

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USMRC

ATOMIC SAFETY AND LICENSING BOARD

'94 JUL -7 P3:40

Before Administrative Judges:

James P. Gleason, Chairman
Dr. Jerry R. Kline
G. Paul Bollwerk, III

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Thomas D. Murphy
Alternate Board Member

SERVED JUL - 7 1994

In the Matter of

SEQUOYAH FUELS CORPORATION
and GENERAL ATOMICS

(Gore, Oklahoma Site
Decontamination and
Decommissioning Funding)

Docket No. 40-8027-EA

Source Material License
No. SUB-1010

ASLBP No. 94-684-01-EA

July 7, 1994

MEMORANDUM AND ORDER
(Granting Intervention Motion)

This memorandum and order addresses the intervention petition filed by the Cherokee Nation in this ongoing proceeding regarding the NRC staff's October 15, 1993 enforcement order imposing decommissioning funding requirements for Sequoyah Fuels Corporation's (SFC) facility near Gore, Oklahoma. In our prior decisions in LBP-94-5 and LBP-94-8,¹ we found that petitioner Native Americans for a Clean Environment (NACE) had established its standing to intervene in this proceeding pursuant to 10 C.F.R. § 2.714(a) and had presented litigable contentions so as to

¹ LBP-94-5, 39 NRC 54 (1994) (standing), ruling referral and appeals pending; LBP-94-8, 39 NRC 116 (1994) (contentions), appeals pending.

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sanction its admission as a party to this proceeding.² We now conclude that petitioner Cherokee Nation has established the requisite standing to intervene in support of the staff's enforcement order and has presented litigable contentions, thereby warranting its admission as a party as well.

I. BACKGROUND

Pursuant to our ruling in LBP-94-5, the background for which is fully detailed in that decision and will not be

² SFC and its parent corporation, General Atomics (GA), sought this hearing to contest the staff's October 1993 enforcement order pursuant to 10 C.F.R. § 2.202, which provides that "the licensee or any other person adversely affected" by an enforcement order can request a hearing regarding the order. In LBP-94-5, 39 NRC at 63-66, we ruled that under the terms of 10 C.F.R. § 2.714(a)(1), a petitioner NACE can intervene in support of an enforcement order in a proceeding instituted by the licensee under section 2.202. We also referred that ruling to the Commission. See 39 NRC at 75-76. Thereafter, with the issuance of LBP-94-8 admitting NACE's two contentions, see 39 NRC at 118-20, pursuant to 10 C.F.R. § 2.714a SFC and GA took an appeal of our determination that NACE could intervene in support of the order (along with our ruling that NACE had established its standing to intervene). See [SFC's] Brief on Appeal of LBP-94-5 and LBP-94-8 (Apr. 7, 1994) at 7-28; [GA's] Notice of Appeal (Apr. 7, 1994) (adopting arguments in SFC's appeal brief]. The Board's referred ruling and the SFC and GA appeals currently are pending with the Commission.

With the Cherokee Nation in the same litigative posture as NACE, see Supplement to Cherokee Nation's Combined Response To [SFC's] Answer In Opposition And N.R.C. Staff's Response To Cherokee Nation's Application For Order Allowing Intervention (June 3, 1994) at 2 [hereinafter Cherokee Nation Combined Response Supplement], we need not revisit our ruling in LBP-94-5 regarding intervention by interested persons seeking to support a staff enforcement order.

repeated here,³ on March 29, 1994, we issued a notice of hearing in this proceeding that subsequently was published in the Federal Register.⁴ The notice informed the public that NACE had been allowed to intervene in this proceeding and further invited any person whose interest may be affected by the proceeding to petition for leave to intervene. Acting on this notice, on April 20, 1994, the Cherokee Nation filed a timely application for intervention that set forth several concerns regarding environmental contamination of tribal lands adjacent to the SFC facility.⁵ On May 5 and May 10, respectively, SFC and the staff filed their initial responses to the Cherokee Nation petition.⁶

In its first filing, SFC opposed the Cherokee Nation's application, arguing that the tribe had not met the legal standards for intervention set forth in 10 C.F.R.

³ See LBP-94-5, 39 NRC at 73 n.21.

⁴ 59 Fed. Reg. 15,953 (1994).

⁵ See Application for Order Allowing Intervention (Apr. 20, 1994).

⁶ See [SFC's] Answer in Opposition to Cherokee Nation's Application for Order Allowing Intervention (May 5, 1994) [hereinafter SFC Initial Answer]; NRC Staff's Response to the Cherokee Nation's Application for Order Allowing Intervention (May 10, 1994) [hereinafter Staff Initial Response]. In addition, GA filed a pleading stating that it adopted the arguments against permitting intervention set forth in SFC's answer. See [GA's] Answer in Opposition to the Application of the Cherokee Nation for an Order Permitting Intervention (May 5, 1994).

