

Around the same time that SFC filed its license renewal application, the Nuclear Regulatory Commission discovered substantial radioactive and chemical contamination at the SFC site. As a result, the NRC required SFC to perform extensive studies of the contamination and to modify the groundwater monitoring plan ("GMP") in its license. Order Modifying License, 55 Fed. Reg. 40,959 (October 5, 1990). However, the Commission refused Intervenor's request for a hearing regarding whether SFC's GMP was adequate to identify or track groundwater contaminants at the site. CLI-93-07 (March 18, 1993).

Following an accident in November of 1992, SFC shut down UF6 production and notified the NRC, under 10 C.F.R. § 40.42(b), of its decision to terminate operations. SFC also submitted a "Preliminary Plan for the Completion of Decommissioning" ("PPCD"), which broadly described SFC's plans and proposed timeframes for decommissioning the SFC site. However, the PPCD was "preliminary" and did not contain the full information required by § 40.42(b) for notification and request for termination of license.¹ According to the PPCD, the target date for final submittal of the Final Plan for Completion of Decommissioning ("PCD") was late 1996, with NRC review to be completed in late 1998. The Final PCD would address only those limited activities which are not permitted by SFC's current license, such

¹ See Native Americans for a Clean Environment's and Cherokee Nation's Opposition to Sequoyah Fuels Corporation's Motion for Withdrawal of Application and Termination of Hearing, and Request for Prehearing Conference at 7-8 (July 26, 1993) (hereinafter "Ints.' Opp.").

as ultimate disposition of contaminated soil. In the meantime, the PPCD contemplated that SFC would study and monitor contamination at the site and conduct cleanup activities under the terms of the 1985 license, which was then pending for renewal. These decommissioning activities included completion of raffinate disposal, clean-out and decontamination of existing structures, offsite shipment of raffinate sludge, disposition of CaF₂ sludge, and disposition of yellowcake. See Ints.' Opp. at 8-9.

On July 12, 1993, SFC moved the Licensing Board for permission to unconditionally withdraw its license renewal application. The motion was granted. Intervenors seek review of the following errors made by the Board:

I. The Licensing Board Misinterpreted the Scope of Its Authority Pursuant to 10 C.F.R. § 2.107.

At the outset, the Licensing Board wrongly concluded that it lacked authority under 10 C.F.R. § 2.107 to deny an improper request for withdrawal of a license application following notice of hearing.² LBP-93-25 at 20. Section 107(a) provides that:

² In addition, the Board erred in concluding that the issues raised by Intervenors in opposition to the proposed withdrawal -- i.e., groundwater monitoring, raffinate disposal, adequacy of management -- are "relat[ed] to decommissioning" placed them beyond the scope of the Licensing Board's jurisdiction. LBP-93-25 at 27. Decommissioning, i.e., cleanup and waste disposal, is an activity that went on throughout the operating life of the SFC plant, under the terms of its operating license. The decommissioning activities that SFC intends to continue pending submission of its Final PCD in 1996 are the same ones that have been authorized since 1985 or earlier by its existing license. Thus, there can be no doubt that the Licensing Board has jurisdiction over those activities in the renewal proceeding. The Licensing Board lacks jurisdiction only over those decommissioning activities which are not covered by the existing license and which therefore must be proposed in a license amendment applica-

The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

(emphasis added). The discretionary language in the first sentence clearly allows the NRC to deny an improper request for withdrawal. The second sentence shifts the general authority described in the first sentence to the presiding officer -- i.e., if the licensee takes the unusual step of attempting to withdraw a license application after a notice of hearing has been issued, then withdrawal cannot be accomplished without the approval of the presiding officer. To interpret this language as precluding the denial of an application for withdrawal, as LBP-93-25 does, would have the absurd and irrational result that the NRC has less authority over a licensee after a hearing has been noticed and the agency and other parties have committed substantial resources to the process, to their prejudice.

Intervenors do not dispute the Licensing Board's conclusion (LBP-93-25 at 23, 25) that the NRC lacks the power to require a licensee to pursue new business activities that it does not desire. See Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156,

(continued)

tion. See 10 C.F.R. § 40.42(c)(2)(i) (plan for completion of decommissioning required "if the procedures necessary to carry out decommissioning have not been previously approved by the NRC and could increase potential health and safety impacts. . .")

161-62 (1980). However, in this case, SFC has explicitly stated that it intends, for some years, to continue certain decommissioning-related activities under the terms of the 1985 license which was extended only by virtue of SFC's renewal application. (Indeed, it must carry out those activities in order to safely decommission the plant.) Nothing in § 2.107 can be read to deprive the NRC of the authority to require SFC to conform to the regulatory requirements for renewal of the 1985 license terms when SFC will continue to operate pursuant to these terms.³ See Nuclear Engineering Company, Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), unpublished Licensing Board Memorandum and Order Ruling on Motions to Withdraw Application and Dismiss Proceeding (May 4, 1979). This aspect of the Board's decision should be reviewed, not only because it misconstrues § 2.107 and conflicts with Commission precedents, but because the scope of the Commission's authority over its licensees is a "substantial and important" question of both law and policy. 10 C.F.R. § 2.786(b)(4)(iii).

