

November 25, 2003

**RAS 7088**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**DOCKETED 11/25/03**

BEFORE THE PRESIDING OFFICER

In the Matter of

SEQUOYAH FUELS CORPORATION  
(Gore, Oklahoma Site)

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Docket No. 40-8027-MLA-6

ASLBP No. 03-807-01-MLA

NRC STAFF RESPONSE TO REQUESTS FOR HEARING FILED BY  
THE STATE OF OKLAHOMA, THE CHEROKEE NATION, AND ED HENSHAW

INTRODUCTION

Pursuant to 10 C.F.R § 2.1205(g), the U.S. Nuclear Regulatory Commission Staff (Staff) hereby responds to requests for hearing filed by the Cherokee Nation, the State of Oklahoma, and Ed Henshaw regarding a request from Sequoyah Fuels Corporation (SFC) for approval of a license amendment to address clean up and reclamation of the SFC site. See "State of Oklahoma's Request for Hearing," May 14, 2003; "Request for Hearing," May 15, 2003; Letter requesting a public hearing from Ed Henshaw, May 15, 2003. As set forth below, both the Cherokee Nation and the State of Oklahoma have established standing to intervene and have proffered at least one area of concern germane to this proceeding. Accordingly, their requests for hearing should be granted. Mr. Henshaw, however, has failed to identify one area of concern germane to this proceeding, thus, his hearing request should be denied. Further, in the event that a hearing is granted, pursuant to 10 C.F.R. § 2.1213, the Staff desires to participate as a party to the adjudication.

BACKGROUND

SFC operated a uranium conversion facility at its site near Gore, Oklahoma pursuant to NRC Source Materials License No. SUB-1010 until 1993, when SFC advised the NRC of its intent to shut down and decommission the facility. On January 5, 2001, SFC requested that the NRC

determine if waste material from the solvent extraction process at its site in Gore, Oklahoma could be classified as section 11e.(2) byproduct material under the AEA, and thus could be decommissioned under 10 C.F.R. Part 40, Appendix A, rather than Part 20, Subpart E. Letter to L. Camper, from J.H. Ellis, (Jan. 5, 2001), ADAMS Accession No. ML010170481. Following the Commission's conclusion that some of the waste at the SFC site could properly be classified as 11e.(2) byproduct material, SFC, by letter dated September 30, 2002, requested that its materials license SUB-1010 be amended to allow possession of 11e.(2) byproduct material.<sup>1</sup> See Letter to L. Camper from J.H. Ellis, (Sept. 30, 2002), Accession No. ML022910353. Hearing requests concerning this amendment were filed on December 14, 2002 by the Citizens' Action for Safe Energy, Inc. ("CASE"); and on December 16, 2002 by the State of Oklahoma ("Oklahoma") and the Cherokee Nation.<sup>2</sup> Additionally, 15 individuals also filed requests for hearings. By Memorandum dated May 1, 2003, the Presiding Officer certified to the Commission two questions concerning whether Oklahoma should be permitted to raise the issue of whether the decommissioning waste at the site qualifies as 11e.(2) byproduct material. *Sequoyah Fuels Corporation* (Gore, Oklahoma Site), LBP-03-07, 57 NRC 287, 292 (2003). Until the Commission responds to these questions, the Presiding Officer indicated that it was his "current intention" to withhold action on all of the pending hearing requests. *Id.* at n.8.<sup>3</sup>

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<sup>1</sup> On December 11, 2002, the Staff issued Amendment 29 to Source Materials License No. SUB-1010 to authorize possession of byproduct material as defined in section 11e.(2) of the Atomic Energy Act. See Letter to J. H. Ellis from D. M. Gillen, (Dec. 11, 2002), ADAMS Accession No. ML023450646.

<sup>2</sup> See "State of Oklahoma's Request for Hearing", filed December 16, 2002; and "Request for Hearing by Cherokee Nation on Sequoyah Fuels Corporation's September 30, 2002 Application to Amend Materials License SUB-1010, Docket #40-8027 (2<sup>nd</sup> Corrected Copy)," filed December 16, 2002. On April 15, 2003, the Cherokee Nation withdrew its request based upon a letter agreement that it had reached with the Licensee. See Letter to Commission from J.K. Fite, (April 15, 2003), ADAMS Accession No. ML031140059.

<sup>3</sup> On June 13, 2003, the Commission accepted the certified questions and set a briefing  
(continued...)

