

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

'94 JUN 22 P5:12

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
SEQUOYAH FUELS CORPORATION)	Docket No. 40-8027-EA
GENERAL ATOMICS)	
)	Source Material License
(Gore, Oklahoma Site)	No. SUB-1010
Decontamination and)	
Decommissioning Funding))	
)	

OFFICE OF SECRETARY
DOCKETING & SERVICE
P5:12

NRC STAFF'S RESPONSE TO THE CHEROKEE NATION'S COMBINED
RESPONSE OF MAY 19, 1994, AND SUPPLEMENT OF JUNE 3, 1994

The NRC Staff (Staff) hereby responds to the "Cherokee Nation's Combined Response to Sequoyah Fuels Corporation's Answer in Opposition and N.R.C. Staff's Response to Cherokee Nation's Application For Order Allowing Intervention" (May 19, 1994) (Combined Response), and the Cherokee Nation's "Supplement to Cherokee Nation's Combined Response to Sequoyah Fuels Corporation's Answer in Opposition and N.R.C. Staff's Response to Cherokee Nation's Application For Order Allowing Intervention" (June 3, 1994) (Supplement). For the reasons set forth below, the Staff does not oppose granting the Cherokee Nation (CN) intervention in this proceeding.

SECY-036

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BACKGROUND

On April 20, 1994, CN filed an "Application for Order Allowing Intervention" (Application). This was filed pursuant to a *Federal Register* notice¹ published April 5, 1994, which provided that within twenty days of publication any person whose interest may be affected by this proceeding may petition for leave to intervene. The Staff, Sequoyah Fuels Corporation (SFC), and General Atomics (GA) filed responses to the Application in support of its denial.² On May 19, 1994, CN filed its Combined Response to reply to the responses of the Staff, GA, and SFC.³ On May 23, 1994, the Board issued an order permitting CN to file an amended intervention application and "contentions (with supporting bases) it wishes to litigate in this proceeding." *See Order (Establishing Filing Schedules for Cherokee Nation Amended Intervention Application and Contentions Supplement and for Party Responses Thereto) (May 23, 1994) (May 23, 1994 Order)*. The May 23, 1994 Order also permitted responses to be filed by the

¹ Notice of Hearing; Staff Order Regarding Decommissioning Funding (Mar. 29, 1994), 59 Fed. Reg. 15,953 (1994).

² *See* NRC Staff's Response to the Cherokee Nation's Application For Order Allowing Intervention (May 10, 1994); Sequoyah Fuels Corporation's Answer In Opposition to Cherokee Nation's Application For Order Allowing Intervention (May 5, 1994); General Atomics' Answer In Opposition To The Application Of The Cherokee Nation For An Order Permitting Intervention (May 5, 1994).

³ *See* Cherokee Nation's Motion For Leave To File Combined Response To Sequoyah Fuels Corporation's Answer In Opposition And N.R.C. Staff's Response To Cherokee Nation's Application For Order Allowing Intervention (May 19, 1994); Cherokee Nation's Combined Response To Sequoyah Fuels Corporation's Answer In Opposition And N.R.C. Staff's Response To Cherokee Nation's Application For Order Allowing Intervention (May 19, 1994).

existing parties within fourteen days after service of any amended application and contentions. *Id.* On June 3, 1994, CN filed its Supplement.

DISCUSSION

In the Staff's May 10, 1994 response (Staff's First Response) to the Application, the Staff argued that CN's Application was deficient with respect to establishing standing in that it did not adequately demonstrate that CN would suffer an injury in fact within the zone of interests protected by the statutes administered by the NRC, and it failed to allege adequate facts demonstrating that it could be adversely impacted as a result of this proceeding. *See* Staff's First Response at 4-8.⁴ CN's Combined Response (incorporated by reference in its Supplement) cures the Application's deficiencies with regard to establishing standing.

In its Combined Response, CN states that it (as well as the Choctaw and Chickasaw Nations) holds title to the bed and banks of the Arkansas River adjacent to the SFC facility site. Combined Response at 1-2. CN further states that it is the exclusive owner of the north bank of the river within a half-mile south of the SFC facility at the point of the Arkansas River's confluence with the Illinois River. *Id.* at 2. CN cites several reported cases⁵ in support of the foregoing. *See id.*

⁴ The Staff also noted that CN must submit a valid contention even if it establishes standing.

⁵ These include *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); *Cherokee Nation v. Oklahoma*, 461 F.2d 674 (10th Cir. 1972); and *Choctaw Nation v. Cherokee Nation*, 393 F.Supp. 224 (E.D. Okla. 1975).

According to CN, the natural flow of groundwater in the area of the SFC facility is westward toward CN property; CN notes SFC is in agreement with the assertion of a westerly flow. *Id.* at 3 n.1. CN also claims that certain groundwater monitoring tests in the vicinity of the SFC facility and CN property show "significant levels" of heavy metals. *Id.* at 2.

