

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

DOCKETED
USNRC

In the Matter Of

Sequoyah Fuels Corporation
and General Atomics
Gore, Oklahoma Site Decontamination
and Decommissioning Funding

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INTERVENORS' REPLY BRIEF ON APPEAL OF LBP-95-18

Introduction

Intervenors, Native Americans for a Clean Environment ("NACE") and the Cherokee Nation, hereby submit this reply brief on review of LBP-95-18, Memorandum and Order (Approval of Settlement Agreement), 42 NRC 150 (October 26, 1995) ("LBP-95-18").

A. The Settlement Fails to Provide Secured Funding.

As noted in Intervenors' Brief on Appeal of LBP-95-18 (March 25, 1996) ("Intervenors' Brief"), the Settlement Agreement fails to meet one of the principal goals set forth in the NRC staff's October 15, 1993 Order: to obtain a secured source of decommissioning funding. Intervenors' Brief at 8. The staff responds that SFC does not have the financial resources to obtain an additional surety instrument "of any significant amount." NRC Staff's Brief Regarding Commission Review of Settlement Agreement Between Sequoyah Fuels Corporation and the NRC Staff (April 29, 1996) ("NRC Staff Brief") at 4. However, this argument is not supported by any NRC staff review of SFC's claims regarding its resources, anticipated revenues and expenses, and decommissioning cost estimate. Despite NRC staff promises to do so, it has never

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issued a review of SFC's 1993 Preliminary Plan for Completion of Decommissioning ("PPCD"), the financial document on which the Settlement Agreement allegedly is based.¹ See letter from Robert M. Bernero, NRC, to John H. Ellis, SFC (November 29, 1993). Nor does the PPCD contain any detail regarding SFC's resources and expenses. As a result, it is impossible to determine whether SFC has the capability to obtain secured funding, or how much that would be.² By the same token, there is absolutely no support for SFC's bald assertion that, "[a]s projected in the PPCD, the combination of SFC's net assets and net revenues is expected to be adequate to finance decommissioning." Sequoyah Fuels Corporation's Response to Briefs of Intervenors and State of Oklahoma on Appeal of LBP-95-18 (April 29, 1996) ("SFC Brief") at 23. In fact, the NRC staff's October 15, 1993, decommissioning funding order cited the PPCD's decommissioning cost estimate of \$86 million as the minimum amount necessary to clean up the site. Actual decommissioning costs are likely to be much higher, as

¹ Aside from relying on the 1993 PPCD without reviewing it, the staff has failed even to incorporate SFC's more recent revision to the PPCD. Letter from John H. Ellis, SFC, to Robert M. Bernero, NRC (February 17, 1995) (See Attachment 7 to Enclosure 1 to SFC's Brief). For example, the staff refers to the 1993 PPCD figure of \$72 million for anticipated ConverDyn revenues, while a 1995 revision to the PPCD estimates these revenues at \$68.8 million. NRC Staff Brief at 7.

² Intervenors note that SFC's 1995 3rd Quarter Financial Assurance Report to EPA identified an actual "other revenue source" in the amount of \$803,956, apparently from the sale of SFC's laboratory to another company. SFC and the staff do not explain, nor is it apparent, why this unexpected income could not have been used to collateralize a decommissioning fund.

witnessed by the fact that the cost of the not-yet-finished Site Characterization Plan as of February 17, 1995 -- \$1,589,000 -- is almost four times higher than the \$401,000 estimated in the 1993 PPCD. Compare Table 10-2 of the 1993 PPCD with Table 10-2 of the 1995 revision to the PPCD.

The staff and SFC fail to demonstrate that the "decommissioning reserve," established in 1988 as a condition of the 1988 transfer of SFC from Kerr-McGee to GA, is intact, sufficient, and committed solely to decommissioning-related expenses, as required by the contemporaneous NRC documents approving the transfer. Neither the staff nor SFC provides any accounting of whether the decommissioning reserve has been or is being properly maintained and applied.³ As a result, the NRC's 1988 stipulation that SFC must accumulate the decommissioning reserve, on which both the NRC staff and the public relied as a basis for upholding the safety of the license transfer from Kerr-McGee to GA, is rendered completely meaningless by this settlement agreement.