By letter dated January 28, 2003, SFC submitted a request for approval of a license amendment to address clean up and reclamation of the SFC site. See Letter to D.M. Gillen from J.H. Ellis, (Jan. 28, 2003), ADAMS Accession No. ML030550045. In its reclamation plan (RP) SFC proposes to build a disposal cell on the site and put the radioactive waste in that cell. SFC also requested permission to dispose of source material wastes in the cell, under the guidance in Attachment 1 to NRC Regulatory Issue Summary 2000-23 (November 30, 2000). See "Sequoyah Fuels Corp.; Notice of Receipt of Amendment Request and Opportunity to Request a Hearing," 68 Fed. Reg. 18268 (2003). On April 15, 2003, the NRC published in the *Federal Register* a Notice of Receipt of Amendment Request and Opportunity to Request a Hearing. *Id.* Timely hearing requests were received from Oklahoma, the Cherokee Nation, and Mr. Ed Henshaw.<sup>4</sup>

On November 13, 2003, the Commission issued its decision on the certified question, determining that the front-end waste at SFC's facility may be considered byproduct material under section 11e.(2) of the Atomic Energy Act (AEA). *Sequoyah Fuels Corp. (Gore, Oklahoma Site)*, CLI-03-15, slip op. (Nov. 13, 2003).<sup>5</sup> In accordance with the Presiding Officer's August 25, 2003 Order, directing the Staff to file its response to the pending hearing requests in the above-captioned proceeding (MLA-6) within 14 days of a Commission decision on the certified question, the Staff's responses are set forth below.

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<sup>3</sup>(...continued)  
schedule so it could decide the merits of the issue. See *Sequoyah Fuels Corporation (Gore, Oklahoma Site)*, CLI-03-06, 57 NRC 547, 551 (2003).

<sup>4</sup> See "State of Oklahoma's Request for Hearing", filed May 14, 2003 (Oklahoma Hearing Request); Cherokee Nation's "Request for Hearing", filed May 15, 2003 (Cherokee Nation Hearing Request); and Letter from Ed Henshaw requesting a public hearing, dated May 15, 2003 (Henshaw Hearing Request).

<sup>5</sup> Subsequently, the Presiding Officer in MLA-5 issued a memorandum and order denying the hearing requests filed by Oklahoma, Citizens' Action for Safe Energy, the Cherokee Nation, and fifteen individuals. *Sequoyah Fuels Corp.*, LBP-03-24, slip op. (Nov. 21, 2003).

## DISCUSSION

The Commission's regulations for Subpart L set out the informal hearing procedures governing the adjudication of materials licensing proceedings, such as the license amendment request at issue here. 10 C.F.R. § 2.1201 *et. seq.* Specifically, section 2.1205(e) identifies the required content of a hearing request submitted in a Subpart L proceeding. According to the Commission's regulations, the request must describe "in detail" (1) the interest of the requestor in the proceeding; (2) how that interest might be affected by the results of the proceeding, with particular reference to the factors set out in subparagraph (h) of the section; (3) the requestor's areas of concern about the licensing activity that is the subject matter of the proceeding; and (4) that the request for a hearing is timely. 10 C.F.R. § 2.1205(e). Section 2.1205(h) of Subpart L invests the Presiding Officer with the duty of determining both that the areas of concern specified in the hearing request are germane to the subject matter of the proceeding and that the "judicial standards for standing" have been met by the hearing requestor. 10 C.F.R. § 2.1205(h).

### A. Legal Standards for Standing

In order to establish standing to intervene under the informal licensing procedures of 10 C.F.R. Part 2, subpart L, a petitioner must allege (1) an actual or threatened, concrete and particularized injury that (2) is fairly traceable to the challenged action, (3) falls among the general interests protected by the Atomic Energy Act (or other applicable statute, such as the National Environmental Policy Act (NEPA)) and (4) is likely to be redressed by a favorable decision. *Sequoyah Fuels Corp.*, CLI-01-02, 53 NRC 9, 13 (2001). The Presiding Officer must consider, among others, the (1) the nature of the requestor's right under the AEA to be made a party to the proceeding; (2) the nature and extent of the requestor's property, financial, or other interest 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. The State of Oklahoma Has Established Standing

Oklahoma asserts that it has “numerous property, financial, sovereignty, regulatory, public trust, and other interests that will be affected by approval of the RP.” Oklahoma Hearing Request at 9, 13. The State asserts that it owns the water in certain streams on the SFC site and in lakes located near the SFC site, operates a wildlife refuge near the site, and owns and operates certain roads in close proximity to the SFC site. *Id.* at 10. Oklahoma asserts that the RP, if approved, would result in an injury to those natural resources, as well as to the citizens of the State. *Id.* at 10, 11. Oklahoma claims that the alleged injuries to its interest can be redressed by a favorable decision in this matter because a hearing could result in modifications to or disapproval of the SFC’s RP. *Id.* at 13. Oklahoma also asserts that it is entitled to the presumption of standing based on its geographic proximity to the SFC site. *See id.* at 13 *citing Georgia Inst. of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995). Oklahoma claims that the RP involves a significant source of radioactivity producing an obvious potential for offsite consequences. *Id.* Oklahoma further notes that the NRC has previously found that the State had standing to request a hearing on SFC’s proposed decommissioning plan.<sup>6</sup> *See id.* at 12 *citing Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning) CLI-01-02, 53 NRC 9 (2001).

