



OFFICE OF ATTORNEY GENERAL  
STATE OF OKLAHOMA

March 23, 2004

Clerk, United States Court of Appeals  
for the Tenth Circuit  
Byron White United States Courthouse  
1823 Stout Street  
Denver, Colorado 80257

Re: 04-9523, State of Oklahoma v. NRC Dist/Ag docket: 40-827-MLA-5

Dear Madam/Sir:

Enclosed for filing please find a copy of the Final Order by the U.S. Nuclear Regulatory Commission ("NRC") and a copy of the Petition for Review that were inadvertently omitted from the Docketing Statement filed March 17, 2004.

As attested to in the attached Certificate of Service, a copy of the Final Order and Petition for Review has been served on counsel for the following parties:

John Ashcroft, United States Attorney General  
U.S. Department of Justice  
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Washington, DC 20530-0001

General Counsel  
USNRC  
Mail Stop: O-15D21  
Washington, DC 20555-0001

Sincerely,

A handwritten signature in black ink, appearing to read "Sarah E. Penn", is written over a horizontal line.

Sarah E. Penn  
Assistant Attorney General


Enclosures

**CERTIFICATE OF SERVICE**

I, Sarah E. Penn, attorney for Petitioner, hereby certify that on March 23, 2004, I sent a copy of the foregoing Final Order and Petition for Review to:

Office of the General Counsel, U.S. Nuclear Regulatory Commission, at Mail Stop O-15D21 Washington, DC 20555-0001;

John Ashcroft, United States Attorney General at U.S. Department of Justice, 950 Pennsylvania Avenue, NW Washington, DC 20530-0001

  
\_\_\_\_\_  
Signature

March 23, 2004  
Date

Jean Burnett  
Office of the Attorney General  
4545 North Lincoln Boulevard, Suite 260  
Oklahoma City, Oklahoma 73105

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The State of Oklahoma, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 United States Nuclear Regulatory )  
 Commission and the United States )  
 of America, )  
 )  
 Respondents. )

Case File No. \_\_\_\_\_

RECEIVED  
U.S. COURT OF APPEALS  
10TH CIRCUIT  
04 MAR -5 PM 3:53

PETITION FOR REVIEW

The above-named Petitioner hereby petitions for review by this Court of the final order denying the State of Oklahoma's Request for Hearing on the matter of Sequoyah Fuels Corporation's ("SFC") request to amend Source Material License No. SUB 1010 to authorize possession of byproduct material and decommission its facility in Gore, Oklahoma pursuant to that authorization was entered by the United States Nuclear Regulatory Commission ("NRC") on January 8, 2004. A copy of the decision is attached.

To date, no court has upheld the validity of the order.

Jurisdiction is asserted pursuant to 28 U.S.C.A. §2342(4) (1994 & Supp. I 2003).

Venue is asserted pursuant to 28 U.S.C.A. §2343 (1994) because Petitioner has its principal offices located in Oklahoma City, Oklahoma which is within the

COPY

jurisdiction of this judicial circuit.

This petition is timely filed pursuant to F.R.A.P. 15 and 28 U.S.C.A. § 2344 (1994) as it is filed within 60 days of the final order of license amendment.

Relief is sought on the basis that the NRC rejected the State of Oklahoma's Request for Hearing on SFC's license amendment requesting an Atomic Energy Act, 42 U.S.C. §2014(e)(2) (2003), 11e(2) byproduct license and authorizing the entire SFC facility in Gore, Oklahoma to be decommissioned under the provisions of 10 CFR Part 40, Appendix A. The NRC erred in holding that the waste could legally be reclassified as 11e(2) byproduct material. The NRC further erred in holding that the State lacked standing to be heard on the other areas of concern raised by the State in its Request for Hearing and that the areas of concern were not germane to the proceeding. The final decision of the NRC incorporates a previously rendered decision, currently on appeal to this court in a separate proceeding, which granted SFC's amendment request to reclassify its waste as 11e(2) byproduct material.