II. The Licensing Board Ignored the Requirements of 10 C.F.R. § 40.42.

By disregarding the plain language of NRC regulations, the Licensing Board has wrongly allowed SFC to withdraw its license renewal application and operate with an expired license, when SFC

³ Indeed, SFC's continued operation under expired license terms, without a public hearing on the adequacy of those license terms to provide for safe conduct of the activities authorized by the license, would severely prejudice intervenors and the public.

has not satisfied the requirements for continued operation absent application for renewal, as set forth in 10 C.F.R. § 40.42. Pursuant to 10 C.F.R. § 40.42(a) SFC's license expired on September 29, 1990, unless it timely applied for renewal under § 40.36(b), or unless the license were extended pursuant to 10 C.F.R. § 40.42(e), which provides that:

Each specific license continues in effect, beyond the expiration date if necessary, with respect to possession of residual source material present as contamination until the Commission notifies the licensee in writing that the license is terminated.

If no renewal application were submitted, or if SFC withdrew its license renewal application and thereby restored itself to the status of never having filed a license renewal application, SFC must also meet the requirements of 10 C.F.R. § 40.42(c). Thus, if SFC seeks to withdraw its license renewal application, it must fit within § 40.42(e) to avoid operating with an expired license, and it must also satisfy § 40.42(c).

Contrary to the Licensing Board's strained interpretation of the regulations, SFC does not fit within § 40.42(e), and has not satisfied § 40.42(c). Therefore, withdrawal of the license renewal application cannot be allowed.

SFC does not fall within the license extension provision of § 40.42(e) because extension of the license term without renewal review is not "necessary," by virtue of the very fact that SFC has applied for renewal. The pending renewal proceeding is an available and appropriate forum in which the Licensing Board can

evaluate the adequacy of the license and establish a new expiration date that is consistent with SFC's now-limited operation.

SFC also does not fit within § 40.42(e) because that extension of the license term is only for possession of "residual source material present as contamination." SFC still has a significant amount of commercially usable or salable source material on the site, such as UF6 cylinders and yellowcake. These materials can in no manner be characterized as "contamination." See Ints.' Opp. at 9.

SFC has also not satisfied the conditions of § 40.42(c)(1), which requires that a substantial portion of decommissioning activities must have been finished before SFC's license expired in 1990 (or at best July 1993 when the motion for withdrawal was filed), leaving for the post-expiration period only those limited activities for which additional NRC licensing action is required. At present, SFC is only beginning those activities which must be completed by the expiration of the license, i.e., disposal of cylinders, yellowcake, raffinate sludge, and raffinate fertilizer. See Ints.' Opp. at 14.

Finally, SFC has not met the requirements of 10 C.F.R. § 40.42(b) for notification of termination of licenses. SFC did not submit a completed form NRC-314, it provided only "available" radiation survey data rather than a completed report, and it failed to submit a Final PCD. See Ints.' Opp. at 7-9. The Commission should not let stand the Licensing Board's egregious disregard for all of these requirements of 10 C.F.R. § 40.42.⁴

III. LBP-93-25 Unlawfully Deprives Intervenors of Their Right to hearing on the License Terms Under Which SFC Will Continue to Operate.

By unconditionally granting SFC's motion to withdraw its license renewal application, the Licensing Board has effectively granted SFC an indefinite extension of its 1985 license with respect to non-production related activities, which SFC now plans to continue through at least the year 1997. In so doing, the Licensing Board has completely deprived Intervenors of the hearing to which they are entitled, under the Atomic Energy Act, on the terms under which the adequacy of SFC's license should be renewed in order to protect public health and safety and the environment as SFC carries out those licensed activities. Given the recent discoveries of extensive contamination at the site, such a public re-examination is critically important.

Moreover, as the Licensing Board acknowledges, many of the issues which Intervenors seek to raise in this proceeding, including the safety of raffinate spreading, emergency planning, and the adequacy of SFC's management and operational programs to provide for safe operations, may be mooted before they are ever heard. LBP-93-25 at 36. With respect to the adequacy of groundwater monitoring, it is possible - but not assured - that five

⁴ The Licensing Board's erroneous decision to ignore the requirements of 10 C.F.R. § 40.42 and exempt SFC from license renewal review under § 40.42(e) apparently is driven by the premise that it lacks authority to deny the withdrawal of SFC's license renewal application, and thus the application of § 40.42, albeit imperfect, is the better alternative. LBP-93-25 at 25. As discussed above in Section I, this premise has no basis in Commission regulation or precedent.

years from now, Intervenors could be heard on the adequacy of the GMP to support whatever decommissioning measures are provided for in the final decommissioning plan. However, Intervenors' interest in an efficient and timely decommissioning process could be prejudiced if the GMP were found to be inadequate and decommissioning were delayed another five years while SFC gathered more data.