The Staff agrees that Oklahoma has established standing to intervene in this proceeding. The State has asserted an interest in protecting the water it owns, the wildlife refuge it manages, and the roads it owns and maintains. The Staff also recognizes that the State has an interest in

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<sup>6</sup> Oklahoma also asserts that its tax revenues will be harmed. *Id.* at 11-12. However, assertions of harm to economic interests are not within the zone of interest protected by the AEA. *See Pacific Gas and Electric Company* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-15, 55 NRC 317, 336, fn. 23 (2002), *citing Virginia Electric Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105-106 (1976). And, while economic interest may fall within the zone of interests protected by NEPA if the injury is environmentally related, Oklahoma’s assertions are too general to support standing. *See Northern States Power Company* (Pathfinder Atomic Plant, Byproduct Material License No. 22-08799-02), LBP-89-30, 30 NRC 311, 313 (1989), *citing Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977).

protecting the interests of its citizens. See *Carolina Power & Light Company* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29-30 (1999). The State has further alleged in sufficient detail potential injury to these interests that is concrete and particularized and is fairly traceable to the challenged action. These interests fall within the general interests protected by the Atomic Energy Act (or other applicable statute, such as the National Environmental Policy Act). Finally, the State's alleged injuries are redressable by a favorable decision. Oklahoma, however, must still advance at least one area of concern germane to this proceeding.

2. The Cherokee Nation Has Established Standing

The Cherokee Nation states that it is a federally recognized tribe and exercises governmental authority over fourteen counties in eastern Oklahoma, including the county in which the SFC site is located. Cherokee Hearing Request at 7. The Cherokee Nation asserts that it is concerned with protecting the environment, as well as the public health, safety, and welfare of its tribal members, including those living in the vicinity of the SFC site. *Id.* The Cherokee Nation also asserts that it owns or has "property interests" related to waters affected by the SFC site. *Id.* The Nation and its members own property adjacent to the site and members use this property for recreation, water supply, irrigation, fish and wildlife propagation and subsistence. *Id.* at 7-8, 9. If the RP is inadequate, the Nation asserts, these interest will be adversely affected. See *id.* at 8, 9. The Nation also asserts that it is entitled to the presumption of standing based on geographic proximity. *Id.* at 9.

The Staff agrees that the Cherokee Nation has established standing to intervene in this proceeding. It has alleged an injury to its interests that are within the zone of interests to be protected by the AEA (or other applicable statute, such as NEPA) and these injuries can be redressed by a favorable decision. Further, the Nation has alleged an injury to the interest of its members and has provided affidavits of Tribal members authorizing the Nation to represent their

interests. *Id.* at 9-11, Attachment. The Nation still must submit at least one area of concern germane to this proceeding.

3. Ed Henshaw Has Established Standing

Mr. Henshaw seeks admission to this hearing based upon his interest in protecting his health and that of his family; his home and acreage; his livestock and animals; and his personal property. See Henshaw Hearing Request at 1. Mr. Henshaw alleges that “improper design of the cell in the proposed environment, improper environmental characterization of the site, and introduction of non 11e.(2) materials into the cell have the potential of detrimental physical effects” on himself, his family, his property and the environment. *Id.* Additionally, Mr. Henshaw notes that he owns ten acres of land adjacent to the Sequoyah Fuels Corporation property and that possible effects of an improper reclamation plan include “adverse health effects, devaluation of property and physical property damage.” *Id.*

Mr. Henshaw’s request, although brief, provides sufficient information to establish standing to intervene in this proceeding. He has alleged an injury to his interests that are within the zone of interests to be protected by the AEA (or other applicable statute, such as NEPA) and these injuries can be redressed by a favorable decision.<sup>7</sup>

B. Areas of Concern Germane to the Subject Matter of this Proceeding

1. Legal Standards

In addition to demonstrating standing, in order to be granted a hearing in an informal Subpart L proceeding, a petitioner must specify its area of concern about the licensing activity that is the subject matter of the proceeding. 10 C.F.R. § 2.1205(e)(3); see *Sequoyah Fuels Corporation* (Gore, Oklahoma Site Decommissioning), LBP-99-46, 50 NRC 386, 390 (1999). The Presiding Officer must determine whether any of the hearing requesters have articulated an area of concern

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<sup>7</sup> However, Mr. Henshaw must still set forth at least one area of concern germane to the proceeding. As indicated below, he has failed to do so, thus, his hearing request should be denied.

that is germane to the subject matter of this proceeding. 10 C.F.R. § 2.1205(h). The statement of the area of concern must be sufficient to establish that the issues the requesters are raising fall within the range of matters properly subject to challenge in such a proceeding. *Statements of Consideration*, "Informal Hearing Procedures for Materials Licensing Adjudications," 54 Fed. Reg. 8269, 8272 (Feb. 28, 1998). A petitioner need only "state his areas of concern with enough specificity so that the Presiding Officer may determine whether concerns are truly relevant--i.e., "germane" -- to the license amendment at issue." *Sequoyah Fuels*, CLI-01-02, 53 NRC 9, 16 (2001). This pleading burden is "modest." *Id.*

The required level of detail for an area of concern is not extensive because it would be inequitable to require the requester to set forth all of its concerns without access to the hearing file. The areas of concern are intended to provide the minimal information necessary to ensure that the hearing requester desires to litigate issues germane to the licensing proceeding, and therefore should be allowed to take the additional step of making a full written presentation pursuant to 10 C.F.R. § 2.1233. 54 Fed. Reg. at 8273; *see also Sequoyah Fuels*, CLI-01-02, 53 NRC at 16.