The primary basis for the NRC's holding is that the license amendment did little more than authorize possession of 11e(2) byproduct material which the NRC determined was legally permissible. Even assuming that the NRC was correct in holding that a portion of SFC's waste could legally be classified as 11e(2) byproduct material, the State of Oklahoma raised nine additional areas of concern with SFC's license amendment request on which it is entitled to be heard.

The license amendment request will convert the entire SFC facility to a uranium mill tailings site with an onsite disposal cell and grant SFC a new license under 10 C.F.R. §40.31. The fact that the NRC determined a portion of SFC's waste could legally be classified as mill tailings does not mean that SFC has satisfied all the requirements for obtaining a mill tailings license nor does it mean that the entire SFC site should be decommissioned as a mill tailings site under 10 C.F.R. Part 40, Appendix A. Further, it does not relieve the NRC of their obligation to evaluate the impacts of issuing this license in a Safety Evaluation Report and Environmental Assessment. In addition to the legality of reclassifying SFC's waste as 11e(2) byproduct material, the State of Oklahoma raised the following issues with regard to SFC's license amendment in its Request for Hearing on which it is entitled to be heard.

- (1) SFC's failure to identify the waste to be reclassified;
- (2) SFC's proposal to decommission the entire site under 10 C.F.R. Part 40, Appendix A and terminate the license upon compliance with those regulations;
- (3) Removal of the condition requiring decommissioning for unrestricted release and pollutant discharge reporting;
- (4) SFC's failure to comply with the requirements for issuance of a uranium mill tailings license in 10 C.F.R. Part 40;

- (5) NRC Staff's failure to conduct a Safety Evaluation Report and an Environmental Assessment;
- (6) SFC's proposal to dispose of all its waste onsite in a mill tailings impoundment that will be transferred to the Department of Energy under Title II of the Uranium Mill Tailing Radiation Control Act, 42 U.S.C. §2113;
- (7) Incorporation of settlement terms between SFC and the NRC regarding financial assurance for SFC's Source Material License;
- (8) Incorporation of vague language that amends unspecified terms throughout the licences; and
- (9) The adequacy of the *Federal Register* Notice.

The State of Oklahoma has standing to be heard on all of these issues because these requested actions are contrary to the Atomic Energy Act (AEA) of 1954, as amended 42 U.S.C. § 2011 (2000) *et seq.*; the decommissioning standards in 10 C.F.R. Parts 20 and 40; 10 C.F.R. Part 40, Appendix A; and the Standard Review Plan for the Review of a Reclamation Plan for Tailings Sites Under Title II of the Uranium Mill Tailings Radiation Control Act of 1978 (NUREG -1620, Final Rev. 1) 2003. Additionally, the State of Oklahoma has standing because the license amendment will not be protective of public health, safety and the environment, and poses a substantial threat to the property and natural resources of the state.

Further, all of these areas of concern are germane to the proceeding and constitute adequate grounds for denying or conditioning SFC's license because they relate directly to SFC's compliance with the statutes and regulations governing issuance of licenses and license amendments under the AEA, as well as the impact of the amendment on public health, safety and the environment.

Therefore, Petitioner prays for a reversal of the decision issued by Respondent and for the grant of Petitioner's Request for Hearing to address the stated concerns.

Respectfully submitted,



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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

COMMISSIONERS

Nils J. Diaz, Chairman  
Edward McGaffigan, Jr.  
Jeffrey S. Merrifield

January 8, 2004 (2:06PM)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

SERVED January 8, 2004

In the Matter of )  
SEQUOYAH FUELS CORPORATION )  
(Gore, Oklahoma Site) )

Docket No. 40-8027-MLA-5

CLI-04-01

MEMORANDUM AND ORDER

The State of Oklahoma appeals the denial of its request for a hearing in this materials license amendment proceeding. We affirm.