§ 2.714(a)(1) because it failed to establish a cognizable "organizational" or "representational" interest in the proceeding; failed to show how its interest would be affected by the proceeding; and failed to identify the specific aspect or aspects of the subject matter of the proceeding as to which it wishes to intervene.⁷ In its response, the staff likewise found the Cherokee Nation petition deficient for failing to address adequately the tribe's "injury in fact" and the adverse impact the proceeding could visit on the Cherokee Nation's interest. The staff also asserted that it was unclear whether the Cherokee Nation was seeking intervention on its own behalf as an organization or on behalf of its members. While concluding that the petitioner had not submitted enough information to demonstrate its standing to intervene, the staff nonetheless suggested that the Cherokee Nation be given the opportunity to amend its petition to correct the identified pleading deficiencies and to submit a valid contention.⁸

⁷ See SFC Initial Answer at 10-18. In addition to its argument addressing the intervention factors in 10 C.F.R. § 2.714(a)(1), SFC asserted that section 189a(1) of the Atomic Energy Act (AEA), 42 U.S.C. § 2239(a)(1), the AEA's principal provision affording hearing rights to intervenors, does not provide for intervention by the Cherokee Nation as it seeks to support the staff's October 1993 enforcement order because the order does not grant, suspend, revoke, or amend a license. See id. at 8-10.

⁸ See Staff Initial Response at 3-8.

On May 19, while the Board was considering the parties' initial filings, the Cherokee Nation filed a combined response to the SFC and staff responses.⁹ That response outlines the Cherokee Nation's claim of ownership to the north bed and banks of the Arkansas River, which is approximately one-half mile to the southwest of the SFC facility, and included a letter from the Cherokee Nation Office of Environmental Services (OES) outlining the results of United States Environmental Protection Agency (EPA) groundwater tests conducted on riverbed property.¹⁰ Asserting that the natural groundwater flow is to the west toward the tribal riverbank property, the combined response declares that if SFC "does not do an adequate clean-up of the site and nearby tribal property," tribal property would remain contaminated and would continue to be contaminated by water runoff from the SFC property.¹¹ The response

⁹ Cherokee Nation's Combined Response to [SFC's] Answer in Opposition and N.R.C. Staff's Response to Cherokee Nation's Application for Order Allowing Intervention (May 19, 1994) [hereinafter Cherokee Nation Combined Response]. Although the pages in this filing are not numbered, we refer to them in their numerical order.

¹⁰ See id. at 2. The OES letter declared that heavy metals contamination levels met "EPA Superfund criteria" for contamination. Id., attached Letter from Curtis Canard, Cherokee Nation OES, to James Wilcoxon (Sept. 24, 1992). The Cherokee Nation, however, does not explain how this seemingly nonradiological contamination is under the jurisdiction of the NRC rather than the EPA.

¹¹ Id. at 3.

concludes by adopting the contentions previously filed by NACE and admitted by the Board.¹²

On May 23, prior to receiving the Cherokee Nation May 19 combined response, we issued an order allowing the Cherokee Nation the opportunity to amend its intervention petition by providing any additional information it believed appropriate relative to its standing in this proceeding.¹³ The order also requested that the Cherokee Nation supplement its petition by listing those contentions and supporting bases it wished to litigate.¹⁴ The other parties were given the opportunity to respond to that amended petition within fourteen days after service.

Because the Cherokee Nation's May 19 combined response literally crossed paths in the mail with our May 23 order, on June 3 the tribe provided a further supplement to its combined response. In that supplement, the tribe declines to submit any additional information regarding the basis for its standing and declares that it should be permitted to appear as a party in support of the staff's October 1993

¹² See id. at 4. See also LBP-94-8, 39 NRC at 118-20.

¹³ See Order (Establishing Filing Schedules for Cherokee Nation Amended Intervention Application and Contentions Supplement and for Party Responses Thereto) (May 23, 1994) at 1 (unpublished). This order had the effect of granting the Cherokee Nation's May 19, 1994 motion for leave to file that accompanied the tribe's May 19 combined response to the initial SFC and staff responses.

¹⁴ See id. at 1-2.

enforcement order.¹⁵ In its response to the tribe's May 19 combined response and June 3 supplement, SFC does not address the Commission's standing requirements; instead, SFC repeats the arguments it makes to the Commission in appealing LBP-94-5 by denying categorically that any petitioner can intervene in support of a staff enforcement order.¹⁶ The staff, however, does not oppose granting the Cherokee Nation intervention request so long as the tribe is limited to representing its own organizational interests.¹⁷

¹⁵ See Cherokee Nation Combined Response Supplement at 1-2.