## 2. Oklahoma's and Cherokee Nation's Areas of Concern

Oklahoma and the Cherokee Nation raise similar areas of concern. Accordingly, they are addressed together following the order and titles used by Oklahoma in its hearing request.

### a. 10 CFR Part 20 Should be Applied to the Decommissioning of the Site

Oklahoma asserts that SFC's proposal to decommission the entire site using the criteria of 10 CFR Part 40, Appendix A and the guidance in the *Standard Review Plan for the Reclamation of Mill Tailings Sites Under Title II of the Uranium Mill Tailings Radiation Control Act of 1978* (NUREG-1620) is inappropriate and contrary to the guidance in SECY-02-0095. Oklahoma Hearing Request at 16-17. *See also* Cherokee Nation Hearing Request at 12. Oklahoma claims that the criteria in Appendix A were not intended or designed to apply to waste with the radiological and non-radiological characteristics such as the waste found on the SFC site. *Id.* at 17. Rather,



according to Oklahoma, the requirements of Part 20 for license termination should be applied. Oklahoma Hearing Request at 18-19. Even if some of the waste could be classified as 11e.(2) byproduct material, Oklahoma asserts that it would be inappropriate to apply Part 40, Appendix A criteria to the non-11e.(2) waste and the portions of the site not contaminated by non-11e.(2) waste. *Id.* at 18. See also Cherokee Nation Hearing Request at 12. SFC, according to Oklahoma, totally fails to even address its compliance with Part 20 and did not request an exemption from its requirements. *Id.* at 17 n. 5 & 18-19.

Oklahoma and the Cherokee Nation raise a germane area of concern with respect to the appropriateness of applying the criteria of 10 CFR Appendix A to the non-11e. (2) byproduct material located on the SFC site.<sup>8</sup> With respect to the appropriate criteria to be applied to the 11e.(2) byproduct material, however, to the extent the Petitioners are arguing that Appendix A to Part 40 should not be applied, the Petitioners are impermissibly challenging the Commission's regulations. The criteria of Appendix A explicitly apply to the disposition of 11e.(2) byproduct material.<sup>9</sup> Thus, that part of the area concern is not germane to this proceeding.<sup>10</sup>

b. SFC Failed to Establish Proper Dose and Cleanup Criteria

Oklahoma asserts that SFC only applied the requirements of Part 40 to determine the total effective does (TEDE) from residual radioactivity and to select the soil cleanup criteria. Oklahoma Hearing Request at 19. Oklahoma claims that SFC should have also applied the requirements of

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<sup>8</sup> In SECY-02-0095, the Staff noted that the license termination rule would apply to non-11e.(2) byproduct material and Appendix A to the mill tailings. The release criteria are both protective, but different in their approaches. SECY-02-0095 at 7 n.6. The Staff suggested that it might be more efficient to apply only one set of regulations. *Id.*

<sup>9</sup> The Staff Requirements Memorandum (SRM) approving Option 2 of SECY-02-0095 specifically stated that SFC's "front-end waste. . . can be disposed of in accordance with the uranium mill tailings impoundment regulations in Appendix A of 10 CFR Part 40." SRM for SECY-02-0095, July 25, 2002.

<sup>10</sup> As noted above, the Commission recently ruled that the waste at SFC's site could be classified as 11.e(2) byproduct material. See *Sequoyah Fuels*, CLI-03-25, slip op. at 1, 4.

Part 20. *Id.* Further, Oklahoma claims, the use of the radium benchmark approach<sup>11</sup> (under Part 40) is inappropriate due to the unusually high concentrations of uranium and thorium and relatively low levels of radium at the SFC site as compared to a typical uranium mill site. *Id.* at 19-20. In any event, according to Oklahoma, SFC misapplied the radium benchmark dose calculation and the resident farmer scenario as described in NUREG-1620 Appendix H. *Id.* at 20. Oklahoma also questions the cleanup levels selected by SFC for the site, arguing that SFC gives no explanation for its selection of 100 pCi/g as a cleanup level. See *id.* at 20-21. SFC, according to Oklahoma, failed to consider the chemical toxicity of uranium and to develop cleanup levels for non-radiological contaminants as required by Part 40, Appendix A, Criterion 6. *Id.* at 21. Oklahoma claims that SFC never actually selected a cleanup level for the site and did not demonstrate how the cleanup plan satisfies the dose criteria in either Part 20 or Part 40.<sup>12</sup> *Id.* 21-22. Finally, Oklahoma claims that SFC's Final Status Survey in Appendix B of the RP is inadequate to demonstrate that it will satisfy Part 20 and Part 40. *Id.* The Cherokee Nation "shares the concerns of the state of Oklahoma" that the appropriate dose and cleanup criteria will not be applied. Cherokee Nation Hearing Request at 12.

This area of concern, to the extent it raises a concern regarding SFC's proposed application of Part 40, Appendix A to the 11e.(2) byproduct material on the site, specifically the application of the radium benchmark dose calculation and the resident farmer scenario, is germane to this proceeding. Further, Oklahoma's concern that SFC is applying Part 40, Appendix A to the cleanup of the non-11e.(2) byproduct material is also germane to the proceeding as is Oklahoma's concern

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<sup>11</sup> The radium benchmark approach requires facilities to reduce residual radioactivity, that is byproduct material, as defined in 10 CFR Part 40, to levels based on the potential doses, excluding radon, resulting from the application of the radium (Ra-226) standard at the site. NUREG-1640, Appendix H at H-1.