**I. BACKGROUND**

Sequoyah Fuels Corporation ("SFC") produced uranium hexafluoride from yellowcake at its facility in Gore, Oklahoma, from 1970 until 1993 and, for a portion of this time, converted depleted uranium hexafluoride to uranium tetrafluoride. The operations produced radioactive waste. Since it ceased operations at the Gore site, SFC has been exploring decommissioning possibilities. To facilitate decommissioning of the site, the NRC Staff recommended to the Commission that SFC's front-end wastes, generated during the yellowcake solvent extraction process, be classified as byproduct material under section 11e(2) of the Atomic Energy Act.<sup>1</sup>

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<sup>1</sup>The term 'byproduct material' means . . . (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." 42 U.S.C. § 2014(e)(2). The Staff made its recommendation in SECY-02-0095, "Applicability of Section 11e.(2) of the Atomic Energy Act to Material at the Sequoyah Fuels Corporation Uranium Conversion Facility" (June 4, 2002).



The Commission approved the NRC Staff's reclassification recommendation.<sup>2</sup> Thereafter, SFC requested a materials license amendment to possess 11e(2) byproduct material. The State of Oklahoma, among others, submitted a hearing request after notice<sup>3</sup> of SFC's license amendment request.

The Presiding Officer initially sought guidance from the Commission. He reasoned that the viability of Oklahoma's claim rested on whether the Commission's SRM, an internal decision, precluded Oklahoma from asserting that the SFC waste does not qualify as section 11e(2) byproduct material.<sup>4</sup> Because Oklahoma's position challenged the Commission's SRM, the Presiding Officer asked us to decide whether Oklahoma could raise the 11e(2) issue in this adjudication.<sup>5</sup> We agreed to examine the classification issue afresh in an adjudicatory setting and requested briefs from the parties.<sup>6</sup> We recently decided that SFC's front-end waste may be considered byproduct material under section 11e(2) of the AEA and remanded this matter to the Presiding Officer for action consistent with our decision.<sup>7</sup>

On remand, the Presiding Officer denied Oklahoma's hearing request and terminated the proceeding.<sup>8</sup> Oklahoma appeals that decision.

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<sup>2</sup>See Staff Requirements Memorandum responding to SECY-02-0095 (July 25, 2002) ("SRM").

<sup>3</sup>See 67 Fed. Reg. 69,048 (Nov. 14, 2002).

<sup>4</sup>See LBP-03-7, 57 NRC 287, 288 (2003).

<sup>5</sup>See *id.* at 291-92.

<sup>6</sup>See CLI-03-06, 57 NRC 547 (2003).

<sup>7</sup>See CLI-03-15, 58 NRC \_\_ (Nov. 13, 2003).

<sup>8</sup>See LBP-03-25, 58 NRC \_\_ (Nov. 21, 2003).

## II. DISCUSSION

The license amendment application is to "authorize SFC to possess 11e(2) byproduct material in any physical or chemical form generated by the past operations authorized under [SFC's source materials license] SUB-1010, and to continue to conduct activities with such materials to the same extent as currently authorized by the license for source material."<sup>9</sup>

Because of the "limited scope of the proposed license amendment," the Presiding Officer found it apparent that Oklahoma could not make a showing of an actual or threatened injury as required to demonstrate standing in this proceeding.<sup>10</sup> The Presiding Officer noted that the "license amendment application at bar . . . does little more than to permit the possession of the Gore waste under a classification that the Commission has decided is legally acceptable."<sup>11</sup>

Oklahoma's viewpoint, and the gravamen of its appeal, is that the license amendment application at issue is in reality a request for a new specific license under 10 C.F.R. § 40.31. Effectively, says Oklahoma, the license amendment grants SFC a license for uranium recovery

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<sup>9</sup>Letter from John H. Ellis to Larry W. Camper, Enclosure 1, "Application for Possession of Byproduct Material" at 1 (Sept. 30, 2002).

<sup>10</sup>See LBP-03-25, 58 NRC at \_\_, slip op. at 2. Standing in an NRC adjudicatory proceeding requires that the hearing requestor allege genuine harm:

- (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 . . . and (4) is likely to be redressed by a favorable decision.

*International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-18, 54 NRC 27, 30 (2001), citing *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13 (2001). See also 10 C.F.R. § 2.1205(h).