¹⁶ See [SFC's] Response in Opposition to the Cherokee Nation's Amended Intervention Application (June 22, 1994) at 2-3. In its filings regarding our referral to the Commission of certain rulings in LBP-94-5 and its pending appeal from LBP-94-5 and LBP-94-8, SFC has put before the Commission the question of whether our determination in LBP-94-5 allowing NACE to intervene in this proceeding should be sustained. See supra note 2; [SFC's] Initial Brief in Opposition to the Ruling in Section II.A of LBP-94-5 (Mar. 11, 1994); [SFC's] Reply Brief in Opposition to the Ruling in Section II.A of LBP-94-5 (Mar. 17, 1994). In both instances, SFC (joined by GA) argues that persons seeking to support a staff enforcement order cannot intervene in an adjudicatory proceeding convened pursuant to 10 C.F.R. § 2.202 to contest the order.

¹⁷ See NRC Staff's Response to the Cherokee Nation's Combined Response of May 19, 1994, and Supplement of June 3, 1994 (June 22, 1994) at 4-6 & n.6 [hereinafter Staff Response to Combined Response/Supplement].

II. ANALYSIS

A. The Cherokee Nation's Particularized Injury

As it has often been stated, in order to grant an intervenor party status in a proceeding, we must find that the petitioner meets the contemporaneous judicial concepts of standing. This requires that the intervenor establish that it will suffer injury in fact relative to its interests in the proceeding and that those alleged interests are within the zone of interests protected by the statutes and regulations under which the petitioner seeks to participate in the proceeding.¹⁸

As noted above, in its May 19 combined response the Cherokee Nation provides confirmation that it holds title to the banks and the riverbed of the Arkansas River adjacent to the SFC facility.¹⁹ The Cherokee Nation further states that the natural flow of the groundwater in the area of the SFC facility is westward toward the Arkansas River and

¹⁸ See, e.g., Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993).

¹⁹ The Cherokee Nation cites several cases in support of its claim of ownership to the affected riverbank and riverbed along the Arkansas River less than a mile to the southwest of the SFC facility. See Cherokee Nation Combined Response at 1-2. Neither SFC nor the staff have disputed this claim. Our review of those cases does not give us any reason to doubt it either. See Choctaw Nation v. Cherokee Nation, 393 F. Supp. 224, 246 (E.D. Okla. 1975) (three-judge court) (finding that the north portion of the Arkansas River bed from the Canadian River fork to the Arkansas-Oklahoma border belongs to the Cherokee Nation in fee simple).

declares that SFC is in agreement with this assertion.²⁰

In its combined response, the Cherokee Nation also alleges that groundwater run-off will continue to contaminate tribal property in the future, affecting the health and safety of tribal members who use the river and the tribe's economic interests in developing the property.²¹

The Cherokee Nation's allegations of environmental damage are proffered in the same factual context as those presented by NACE earlier in this proceeding. As we noted there, "[w]e have no trouble concluding that the interest of [the petitioner] in seeing that the staff's decommissioning funding order is sustained falls within the zone of interests protected by the [Atomic Energy Act (AEA)]."²² Moreover, as we stated in ruling on NACE's petition, "the staff's October 1993 enforcement order makes clear [that] there is uranium contamination of the soil and groundwater on the SFC main processing facility and the nearby pond areas with sufficient safety significance to warrant

²⁰ See Cherokee Nation Combined Response at 3 & n.1. See also LBP-94-5, 39 NRC at 68-71, for a discussion of the groundwater patterns surrounding the SFC facility.

²¹ The staff points out in its June 22 response that the National Environmental Policy Act of 1969 (NEPA) protects some economic interests injured by environmental damage. See Staff Response to Combined Response/Supplement at 4 (citing Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992)).

²² LBP-94-5, 39 NRC at 67.

remediation before the property can be released for unrestricted use."²³ This contamination on the SFC site, in conjunction with the proximity of the Cherokee Nation's property to the SFC facility and the direction of groundwater flow from that facility, establishes that there is a real potential for decommissioning-related activities to have an impact on the Cherokee Nation's riverbank property.

Thus, based on the record before us, we are unable to conclude that there is "no potential for offsite consequences" relative to the Cherokee Nation property from SFC site contamination and its decommissioning operations.²⁴ As a consequence, we find that the Cherokee Nation has sufficiently demonstrated injury in fact to

²³ Id. at 68-69 (citing 58 Fed. Reg. 55,087, 55,087 (1993)).