<sup>12</sup> Oklahoma in a footnote also states that it objects to SFC's plan to leave high levels of uranium in the soil below the footprint of the disposal cell because this could cause contamination of the groundwater. *Id.* at 21 n. 9.

regarding the adequacy of the Final Status Survey in the RP. Furthermore, Oklahoma's challenge to the cleanup level selected by SFC is also germane. However, to the extent that the Petitioners are challenging the application of the criteria in Part 40, Appendix A to the cleanup of the 11e.(2) byproduct material, the Petitioners are impermissibly challenging the Commission's regulations. See 10 C.F.R. § 2.1239(a). Thus, that portion of the area of concern is not germane to this proceeding.<sup>13</sup>

c. SFC Does not Satisfy the Requirements of RIS-2000-23

As Oklahoma correctly notes, the NRC will review SFC's proposal to dispose of non-11e.(2) byproduct material in the 11e.(2) byproduct material disposal cell according to the guidance in RIS-2000-23, Attachment 1, "NRC's Interim Guidance on Disposal of Non-Atomic Energy Act of 1954, Section 11e.(2) Byproduct Material in Tailings Impoundments." See Oklahoma Hearing Request at 22. The guidance lists eight criteria to consider. Oklahoma and the Cherokee Nation assert that SFC has failed to adequately address several of these criteria and, thus, fails to demonstrate conformance with the guidance. *Id.*; Cherokee Nation Hearing Request at 12. As discussed below, because the Petitioners are challenging SFC's conformance with RIS-2000-23 they have raised an area of concern germane to this proceeding, except as noted below.

Criterion 1 sets forth the first presumption, that the non-11e.(2) byproduct material being proposed to be disposed of in an 11e.(2) byproduct material disposal cell has radiological characteristics comparable to those of 11e.(2) byproduct material. See RIS-2000-23, Attachment 1. Oklahoma asserts that the waste designated by SFC as 11e.(2) byproduct material was improperly classified. Oklahoma Hearing Request at 23-24; Cherokee Nation Hearing Request at 13. Both Petitioners claim that the RP does not justify SFC's waste determination classifications and, in fact, not all of the waste should be classified as 11e.(2) byproduct material.

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<sup>13</sup> Neither the State nor the Cherokee Nation have alleged special circumstances warranting a wavier of this prohibition. See 10 C.F.R. § 2.1239(b).

*Id.* at 23; Cherokee Nation Hearing Request at 13. Oklahoma asserts that the radiological concentrations of uranium and thorium in the waste is significantly higher than those found in typical mill tailings. *Id.* at 24. See also Cherokee Nation Hearing Request at 13. This material, according to Oklahoma, is not radiologically similar to typical mill tailings and thus, SFC fails to meet the first criterion. *Id.* The Cherokee Nation raises similar concerns stating that it is concerned that not all of the waste claimed by 11e.(2) material should be disposed of in the same manner.<sup>14</sup> Cherokee Nation Request for Hearing at 13.

To the extent that the Petitioners are challenging the classification of some of the waste on the SFC site as 11e.(2) byproduct material, this area of concern is not germane to the proceeding. The Staff has already granted SFC's request to reclassify some of the waste. See Materials License No. SUB-1010, Approval of Request to Authorize Possession of Byproduct Material (Dec. 11, 2002), ADAMS Accession No. ML023450646. The Commission has recently determined that the front-end waste at SFC's facility may be considered 11e.(2) byproduct material. *Sequoyah Fuels*, CLI-03-14, slip op. at 1,4. Subsequently, the Presiding Officer terminated the proceeding concerning SFC's request (MLA-5). *Sequoyah Fuels*, LBP-03-25, slip op. at 4 (Nov. 21, 2003). However, to the extent that the Petitioners' area of concern challenges SFC's proposal to place the remaining waste that is not 11e.(2) byproduct material in the same cell as the 11e.(2) byproduct material, based on the assertion that the waste is not radiologically comparable, this concern is germane to this proceeding.

The Petitioners next argue that SFC fails to meet criterion 3. Oklahoma Hearing Request at 25; Cherokee Nation Hearing Request at 14. Criterion 3 requires a licensee to provide documentation showing the necessary approvals of other affected regulators, e.g., the U.S.

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<sup>14</sup> The Cherokee Nation specifically objects to the disposal of raffinate sludge in the disposal cell. Cherokee Nation Hearing Request at 13. The Nation asserts that the sludge should be removed and disposed of offsite. *Id.*

Environmental Protection Agency (EPA) or the State, for material containing listed hazardous waste or other material regulated by another Federal agency or State because of environmental or safety considerations. RIS-2000-23, Attachment 1. SFC asserts in the RP that no approvals are necessary since none of the non-11e.(2) byproduct material contain hazardous materials listed under the Resource Conservation and Recovery Act (RCRA). RP, Appendix A at 2. SFC notes that the site is subject to an Administrative Order issued by the EPA under RCRA, and that “the EPA’s concerns are not with any of the non-11e.(2) wastes that SFC wants to place in the disposal cell.” *Id.* Oklahoma claims, referring to the Administrative Order, that the non-11e.(2) byproduct material wastes on the site are contaminated with hazardous waste and approvals from the EPA and the State are necessary. Oklahoma Hearing Request at 25-24. Oklahoma further asserts that the EPA and the Oklahoma Department of Environmental Quality have jurisdiction over the wastes at the SFC site. *Id.*

Because the Petitioners raise concern with respect to SFC’s conformance with Criterion 3, this area of concern is germane to the proceeding.