<sup>11</sup>LBP-03-25, 58 NRC at \_\_, slip op. at 3. The Presiding Officer noted that the license amendment application "also seeks the deletion, revision or addition of several license conditions said to conform the license to current NRC practices with respect to section 11e.(2) byproduct material licenses. It does not appear, however, that any of those changes would authorize any new activities. Nor does it appear that any of them might possibly pose a concrete threat of injury to [a hearing requestor]." *Id.* at \_\_, slip op. at 2.

without requiring SFC to demonstrate compliance with regulations applicable to issuance of such licenses; *e.g.*, preparation of a Safety Evaluation Report and an Environmental Assessment. Oklahoma argues that it has standing to raise issues related to SFC's and the Staff's compliance with the governing statutes and regulations.

The NRC Staff asserts that Oklahoma lacks standing in this proceeding, for there is no actual or imminent injury-in-fact associated with the amendment. The amendment, the Staff says, will result in no increase in radiological exposure or risk. According to the Staff, future licensing actions will address substantive issues, such as the stability and sufficiency of the prospective onsite disposal cell. Indeed, after the Staff approved the license amendment at issue in this proceeding, SFC applied for three other decommissioning-related license amendments -- seeking approval of its reclamation plan, its ground water corrective action plan, and its ground water monitoring plan.<sup>12</sup>

SFC acknowledges that its source materials license has expired but points out that 10 C.F.R. § 40.42(c) gives SFC continuing authority over the materials so long as it limits its actions to those related to decommissioning. In the current license amendment request, seeking the 11e(2) classification, SFC maintains that it does not seek authorization to conduct any activities not already authorized.

The Commission agrees with the Staff and the Presiding Officer that this license amendment threatens no injury to Oklahoma, or, for that matter, to any other person or entity. It simply authorizes *no new activity*. The appropriate vehicle for SFC's reclassification request is 10 C.F.R. § 40.44, which governs amendment of materials licenses, not § 40.31, as Oklahoma insists. SFC has not asked for a license to engage in a uranium recovery enterprise;

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<sup>12</sup>See Docket Numbers 40-8027-MLA-6, 40-8027-MLA-7, and 40-8027-MLA-8, respectively. Oklahoma filed hearing requests in all three of these license amendment proceedings.

rather, it has taken a step toward decommissioning after earlier cessation of nuclear fuel cycle activities at its Oklahoma site.

The Commission also finds no merit in Oklahoma's other points on appeal. Accordingly, we affirm the Presiding Officer's decision to terminate this proceeding.

### III. CONCLUSION

We *affirm* the Presiding Officer's order denying Oklahoma's hearing request. We specifically approve both the Presiding Officer's reasoning and his result.

IT IS SO ORDERED.



For the Commission

A handwritten signature in cursive script, reading "Annette L. Vietti-Cook".

Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 8<sup>th</sup> day of January, 2004.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of

SEQUOYAH FUELS CORP.

(Gore, Oklahoma)

)  
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)  
)  
)  
)

Docket No. 40-8027-MLA-5

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-04-01) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution with copies by electronic mail as indicated.

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Docket No. 40-8027-MLA-5  
COMMISSION MEMORANDUM AND ORDER  
(CLI-04-01)

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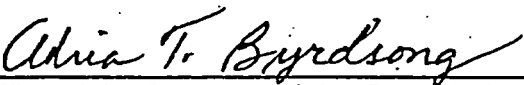
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Docket No. 40-8027-MLA-5  
COMMISSION MEMORANDUM AND ORDER  
(CLI-04-01)

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 8<sup>th</sup> day of January 2004