²⁴ Perry, CLI-93-21, 38 NRC at 95.

provide the tribe, as an organization,²⁵ with standing to intervene as of right in this proceeding.

B. The Cherokee Nation's Contentions

In our May 23, 1994 order, we allowed the Cherokee Nation to amend its intervention application and instructed that the tribe list those contentions, with supporting bases, it desired to litigate in this proceeding. In its May 19 combined response that was submitted prior to the tribe's receipt of the Board's May 23 order, the Cherokee Nation restated and adopted the contentions of NACE, albeit without providing any supporting bases for those contentions.²⁶

²⁵ The Cherokee Nation's intervention application and its later supplements are less than articulate in explaining whether the tribe is seeking to intervene to protect its own organizational interests or those of its members. Of course, to represent the interests of its members, the tribe must identify at least one member who will be injured and obtain authorization to represent that individual. See, e.g., Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 390-96 (1976). The Cherokee Nation has not done this. Nonetheless, because the tribe has made a sufficient showing to establish its standing as an organization, we need not reach the question of whether its petition is sufficient to provide it with representational standing to protect the interests of its individual members.

²⁶ See Cherokee Nation Combined Response at 4. As restated by the tribe, those contentions are:

1. The NRC has enforcement authority over General Atomics.
 2. Guaranteed decommissioning financing by General Atomics is required by NRC regulations and is
- (continued...)

Longstanding Commission practice suggests that the benefit of the doubt should be given to the potential intervenor in order to obviate dismissal of an intervention petition because of inarticulate draftsmanship or procedural pleading defects.²⁷ Because we have already found the NACE bases sufficient to warrant admission of the contentions they support, in this instance we conclude no real purpose would be served by requiring that the tribe file a further supplemental response adopting those bases as well. Accordingly, we admit the Cherokee Nation's two contentions.²⁸

III. CONCLUSION

The Cherokee Nation seeks to ensure that the staff enforcement order contested in this proceeding is sustained, alleging that without the enforcement of that order there is

²⁶(...continued)

necessary to provide adequate protection to public health and safety, including the tribe's members, as well as the property interest of the tribe.

See id.

²⁷ See, e.g., Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631, 633-34 (1973). See also LBP-94-8, 39 NRC at 120 & n.7.

²⁸ Because NACE and the Cherokee Nation have proffered essentially identical contentions, at a future juncture the Board will consider whether and to what degree consolidation of their litigation presentations is appropriate. See 10 C.F.R. § 2.714(f).

the potential for continued radiological contamination of tribal property from groundwater migration. This continuing potential for contamination of tribal property from groundwater flow provides a cognizable injury to an interest within the zone of interests protected by the AEA. The alleged injury also appears to be sufficiently concrete and particularized. We thus find that the Cherokee Nation has established its standing as of right in this proceeding. Further, in adopting the already-admitted contentions of intervenor NACE, the tribe has presented litigable contentions. Accordingly, having fulfilled the requirements of 10 C.F.R. § 2.714, the Cherokee Nation is admitted as a party to this proceeding.

For the foregoing reasons, it is this seventh day of July 1994, ORDERED that

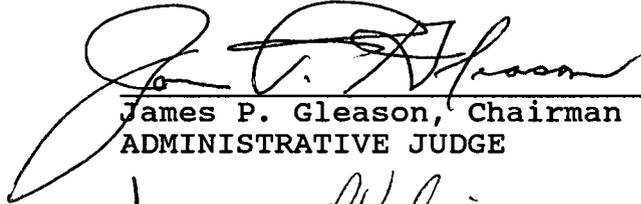
1. The Cherokee Nation's April 20, 1994 intervention application is granted.

2. Contentions 1 and 2 set forth in the Cherokee Nation's May 19, 1994 combined response are admitted.

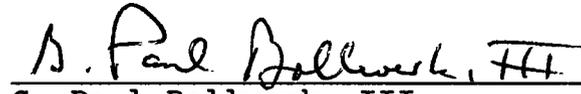
3. In accordance with the provisions of 10 C.F.R. § 2.714a(a), as this memorandum and order grants an

intervention petition, it may be appealed to the Commission within ten days after it is served.

THE ATOMIC SAFETY
AND LICENSING BOARD


James P. Gleason, Chairman
ADMINISTRATIVE JUDGE


Jerry R. Kline
ADMINISTRATIVE JUDGE


G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Bethesda, Maryland

July 7, 1994

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

SEQUOYAH FUELS CORPORATION
GENERAL ATOMICS
(Gore, Oklahoma, Site Decontamina-
tion and Decommissioning Funding)

Docket No.(s) 40-8027-EA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O (LBP-94-19) (GRANTING.. have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
7 day of July 1994


Office of the Secretary of the Commission