The staff demonstrates similar myopia with respect to SFC's recent proposal to set up an escrow account in lieu of a letter of credit, by refusing to require SFC to commit the interest from the escrow account to decommissioning. Letter from Robert A.

³ Indeed, the few available facts indicate that SFC's management of the decommissioning reserve has been erratic at best: in March 1994, SFC reported to the EPA that the balance in the decommissioning and reclamation account was \$3,794,022.20. See Intervenor's Brief at 11, note 9. In its Brief, SFC acknowledges that almost a year later, the decommissioning reserve still stood at the same figure. SFC Brief at 11, note 8. During 1995, however, the reserve was raised by over \$18 million to \$21,857,187.

Nelson, NRC, to John H. Ellis, SFC (April 9, 1996). The NRC staff claims this omission is unimportant because the interest will go to decommissioning anyway. NRC Staff Brief at 11. However, that is not a foregone conclusion, given SFC's high level of indebtedness to Kerr-McGee and GA and its unclear level of non-decommissioning-related indebtedness to other creditors.⁴

The staff argues that tying up financial resources to collateralize a security instrument would be "pointless" because it would render those resources unavailable to carry out current decommissioning activities. NRC Staff Brief at 4, 10. It would not be futile to require the collateralization of such funds, however, if only to protect SFC's resources against Kerr-McGee's \$10.6 million claim.⁵

Finally, the NRC staff contends that the \$750,000 letter of credit/escrow account and the decommissioning reserve are outside

⁴ The staff's attempt to rely on its allegedly long-standing position that licensees need not re-invest interest from escrow accounts into those accounts is entirely meritless. NRC Staff Brief at 11 note 13. The staff's mandate under the October 15, 1993, order, is to ensure that SFC's resources are carefully and responsibly accounted for and committed to pay for as much as possible of the immense costs of cleaning up the SFC site. Interest on the escrow account is a clearly available source of committable and protectable decommissioning funding. For the staff to completely ignore this source of funding is simply irresponsible.

⁵ The staff, SFC, and GA continue to argue that the Commission need not worry about Kerr-McGee's claim because Kerr-McGee has stated in a letter that it will not attempt to collect on the debt. As the Commission has learned from GA's repudiation of previous promises to pay SFC's decommissioning costs, however, such informal promises cannot be relied on, and should be encoded in this settlement.

the scope of the settlement, and therefore are unaffected by it. NRC Staff Brief at 11. See also LBP-95-18, 42 NRC at 153. Given that the purpose of the NRC staff's October 15, 1993, Order and the Settlement Agreement is to ensure adequate funding of decommissioning for the SFC site, it is absurd that the Settlement Agreement ignores these two financial instruments, allows SFC to perpetuate deficiencies in their administration, and yet precludes the NRC staff from taking enforcement action with respect to them.

B. The Settlement Fails to Protect Against Improper Claims.

The staff asserts that the terms of the Settlement Agreement provide sufficient "incentive and assurance" that SFC will not improperly disburse funds, given the enforcement action that SFC and its officers could face. NRC Staff Brief at 6. This argument doesn't hold water. The only incentives and assurances provided for in the Settlement Agreement constitute the NRC's ordinary enforcement powers. See Settlement Agreement, par. 2. Such powers are weak in this case, as the strongest incentive normally available to the government -- the threat of shutting down an operating facility and thereby hampering its profitability -- is entirely inapplicable here. Moreover, it would be more effective to conserve the decommissioning funds in the first place than to threaten SFC with punishment if it mispends those funds: as Judge Bollwerk has noted, it is difficult to retrieve money once it is spent. LBP-95-18, 42 NRC at 157. Thus, the Commission should reject the staff's argument that if

and when the NRC determines that Kerr-McGee is liable for decommissioning costs at the SFC site, it can take action against those entities to recover funds they may have recovered from SFC as creditors. NRC Staff Brief at 13. The Settlement Agreement should clearly provide that SFC may not pay its debt to Kerr-McGee unless and until decommissioning is satisfactorily completed.⁶ Such a ruling would also prevent GA from unjustly enriching itself by using SFC to pay the debts of its subsidiaries, SFIC and SHC.