With respect to the adequacy of funding for decommissioning, Intervenors may never have an opportunity to contest SFC's claim that it is not governed by 10 C.F.R. § 40.36, which requires the provision of guaranteed funds; or to litigate the amount of funding that would be adequate for the safe decommissioning of the plant.⁵ Similarly, questions regarding the safety of SFC's disposal of large quantities of contaminated, high-nitrate raffinate by spraying it on nearby pastures will be mooted unless Intervenors have an opportunity for a hearing now.

The Licensing Board holds out the possibility that the Staff may "require additional license amendments for decommissioning activities which could open other hearing opportunities to scrutinize the Licensee's operations." LBP-93-25 at 37. However, no

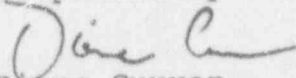
⁵ The Licensing Board asserts that these issues will be "considered" in the pending enforcement proceeding regarding the NRC Staff's order to SFC and GA to put up \$86 million in guaranteed decommissioning funds. LBP-93-25 at 29. However, NACE's attempt to intervene in that proceeding has been vigorously opposed by SFC and General Atomics; and even if NACE is admitted, it is precluded from challenging the adequacy of the funding prescribed by the NRC. See Bellotti v. NRC, 725 F.2d 1381 (1983). Thus, that hearing is by no means the equivalent of a license renewal proceeding.

license amendments will be issued for activities already authorized by the license. Moreover, under Bellotti, Intervenor has no right to challenge the sufficiency of license amendments that are ordered by the Staff in enforcement actions; thus, even if they were held, such proceedings would provide no substitute for a licensing proceeding.⁶

The NRC has a longstanding commitment to assure meaningful public participation in the licensing process. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976). Here, that commitment has been turned on its head: the Licensing Board has declared that public participation is undesirable because it would "minimize" or "negate" the Staff's oversight of current decommissioning activities, "delay" decontamination of critical areas, and "hamper the conduct of an important public policy." LBP-93-25 at 33. To the contrary, where public policy is being made on important decommissioning issues, the affected public should and must be included. See Statements of Ivan Selin, Briefing on Site Decommissioning Management Plan, Tr. at 32 (November 8, 1993). Accordingly, it is vital that the Commission take review of this egregious violation of Intervenor's hearing rights.

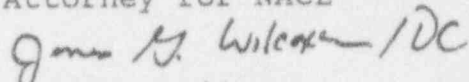
⁶ The Licensing Board also suggests that the wrongs against Intervenor may ultimately be resolved by a proposed rulemaking on timeliness of decommissioning, which is now pending before the Commission. LBP-93-25 at 37. However, it is unknown whether that regulation will even address the issues raised by this case, let alone have retroactive effect. In any event, the fact that the Licensing Board has -- unfairly and improperly -- relied in part on a pending NRC rulemaking for disposition of this case is all the more reason for the Commission to take review.

Respectfully submitted,



Diane Curran
Harmon, Curran, Gallagher, and
Spielberg
6935 Laurel Avenue, Suite 204
Takoma Park, MD 20912
(301) 270-5518

Attorney for NACE



James G. Wilcoxen
Wilcoxen, Wilcoxen & Primomo
P.O. Box 357
Muskogee, OK 74402
(918) 683-6696

Attorney for Cherokee Nation

January 4, 1994

CERTIFICATE OF SERVICE

I, Diane Curran, certify that on January 4, 1994, corrected copies of the foregoing NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S AND CHEROKEE NATION'S PETITION FOR REVIEW OF LBP-93-25 were served on the following by first-class mail:

Ivan Selin, Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Kenneth C. Rogers
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Forrest J. Remick
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

E. Gail de Planque
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge James P. Gleason
Presiding Officer
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge Jerry R. Kline
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Susan L. Uttal, Esq.
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

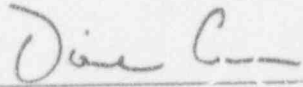
OFFICE OF SECRETARY
U.S. NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555
94 JAN -6 P4:22
JAN 11 1994

Maurice A. Axelrad, Esq.
Newman & Holtzinger
1615 L Street, N.W. Suite 1000
Washington, D.C. 20036

Sequoyah Fuels Corp.
Attn: John H. Ellis, President
P.O. Box 610
Gore, OK 74435

Brita Haughland Cantrell
Assistant Attorney General
2300 Lincoln Blvd., Room 112
Oklahoma City, OK 73105

James Wilcoxon, Esq.
Wilcoxon, Wilcoxon & Primomo
P.O. Box 357
Muskogee, Oklahoma 74402



Diane Curian

* By hand