Criterion 4 provides that the licensee should demonstrate that there will be no significant environmental impact from disposing of the material. RIS-2000-23, Attachment 1. SFC asserts that there will be no significant environmental impact from disposing of the non-11e.(2) byproduct material in the cell. RP, Appendix A at 3. SFC states that the material is chemically and physically very similar to other material classified as 11e.(2) material. *Id.* Further, SFC states, while the CaF sludge is chemically different from the 11e.(2) material, no adverse chemical reaction is anticipated. *Id.* The only impact, according to SFC, will be an increase of approximately 20% in the volume of material to be disposed of in the cell. *Id.* Both Oklahoma and the Cherokee Nation assert that given the higher radiological content of the non-11e.(2) material, the presence of non-radiological contaminants, and the inadequacy of the cell design, SFC fails to adequately evaluate the potentially significant environmental impacts from disposing of the non-11e.(2)

material. See Oklahoma Hearing Request at 26-27; Cherokee Nation Hearing Request at 14-15. Because this area of concern challenges SFC's conformance with criterion 4, it is germane to the proceeding.

Criterion 5 states that the licensee should demonstrate that the proposed disposal will not compromise the reclamation of the tailings impoundment by demonstrating compliance with the reclamation and closure criteria of Appendix A of 10 CFR Part 40. SFC states that its Reclamation Plan demonstrates how disposal of both 11e.(2) byproduct material and the non-11e.(2) byproduct material will be in compliance with Appendix A of 10 CFR Part 40. RP, Appendix A at 4. Both Oklahoma and the Cherokee Nation assert that SFC's Reclamation Plan fails to demonstrate compliance with Part 40, Appendix A. See Oklahoma Hearing Request at 27; Cherokee Nation Hearing Request at 15. Because this area of concern challenges SFC's conformance with criterion 5, it is germane to the proceeding.

Finally, Oklahoma and the Cherokee Nation assert that SFC fails to meet criterion 7, which requires the licensee to obtain concurrence and commitment from the Department of Energy (DOE) to take title to the tailings impoundments after closure. See Oklahoma Hearing Request at 27-28; Cherokee Nation Hearing Request at 15. SFC states that it sent a letter to DOE on November 18, 2002 requesting its concurrence with the proposed disposal. RP, Appendix A at 6. This area of concern is moot. By letter dated June 5, 2003, DOE stated that it is prepared, at the request of the NRC to take title to the Gore site and the 11e.(2) byproduct material. DOE also stated that it would not object to the disposal of the non-11e.(2) byproduct material provided SFC satisfies the requirements of section 83 of the AEA and RIS 2000-23. See Letter to J.H. Ellis from Jessie Hill Roberson, (June 5, 2003), ADAMS Accession No. ML033070176. Further, NRC would not permit the placement of non-11e.(2) byproduct material into the cell without an agreement from DOE that it will take custody of the waste.

d. SFC's Cell Design is Inadequate and Will Result in Pollution

Oklahoma and the Cherokee Nation assert that SFC's cell design is inadequate and is vague and lacking in the required details. See Oklahoma Hearing Request at 28-29; Cherokee Nation Hearing Request at 1. According to Oklahoma, the cell design will not meet the technical criteria of Appendix A of Part 40. *Id.* at 29. The design, according to Oklahoma, is not sufficient to prevent migration of contaminants to soils and water and will not meet radon release limits. *Id.* Further, Oklahoma asserts, SFC's proposed design fails to take into account the differences between the waste at its site and typical mill tailings. See *id.* at 29-30. The Cherokee Nation raises similar concerns. See Cherokee Nation Hearing Request at 16-17.

Specifically, Oklahoma asserts that SFC's proposed placement of the disposal cell was not in accordance with criterion 1 of Part 40, Appendix A and will result in the migration of contamination into the environment. Oklahoma Hearing Request at 30-31. Both Oklahoma and the Cherokee Nation claim that SFC's design for the cover, liner and lack of a leachate collection system for the cell violates criteria 5 and 6. *Id.* at 31; Cherokee Nation Hearing Request at 16. According to Oklahoma, the cover will not prevent infiltration and radon emissions from the cell.<sup>15</sup> *Id.* at 31, 32-33. See also Cherokee Nation Hearing Request at 11. The lack of a proper infiltration barrier will cause contamination of the groundwater and compromise the clay liner, according to Oklahoma. *Id.* at 33. SFC has also not demonstrated, according to Oklahoma and the Cherokee Nation, that the liner will meet the requirements of Criterion 5A(2)(a) and (b). *Id.* at 32; Cherokee