CN asserts it has standing to intervene "on its own as a tribe" since it has property interests "which have likely been adversely [a]ffected by the operation of the Sequoyah Fuels plant." *Id.* at 3. CN argues that if SFC does not adequately clean up the site, "groundwater run-off will continue to contaminate tribal property in the future," affecting the health and safety of tribal members who use the riverbed for hunting and fishing, and the tribe's economic interests in developing the property. *Id.*

In order to demonstrate standing, a petitioner "must allege a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision," and the injury "must be to an interest arguably within the zone of interests protected by the governing statute." *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993). The National Environmental Policy Act of 1969, as amended (NEPA), does protect "some economic interests," namely, those injured by "environmental damage." *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992). Thus, contamination of tribal property from groundwater flow from the SFC facility appears to be an injury to an interest within the zone of interests protected

by NEPA. Such injury also appears to be sufficiently concrete and particularized. Moreover, the Staff believes that the stated injury is "fairly traceable" to a failure to sustain the October 15, 1993 Order issued against GA and SFC, and that a decision to sustain such Order would likely redress such injury. Accordingly, the Staff believes that CN has established standing.⁶

With respect to contentions, the May 23, 1994 Order provides that CN "shall file a supplement to its application that lists those contentions (with supporting bases) it wishes to litigate in this proceeding." In its Combined Response, CN "adopts the contentions of [Native Americans for a Clean Environment]" (NACE), and expressly restates them; however, CN does not separately articulate the bases supporting these contentions. See Combined Response at 4. Presuming CN also adopts the bases

⁶ CN appears to focus principally on its organizational property interests as the basis on which it asserts it has standing. Indeed, it states that "by virtue of its property interests in the area, [it] should be permitted to intervene . . . regardless of its representational standing." Combined Response at 3. However, in its Application, CN states that it "has the obligation to protect the health, safety and welfare of its members where possible." Application at 2. Further, in its Combined Response, CN states that "[t]he health and care of tribal members who use the riverbed for hunting and fishing will be affected" if SFC does not adequately decontaminate the site. Combined Response at 3. Thus, it appears that CN may also be relying somewhat on the representation of some of its members' interests in attempting to establish standing. There is no question that health and safety are interests protected by the Atomic Energy Act. To the extent CN is in fact also asserting standing on a representational basis, CN must provide, *inter alia*, identification of at least one member who will be injured and an authorization for CN to represent that individual. See Staff's First Response at 5. CN has not done this. Therefore, although it is not necessary to reach the question in the circumstances of this proceeding, intervention should not be granted based on CN's representation of the interests of its members who may personally be injured as a result of contamination from the SFC facility.

underlying NACE's contentions, and in light of the Board's acceptance of NACE's contentions and bases,⁷ the Staff believes that CN has proffered at least one valid contention.⁸

CONCLUSION

In view of the foregoing, CN has established standing⁹ and has submitted a valid contention. Accordingly, CN should be permitted to intervene in this proceeding.

Respectfully submitted,



Steven R. Hom
Counsel for NRC Staff

Dated at Rockville, Maryland
this 22nd day of June 1994

⁷ See *Sequoyah Fuels Corporation and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116 (1994).

⁸ In its Supplement, CN also "submits the following contention[]," namely, "whether or not the tribe can appear in support of an order which is the subject of this appeal." Supplement at 2. The Staff views this issue as bearing on whether CN has established the requisite standing. If, however, it is construed as a proposed contention, it should not be admitted. It is evident that CN ultimately seeks a decision sustaining the October 15, 1993 Order issued to SFC and GA. See Combined Response at 3; Supplement at 2. The "contention" proffered in CN's Supplement has no bearing on whether CN would be entitled to the relief it seeks. See 10 C.F.R. § 2.714(d)(2)(ii).

⁹ It should be noted that the issue of whether a petitioner may intervene as of right in an enforcement proceeding to support a Staff enforcement order is now under review by the Commission. See *Sequoyah Fuels Corporation and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54 (1994); [Commission] Order (Apr. 20, 1994); [Commission] Order (Mar. 3, 1994). The Commission's decision regarding that matter could affect the Staff's position here.

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In the Matter of)
)
SEQUOYAH FUELS CORPORATION) Docket No. 40-08027-EA
GENERAL ATOMICS)
) Source Material License
(Gore, Oklahoma Site Decontamination) No. SUB-1010
and Decommissioning Funding))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO THE CHEROKEE NATION'S COMBINED RESPONSE OF MAY 19, 1994, AND SUPPLEMENT OF JUNE 3, 1994" in the above-captioned matter have been served on the following by deposit in the United States mail, first class, or as indicated by asterisk through deposit in the Nuclear Regulatory Commission's internal mail system this 22nd day of June 1994:

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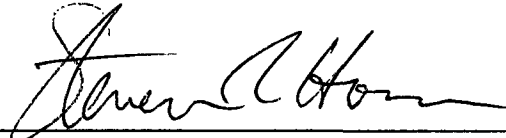
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