DOC ID NO.	DOCKET NUMBER	PLANT NAME	DESCRIPTION	DOCUMENT DATE	DOCKET DATE	RELATED CORRES.	ACCESSION NO.
7077	40-8027-MLA-5	SEQUOYAH FUELS	LB MEMORANDUM AND ORDER (LBP--11/21/2003 03-25) (DENYING HEARING REQUESTS) - SERVED	11/21/2003	11/21/2003		ML033250474
7118	40-8027-MLA-5	SEQUOYAH FUELS	NOTICE OF THE STATE OF OKLAHOMA'S APPEAL FROM THE PRESIDING OFFICER'S DECISION TO DENY THE STATE'S REQUEST FOR HEARING ON THE 11E(2) LICENSE AMENDMENT AND BRIEF IN SUPPORT	12/01/2003	12/05/2003		ML033420230
7146	40-8027-MLA-5	SEQUOYAH FUELS	NRC STAFF'S RESPONSE TO OKLAHOMA'S APPEAL FROM THE PRESIDING OFFICER'S DECISION TO DENY THE STATE'S REQUEST FOR HEARING	12/16/2003	12/16/2003		ML033640231
7166	40-8027-MLA-5	SEQUOYAH FUELS	COUNTER STATEMENT OF SEQUOYAH FUELS CORPORATION TO APPEAL FILED BY THE STATE OF OKLAHOMA	12/16/2003	12/22/2003		ML033580017
7214	40-8027-MLA-5	SEQUOYAH FUELS	COMMISSION MEMORANDUM AND ORDER (CLI-04-01) - SERVED	01/08/2004	01/08/2004		ML040081031



**CERTIFICATE OF SERVICE**

I hereby certify that on March 4, 2004, I sent a copy of the Petition for Review to:

Alvin H. Gutterman, Esq., Paul M. Bessette, Esq., Alex S. Polonsky, Esq. at Morgan, Lewis & Bockius, L.L.P., 1111 Pennsylvania Avenue, NW Washington, D.C. 20004;

Jeannine Hale, Assistant General Counsel, Cherokee Nation at Box 498 Tahlequah, OK 74465;

Kirk F. Williams at 60751 E. 130 Rd. Miami, OK 74354;

Darla Reynolds Sparks at 809 Royal Lane Yukon, OK 73099-4223;

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Margaret Cox at 2420 NW 55<sup>th</sup> Terr. OKC, OK 73112;

Citizen's Action for Safe Energy, Inc. at PO Box 2584 Claremore, OK 74018

the last known addresses, by way of United States mail or courier.

March 4, 2004

Date signed

*Sarah E. Penn*

Signature

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

Entry of Appearance and Certificate of Interested Parties

<b>The State of Oklahoma,</b>	)	
	)	
<b>Petitioner,</b>	)	<b>Case File No.</b> _____
	)	
<b>v.</b>	)	
	)	
<b>United States Nuclear Regulatory</b>	)	
<b>Commission and the United States</b>	)	
<b>of America,</b>	)	
	)	
<b>Respondents.</b>	)	

In accordance with 10<sup>th</sup> Cir. R. 46.1, the undersigned attorney hereby appears as counsel for the State of Oklahoma, Petitioner, in the subject case.

Further, in accordance with 10<sup>th</sup> Cir. R. 46.1, the undersigned certifies as follows:

On the reverse of this form is a completed certificate of interested parties and/or attorneys not otherwise disclosed, who are now or have been interested in this litigation or any related proceeding.

There are no such parties, or any such parties have heretofore been disclosed to the court.

Sarah E. Penn

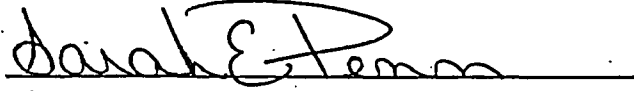
Name of Counsel



Signature of Counsel

4545 N. Lincoln Blvd., Ste. 260 Oklahoma City, OK 73105 (405) 522-4413

I hereby certify that a copy of this Entry of Appearance and Certificate of Interested Parties was mailed on March 4, 2004, to parties/not respondent.

A handwritten signature in cursive script, appearing to read "Sarah E. Temm", is written over a solid horizontal line.

Signature

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

**The State of Oklahoma,** )  
 )  
 **Petitioner,** )  
 )  
 **v.** )  
 )  
 **United States Nuclear Regulatory** )  
 **Commission and the United States** )  
 **of America,** )  
 )  
 **Respondents.** )

**Case File No.** \_\_\_\_\_

**Certificate of Interested Parties**

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The following parties to this litigation, including persons or other entities financially interested in the outcome of the litigation, but not revealed by the caption on appeal, see 10<sup>th</sup> Cir. R. 46.1 (C), and attorneys not entering an appearance in this court who have appeared for any party in prior trial or administrative proceedings sought to be reviewed, or in related proceedings that preceded the subject action in this court:

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