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<sup>15</sup> Both Oklahoma and the Cherokee Nation express concern about the placement of unstabilized material in the disposal cell. Oklahoma Hearing Request at 32-33; Cherokee Nation Hearing Request at 21. The Cherokee Nation is particularly concerned about the placement of partially dewatered raffinate sludge containing high levels of radioactive and hazardous contaminants at the bottom of the cell. Cherokee Nation Hearing Request at 16. The Cherokee Nation specifically opposes onsite disposal of the raffinate sludge. *Id.* at 17. By letter dated November 3, 2003, SFC requested an amendment to authorize dewatering of the refined sludges. See Letter to G.S. Janosko from J.H. Ellis, (Nov. 3, 2003), ADAMS Accession No. ML033140064. The request did not address the ultimate fate of the dewatered sludge.

Nation Hearing Request at 16. Oklahoma claims that SFC failed to meet Criterion 5G by failing to submit a report detailing the chemical and radioactive characteristics of the waste, the complete information on the geological and hydrological systems, and details about site groundwater. *Id.* at 34. SFC's plan also fails to address, according to Oklahoma, how SFC will manage the waste to assure that contaminants will not exceed the groundwater standards in criteria 5 and 13. *Id.* The information SFC does provide, according to Oklahoma, is based on a cell design not proposed in the RP. *Id.* Finally, Oklahoma and the Cherokee Nation assert that SFC's plan for placing the waste in the cell is vague and contradictory. *Id.* at 34; Cherokee Nation Hearing Request at 17.

Because this area of concern raises issues associated with SFC's proposed cell design, it is germane to this proceeding.<sup>16</sup> However, Oklahoma's concerns regarding the management of the waste to assure that contaminants will not exceed groundwater standards pursuant to criteria 5 and 13, are not germane as SFC has submitted both its groundwater monitoring plan and its corrective action plan which address this issue. See Letter to S. Frant from J. H. Ellis, (June 12, 2003), ADAMS Accession No. ML031810551 and Letter to S. Frant from J.H. Ellis, (June 16, 2003), ADAMS Accession No. ML031710029.<sup>17</sup>

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<sup>16</sup> In support of its assertion that SFC's proposed site for the cell does not meet Part 40, Appendix A, criterion 1, Oklahoma states that the portion of the cell that will contain the most highly contaminated waste will be constructed below grade. Oklahoma Hearing Request at 30-31. In its answer to the hearing requests, SFC states that the RP erroneously indicated that the disposal cell will be constructed below grade, in the terrace groundwater formation, and that it will be only partially lined. "Sequoyah Fuels Corporation's Answer Opposing, In Part, State of Oklahoma and Cherokee Nation Requests for Hearing," May 27, 2003 at 33. SFC states that it plans to construct the cell entirely above grade, above the groundwater formation and that the RP will be revised accordingly. *Id.* However, until the RP is so revised, Oklahoma's area of concern remains germane to this proceeding.

<sup>17</sup> These two amendment requests were noticed in the *Federal Register* along with the opportunity to request a hearing. "Notice of Receipt of License Amendment Request From the Sequoyah Fuels Corp. to Approve a Ground Water Corrective Action Plan for Its Gore, Oklahoma Facility, and Opportunity to Request a Hearing", 68 Fed. Reg. 51033; "Notice of Receipt of License Amendment Request From the Sequoyah Fuels Corp. to Approve a Ground Water Monitoring Plan for Its Gore, Oklahoma Facility, and Opportunity to Request a Hearing," 68 Fed. Reg. 51034 (continued...)



e. SFC Failed to Address Non-Radiological Hazards in the RP

Both Oklahoma and the Cherokee Nation assert that SFC did not fully characterize the waste and contaminated media at the site for radiological and non-radiological materials as required by Criterion 5 of Appendix A. *Id.* at 35; Cherokee Nation Hearing Request at 17. Oklahoma and the Cherokee Nation allege that the RCRA Facility Investigation Report and Draft Corrective Measures Study completed for the EPA indicate that the SFC site is likely contaminated with hazardous waste. *Id.* at 35-36; Cherokee Nation Hearing Request 17-18. According to Oklahoma and the Cherokee Nation, SFC fails to address these hazards in its RP. *See Id.* at 36; Cherokee Nation Hearing Request at 18. Oklahoma also asserts that NRC is required to evaluate these impacts under NEPA. *Id.*

Since this area of concern challenges SFC's conformance with criterion 5, it is germane to this proceeding.

d. SFC Has Not Demonstrated Adequate Long Term Custodianship, Financial Assurance and Institutional Controls

Both Oklahoma and the Cherokee Nation claim that SFC's plan for long-term custodianship is inadequate. Oklahoma Request for Hearing at 38; Cherokee Nation Request for Hearing at 18. Most significantly, Oklahoma and the Cherokee Nation stated that SFC has failed to demonstrate that DOE will take custody of the site because of the placement of non-11e.(2) material in the disposal cell. *Id.*; Cherokee Nation Hearing Request at 18. SFC has also failed to provide a contingency plan in the event DOE declines to accept the site. This area of concern is moot. As discussed above, by letter dated June 5, 2003, DOE stated that it is prepared, at the request of the NRC to take title to the Gore site and the 11e.(2) byproduct material. DOE also stated that it would

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<sup>17</sup>(...continued)  
(2003). Both Oklahoma and the Cherokee Nation filed hearing requests. Subsequently, the Presiding Officer denied their requests as untimely. *Sequoyah Fuels Corp.* (Gore, Oklahoma), LBP-03-24, slip op. at 9 (Nov. 19, 2003).

not object to the disposal of the non-11e.(2) byproduct material provided SFC satisfies the requirements of section 83 of the AEA and RIS 2000-23. See Letter to J.H. Ellis from Jessie Hill Roberson, (June 5, 2003), ADAMS Accession No. ML033070176.

