here attack both the legal validity of the EPA standards and the lawfulness of the Commission's implementation and enforcement of those standards.\* (While the Cotter Corporation is not a party to this proceeding, it is virtually certain that the Commission's decision in this case will establish a precedent for action by Agreement States such as Colorado; if the Commission sanctions requirements less protective of human health and the environment than are the EPA standards, there is very little doubt that licensees in Agreement States will seek to be treated similarly.) Accordingly, the health, safety, and the environment of EDF's members (including Dr. Dilley) would be adversely affected by Commission action that weakened or eliminated site-specific requirements for implementation of the EPA ground water protection standards.

Other EDF members, including Mr. Larry Thomas, live and work in Moab, Utah, within a few miles of the uranium mill owned and operated by Atlas Minerals Corporation. The Uranium Recovery Field Office found that "all wells downgradient from the tailings impoundment show some elevation in levels of the mobile ions above normal background levels. The staff concluded that tailings

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\* The EPA standards establish a comprehensive program for ground water protection at uranium mills. Fundamental to the success of such a program, however, is the detection monitoring program called for by 40 C.F.R. § 192.32(a)(2)(iii). This component must be implemented to determine background concentrations of parameter species, which are in turn necessary to assess whether seepage and ground water contamination is occurring and whether remedial action is warranted. And it is this component of the EPA standards that is at the center of the controversy before the Commission, with the licensees objecting to license amendments devised to implement the detection monitoring program.

impoundment seepage is actively occurring at this site." Uranium Recovery Field Office, Memorandum for Docket File No. 40-3453 (April 30, 1985). The staff also found that Atlas does not yet have in place true point of compliance wells, and that an adequate statistical base does not exist for indicator species. The EPA standards required that detection monitoring programs be completed by October 7, 1984. The Atlas Corporation is not in compliance with the EPA standards; the relief Atlas seeks in this proceeding would, for all practical purposes, delay still further the time when the licensees must implement the EPA standards. Thus, the health, safety, and environment of EDF members and the public at large living and working near the Atlas mill will be adversely affected by Commission action that grants any or all of the relief sought by the licensees in this case.

Similarly, many EDF members live, work, travel, and recreate near the uranium mills located in Wyoming. The EDF members living in Casper, Wyoming, are adversely affected by radiological and nonradiological releases from the Bear Creek Uranium Company Mill (49 miles from Casper) and from the Pathfinder Mines Corporation mill in Shirley Basin (45 miles from Casper). The Field Office staff has found that a review of available ground water data for the Bear Creek mill indicates that downgradient wells show elevated levels of certain parameters and therefore indicate that seepage is leaving the tailings impoundment. Uranium Recovery Field Office, Memorandum for Docket File No. 40-8452 (May 7, 1985). Downgradient wells at the Pathfinder Mines mill also show higher concentrations of dissolved constituents



than does the background well, indicating that the seepage pathways from the tailings impoundment remain open. Uranium Recovery Field Office, Memorandum for Docket File No. 40-6622 (April 22, 1985).

Notwithstanding the evidence of leachate migration to underlying aquifers, the Bear Creek Uranium Company has not yet compiled a data base to determine the quality of water passing under the tailings impoundment. The Pathfinder Mines Corporation also lacks such basic information that the EPA standards required to have been compiled well over one year ago. Yet in this proceeding both licensees are challenging the lawfulness of the EPA standards, and the Commission's duty to implement and enforce those standards. Again, as noted above, a Commission determination to grant all or part of the relief requested by the licensees would adversely affect the health, safety, and environment of EDF's members and the public at large.

In sum, fundamentally important interests of EDF's members, and of the public at large, would be adversely affected by a Commission determination to grant any or all of the relief requested by the licensees, or to in any other way modify or weaken the ground water protection standards required by the EPA regulations.

## **2. The Interests of EDF's Members Are Within The Zone of Interests Protected by Statute**

The Commission has stated, in other contexts, that "the public safety is the first, last, and a permanent consideration in any decision on the issuance" of a license. Power Reactor

Development Co. v. International Union of Electrical, Radio, & Machine Workers, 367 U.S. 366, 402 (1961), quoting from Consumers Power Co., ALAB-315, 3 NRC 101 (1976). See Power Reactor Development Co., 1 AEC 128, 136 (1959). If anything, in amending the Atomic Energy Act with the Uranium Mill Tailings Radiation Control Act (UMTRCA), Congress evinced a heightened solicitude for protection of human health and the environment from the hazards associated with mill tailings. Indeed, Congress expressly found, in enacting UMTRCA, that every reasonable effort must be made to manage and dispose of mill tailings in a "safe and environmentally sound manner" because of the radiological and nonradiological hazards associated with these materials. 42 U.S.C. § 7901(a).