The staff claims to have no knowledge of the likelihood of an SFC bankruptcy, and notes that SFC's financial health depends in large part on the health of ConverDyn. NRC Staff Brief at 7. The staff's claimed ignorance on this matter is belied by the viewgraphs of the staff's July 26, 1995, presentation to the Executive Director for Operations, in which a "Current Issue" under discussion was "Significant Potential for Bankruptcy." Jim Shepherd, Sequoyah Fuels Corp Site, Current Issues and Actions at 5. See Attachment 3 to Intervenor's Brief.

Also inadequate is the staff's answer to Judge Bollwerks' question as to whether the staff could take any action prior to

⁶ The Commission should reject out of hand the NRC's argument that such measures would be excessive because of the absence of willful misconduct by SFC. NRC Staff Brief at 14. The SFC site ranks among the most severely and wantonly contaminated nuclear sites in the country, thanks to this agency's lack of vigilance over the licensee's recklessly unsafe and environmentally damaging management of the facility for 20 years. This is not a case where the licensee has demonstrated that it is capable of managing its affairs safely with minimum oversight -- indeed, it is the opposite.

bankruptcy to assert a preferential claim on SFC assets for decommissioning purposes. The staff argues that prior notice of an SFC bankruptcy is unnecessary because the government may take action either before or after the bankruptcy is declared. NRC Staff Brief at 8. However, Intervenor believe that given the complexity and novelty of the issues raised by a bankruptcy filing, the public interest would best be served by providing for maximum notice to the government and the public regarding any intention by SFC to file for bankruptcy. As the NRC staff concedes, this area of the law is attended by a degree of uncertainty. NRC Staff Brief at 8. In fact, the precise framing of the government's claim against a debtor is key to whether the bankruptcy court will allow the action to go forward as an exercise of police power that is exempt from the general stay of creditors' claims under 11 U.S.C. § 362(b)(4), or whether the court will treat the government as an ordinary creditor. Generally similar government actions have been treated differently, depending on subtle distinctions in their wording. Compare Commonwealth Oil Refining Co. v. EPA, 805 F.2d 1175, 1182-84 (5th Cir. 1986), cert. denied, 483 U.S. 1005 (1987) (EPA cleanup order exempted from stay of creditors' claims under 11 U.S.C. § 362(b)(4)), with U.S. v. Nicolet, Inc., 857 F.2d 202, 210 (3rd Cir. 1988) (EPA exempted from stay of creditors' claims for purposes of bringing suit for judgment of cleanup costs, but recovery of those costs would be stayed). Under the circumstances, the public interest would be best served by requiring

advance notice of SFC's intent to file for bankruptcy.

C. The Settlement Agreement Is Defective Because It Fails to Address GA.

As Judge Bollwerk observed in LBP-95-18, given the corporate and business interrelationships between SFC and GA, the public interest is not served by approving a settlement agreement between SFC and the NRC staff without evaluating all settlements involving the parties to this case. 42 NRC at 159. The NRC staff, SFC, and GA all claim that the settlement with SFC can be evaluated independently of GA. However, as Intervenor has demonstrated, the settlement does not address the issue of whether GA may -- either directly or through its subsidiaries, SFIC and SHC -- exercise control or undue influence over SFC to use SFC's resources for its own financial purposes. This question cannot be resolved without reference to the proposed settlement between GA and the NRC.

The staff concludes that no prejudice would occur if the Commission were to delay final approval of the SFC settlement until after the staff and GA conclude their settlement negotiations. Although SFC and GA complain of prejudice to SFC's business interests, this alleged prejudice is not documented. Clearly, GA and the NRC staff are on the verge of settlement: recently, they reported to the Licensing Board that they have exchanged draft settlement agreements, and "remain very optimistic that continued negotiations will result in a final signed settlement agreement in the very near term that will

resolve this proceeding in its entirety." NRC Staff's and General Atomics' Joint Motion for Extension of Stay of Discovery Through June 14, 1996 (May 6, 1996). Under the circumstances, there is no reason for the Commission to consider the SFC Settlement Agreement in isolation from the GA agreement.

D. The Settlement Agreement Is Defective Because It Fails to Address SHC or SFIC.

As demonstrated in Intervenor's Brief, the Settlement Agreement fails to account for the involvement of SHC and SFIC in SFC's financial affairs. The NRC staff protests that SHC and SFIC cannot be called into this settlement, because they were not named as parties. NRC Staff Brief at 15. The staff misconstrues Intervenor's position. The settlement cannot and should not ignore the fact that SFC treats these two entities as corporate appendages, to which it has transferred (and may continue to transfer) some of its assets. Any settlement agreement between SFC and the NRC should require SFC to recover and use for decommissioning those funds that it has transferred to SHC and SFIC, and ensure that it does not use SHC and SFIC to hide or protect any funds or assets that should otherwise be committed to decommissioning.