Oklahoma also argues that the documentation of costs set forth in Table 7-1 of the RP does not provide the amount of detail set forth in NUREG-1620, Appendix C. Thus, Oklahoma argues, SFC has failed to provide sufficient detail to determine compliance with criteria 9 and 10.<sup>18</sup> Both Oklahoma and the Cherokee Nation claim that there is a lack of funds for long term maintenance and surveillance. Oklahoma Hearing Request at 39; Cherokee Nation Hearing Request at 18-19. Referring to Table 7-1 of the RP, Oklahoma and the Cherokee Nation claim that SFC is only making \$21,866 available annually for long term maintenance and surveillance. Both claim that this amount is inadequate because of the unique features of the site. In accordance with the guidance set forth in NUREG-1620, Petitioners assert that the amount of funding to be required should be escalated.

Although this may be an area of concern as it raises a challenge to SFC's compliance with criteria 9 and 10, the amount of decommissioning funding (including the amount under Criterion 10), was the subject of a settlement agreement between the NRC and SFC. *Sequoyah Fuels and General Atomics* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195 (1997). The Cherokee Nation was an intervenor in that proceeding and the State of Oklahoma filed a brief *amicus curiae*. See *id.* at 202. Under this agreement, SFC agreed to "commit all of its present and future net assets and net revenues to funding the decontamination and decommissioning of the SFC site. In exchange, the Staff agreed to forgo further enforcement or other action against SFC to secure any

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<sup>18</sup> Criterion 9 requires the provision of a surety arrangement to assure that sufficient funds will be available to carry out the decontamination and decommissioning of the mill and site and for the reclamation of any tailings or waste disposal areas. Criterion 10 establishes a minimum charge of \$250,000 (1978 dollars) to cover the cost of long-term surveillance to be paid to the general treasury prior to the termination of the license.

additional decommissioning funding.” *Id.* at 203. In reviewing the settlement agreement, the Commission determined that “[w]e see no violation of law or jeopardy to public health and safety that would justify the Commission’s rejection of the settlements.” *Id.* at 218. Thus, this area of concern is not germane to the proceeding.

f. SFC Is Required to Submit Groundwater Cleanup and Monitoring Plan with the RP

Both Oklahoma and the Cherokee Nation claim that SFC should be required to submit its groundwater cleanup and monitoring plan with the RP. Oklahoma Hearing Request at 40-41; Cherokee Nation Hearing Request at 19. As discussed above, SFC has submitted its groundwater cleanup and monitoring plan. Petitioners claim, however, that the RP and the groundwater plans are inextricably linked that should be evaluated together. Oklahoma Hearing Request at 40-41; Cherokee Nation Hearing Request at 19. However, there is no requirement that the groundwater protection plan be submitted at the same time as the RP. NUREG-1620 provides that a licensee may either present its groundwater corrective action plan with the reclamation plan or as a separate licensing submittal.<sup>19</sup> NUREG-1620 at 4-38. Accordingly, this area of concern is not germane to the proceeding.

3. Ed Henshaw’s Areas of Concern

Mr. Henshaw fails to provide any areas of concern in his hearing request. Thus, his request for a hearing should be denied. See 10 C.F.R. § 2.1205.

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<sup>19</sup> NUREG-1620 does recognize that a separately submitted corrective action plan will contain much of the same information required for the reclamation plan. *Id.*

CONCLUSION

Oklahoma and the Cherokee Nation have demonstrated the required standing to intervene in this proceeding. Additionally, both have articulated areas of concern that are germane to the subject matter of this proceeding. Therefore, their requests for a hearing should be granted. Mr. Ed Henshaw, however, has failed to provide any areas of concern germane to this proceeding, his hearing request should, therefore, be denied.

Respectfully submitted,

**/RA/**

Marian L. Zabler  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 25th day of November, 2003

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of	)	
	)	Docket No. 40-8027-MLA-6
SEQUOYAH FUELS CORPORATION	)	
(Gore, Oklahoma Site)	)	ASLBP No. 03-807-01-MLA
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO REQUEST FOR HEARING FILED BY THE STATE OF OKLAHOMA, THE CHEROKEE NATION, AND ED HENSHAW" in the above-captioned proceeding have been served on the following by deposit into the United States mail or through deposit in the Nuclear Regulatory Commission's internal mail system as indicated with a single asterisk, and/or by electronic mail where indicated with a double asterisk on this 25th day of November, 2003.

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