Assuredly, the interests of EDF and its members in preventing or minimizing the release of hazardous and toxic substances into the environment from mill tailings fall within the purposes of the Atomic Energy Act of 1954, as amended. Just as certainly, the interests of EDF and its members fall well within the zone of interests to be protected by the Act.

### 3. Conclusion

Both strands of the standing test enunciated by the Commission for intervention as of right are satisfied in this case. Therefore, EDF respectfully urges that the Commission grant its petition for intervention as a full party.

#### C. EDF ALSO QUALIFIES FOR DISCRETIONARY INTERVENTION

In a precedent-setting case, the Commission looked to the value and importance of fostering meaningful public participation in Commission proceedings such as this, and concluded that "there

is no legal impediment preventing administrative agencies from allowing wider public participation in their proceedings than is required by statute." Portland General Electric Co., CLI-76-27, 4 NRC 610, 614 (1976). Accord Metropolitan Edison Co., CLI-83-25, 18 NRC 327 (1983). In reaching that conclusion, the Commission quoted approvingly from an earlier decision, saying that public participation "is a vital ingredient to the open and full consideration of licensing issues...." Portland General Electric Co., 4 NRC at 615, quoting Southern States Power Co., CLI-75-1, 1 NRC 1,2 (1975).

Applying that teaching to this case, EDF submits that even if it did not meet the requirements for intervention as a matter of right, the purposes of public participation in important Commission proceedings militates for EDF's intervention as a matter of discretion. EDF has been the lead conservation organization in advocating (before Congress and before this and other agencies) technically sound, responsible regulatory responses to a serious national problem -- disposal of radioactive uranium mill tailings. In keeping with its commitment to this issue, EDF was the lead environmental petitioner in challenges to EPA's standards, and participated extensively in the Commission's rule-making to conform its mill tailings regulations to the EPA standards. Thus, EDF has developed a broad expertise in this field, and has represented the public interest in a number of forums. EDF's participation would, as a consequence, materially assist in the development of a sound record in the present case.

At the same time, exclusion of EDF from this proceeding



would significantly impair EDF's ability to protect its interests and those of its members. This is the first case to arise where licensees are challenging the EPA standards in a licensing context, and this case likely will set an important precedent for the manner in which the Commission enforces the EPA standards. Yet there simply are no means -- except through participation in this case -- whereby EDF can protect its interests and those of its members. The Commission clearly has exclusive licensing authority over mills and byproduct material; resort to other agencies would therefore be futile.

Moreover, the existing parties will not adequately protect EDF's interests. In a rulemaking to conform the Commission regulations to the EPA standards, the Commission adopted the position that it may authorize site-specific measures less protective of human health and the environment than are EPA's standards. 50 Fed. Reg. 41852, 41853 (Oct. 16, 1985). As a result, neither the Commission nor the licensees will adequately protect and advocate the health and environmental interests of EDF and its members.


And finally, EDF has stated before, and reiterates now that this case is wholly legal in nature and can be disposed of by summary procedures. EDF can and will meet whatever briefing schedule is set by the Commission, and will not introduce into the proceedings issues beyond the scope of those raised by the licensees. Consequently, EDF's participation will not inappropriately broaden or delay the proceedings.

To the contrary, EDF's participation will serve all of the

salutary purposes noted by the Commission in endorsing meaningful public participation in licensing proceedings. Therefore, even if EDF did not qualify for intervention as a matter of right, EDF meets all of the tests for intervention as a matter of discretion.

D. CONCLUSION

For all of the foregoing reasons, we respectfully urge that the Commission grant EDF's petition to intervene as a full party in this proceeding.

  
James B. Martin  
Environmental Defense Fund  
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# CERTIFICATE OF SERVICE

I hereby certify that on this 12<sup>th</sup> day of December 1985, I delivered by hand the original and three copies of the attached MEMORANDUM IN SUPPORT OF ENVIRONMENTAL DEFENSE FUND'S STANDING TO INTERVENE to the offices of the Uranium Recovery Field Office, and that I caused COPIES OF SAME to be deposited in the United States Mails, first class postage prepaid, and addressed as follows:

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