E. The Settlement Agreement Fails to Provide for Adequate Financial Submittals and Auditing by the NRC Staff.

In answer to the Commission's question regarding the staff's process for ensuring proper and timely review of SFC's annual audited financial statements, the staff asserts that it will review the quarterly financial statements and reports filed by

SFC with the U.S. Environmental Protection Agency ("EPA"). NRC Staff Brief at 4. The NRC fails to note, however, that SFC's quarterly reports to EPA are not audited. Moreover, they consist of "Consolidated Balance Sheets" which do not conform to the line items in the PPCD budgets. Thus, the quarterly financial statements to EPA lack either the reliability of audited financial statements or a format that would allow them to be compared to the PPCD, which supposedly governs the Settlement Agreement. See Settlement Agreement, par. 2.


SFC and the NRC staff also fail to demonstrate that the Settlement Agreement is adequate despite its failure to provide for financial and corporate reports for ConverDyn. ConverDyn not only constitutes the anticipated source of 80% of SFC's decommissioning revenues, but ConverDyn's payments to SFC have been reduced as a result of ConverDyn's expenditures on the expansion of the Allied Signal facility to provide additional uranium storage capacity.⁷


Conclusion

For the foregoing reasons, the Commission should reverse LBP-95-18 and remand it to the Licensing Board for further proceedings.

⁷ As discussed in Intervenor's Brief at 24, note 24, and confirmed in the attached Affidavit of Lance Hughes, James Shepherd of the NRC staff informed him that SFC had paid for the expansion of the Allied Signal facility in order to accommodate the storage of yellowcake from SFC. Although the staff and SFC deny this conversation, SFC concedes that its "cash flow" was affected by the Allied Signal expansion. SFC Brief at 21-22, note 17.

Respectfully submitted,


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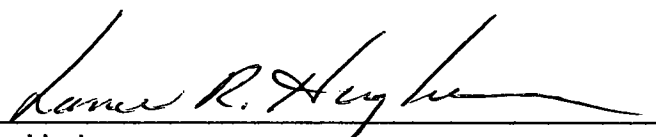

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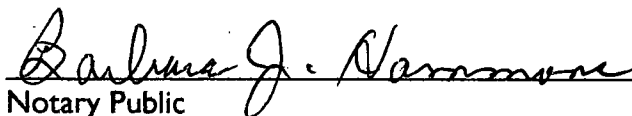
AFFIDAVIT OF LANCE HUGHES

I, Lance Hughes, depose and say:

1. My name is Lance Hughes. I am director of Native Americans for a Clean Environment (NACE). My business address is P.O. Box 1671, Tahlequah, Oklahoma, 74465.
2. Before the Commission, on April 29, 1995, the NRC Staff filed a legal brief titled 'NRC STAFF'S BRIEF REGARDING COMMISSION REVIEW OF SETTLEMENT AGREEMENT BETWEEN SEQUOYAH FUELS CORPORATION AND THE NRC STAFF'.
3. At page 18, the above brief discusses a telephone conversation between myself and NRC project manager James Shepherd. The NRC staff characterizes the conversation as "alleged" and further states "First of all, the Staff hereby states that Mr. Shepherd is prepared to assert under oath that no such (mis)information was conveyed by him to anyone".
4. I hereby state, to the best of my memory, I had a conversation with Mr. James Shepherd during the late summer or very early fall of 1995. During the conversation, Mr. Shepherd stated that Sequoyah Fuels had paid for expansion of the Allied-Signal facility. According to Mr. Shepherd, the staff considered this to be a decommissioning related expense because it provided an expansion of Allied-Signal's storage area, thereby allowing Sequoyah Fuels to perform the decommissioning activity of shipping its yellowcake inventory off-site.


Lance Hughes

Signed and sworn to before me this 13~~th~~ day of May, 1996.


Notary Public

My Commission expires: 11-13-97

CERTIFICATE OF SERVICE

I certify that on May 14, 1996, copies of the foregoing INTER-
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