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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

'99 DEC 29 P1:19

Before Administrative Judges:
Thomas S. Moore, Presiding Officer
Thomas D. Murphy, Special Assistant

OFFICE
OF
ADMINISTRATIVE
JUDGES

In the Matter of

FANSTEEL, Inc.

(Muskogee, Oklahoma Facility)

Docket No. 40-7580-MLA

ASLBP No. 00-772-01-MLA

December 29, 1999

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MEMORANDUM AND ORDER
(Granting the Request for Hearing)

Pursuant to 10 C.F.R. § 2.1205, the State of Oklahoma (State) requests an informal hearing on the request of Fansteel, Inc. (Fansteel) to amend its Source Material Licence No. SMB-911 for both the construction of a permanent, on-site, above-grade, radioactive waste disposal cell at its facility located near Muskogee, Oklahoma, and restricted release decommissioning of the disposal site pursuant to 10 C.F.R § 20.1403. The State's Subpart L request challenges the decommissioning plan, alleging that the proposal fails to comply with NRC regulations thus endangering the health and safety of the citizens and environment within its borders.

For the reasons set forth below, the State has established its standing and set forth several areas of concern germane to the subject of this proceeding. Therefore, the State's request for a Subpart L

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informal hearing on Fansteel's proposed source material license amendment is granted.

I. BACKGROUND

Until 1989, Fansteel conducted operations to recover various rare metals at its facility located near Muskogee, Oklahoma, under source material license No. SMB-911. The residues and contaminated soil currently located at the site resulted from operations at the facility for the production of tantalum and columbium metals from ores and slags that also contained low concentrations of uranium and thorium. Fansteel's proposed decommissioning plan for the facility was submitted to the NRC Staff on July 6, 1998, and was further supplemented on December 4, 1998. This proposed decommissioning plan consists of a two-fold approach: first, the majority of the facility would be decommissioned for unrestricted release pursuant to 10 C.F.R. § 20.1402; second, a permanent, on-site, above-grade, disposal cell for the disposal of radioactive decommissioning waste would be located at the site and the corresponding portion of the site would be decommissioned through restricted release pursuant to 10 C.F.R. § 20.1403.

Notice of consideration for Fansteel's proposed amendment was published in the Federal Register on September 14, 1999. See 64 Fed. Reg. 49,823 (1999). Pursuant to 10 C.F.R. § 2.1205, the State of Oklahoma responded to this notice and filed its timely request for an informal hearing on the proposed decommissioning plan on

October 14, 1999. Fansteel filed its response to the State's request for a hearing on October 29, 1999, and the NRC Staff file its response on November 5, 1999.

In this Subpart L informal proceeding, the State's request for a hearing must describe in detail: (1) its interest in the proceeding; (2) how its interests may be affected by the results of the proceeding; (3) its areas of concern germane to the subject matter of the proceeding; and (4) the circumstances that establish the timeliness of its hearing request. 10 C.F.R. § 2.1205(e)(1)-(4). To be admitted as a party to the proceeding, the State must also satisfy the judicial requirements of standing. 10 C.F.R. § 2.1205(h). Thus, the State must assert an injury-in-fact that is fairly traceable to the proposed action and that is likely to be redressed by a favorable decision by the Presiding Officer. The alleged injury-in-fact must also be within the "zone of interests" protected by the Atomic Energy Act (AEA) and the National Environmental Policy Act (NEPA). See, e.g., Bennett v. Spear, 520 U.S. 154, 167-68, 175 (1997).

The State asserts that it has "significant property, financial, sovereign, and other interests, such as the air, land, waters, environment, natural resources, wildlife, and citizens of Oklahoma, that will be affected by the results of the [p]roceeding." State of Oklahoma's Request for Hearing, (Oct. 14, 1999) at 9 [hereinafter State Request]. Next, the State asserts that as a sovereign, it is parens patriae and has a duty to protect the health, safety, and welfare of its citizens. Oklahoma also claims it has a

quasi-sovereign interest in the physical and economic health of its citizens including the protection of ground and surface water integrity, the area's tax base and Oklahoma's tax revenue. Oklahoma alleges a proprietary interest in all the land, air, water, wildlife, and other natural resources within its borders. The State also alleges that it operates and manages the Webbers Fall Unit of the McCellan-Kerr Wildlife Refuge and the Cherokee Gruber Wildlife Refuge located near the Fansteel site. Further, it alleges that it operates and maintains roads and thoroughfares in close proximity to the site, namely, State Highway 165 that runs adjacent to the site. Finally, the State asserts an interest in the correct application and enforcement of laws and regulations governing NRC-licensed facilities because of their precedential impact upon future decommissioning proceedings within Oklahoma's borders. Id. at 9-12. The State asserts that these interests will be harmed by the decommissioning plan because it provides for a significant source of radioactivity to be left at the site that may lead to offsite consequences. Oklahoma claims that the proximity of the storage cell to the Arkansas River, Highway 165, and the waters of two wildlife refuges poses a potential danger for harmful offsite consequences. Id.

In its request for an informal hearing, the State must also identify and describe in detail areas of concern germane to the decommissioning plan. 10 C.F.R. §§ 2.1205(e)(3)&(h). In an informal proceeding, the areas of concern constitute the general subject matter of issues that the petitioner seeks to litigate. An area of concern

is "germane" if it is relevant to the question whether the requested license amendment should be denied or conditioned.

The State identifies several areas of concern that it alleges are germane to the present proceeding. First, the State alleges that the NRC did not intend for 10 C.F.R. § 20.1403 restricted release decommissioning to be applied to the Fansteel site. Next, the State argues that the Fansteel decommissioning plan fails to comply with the requirements of section 20.1403(a) that residual levels of radioactivity be as low as reasonably achievable (ALARA). The State also claims that the decommissioning plan fails to comply with section 20.1403(e), which requires that total effective dose equivalent (TEDE) levels not exceed certain prescribed levels if institutional controls fail. Next, the State asserts that the decommissioning plan does not satisfy the requirements of section 20.1403(b) because Fansteel fails to show legally enforceable institutional controls and long-term custodianship for the site. Similarly, the State alleges that the plan fails to satisfy section 20.1403(c) financial assurance requirements. Finally, the State challenges the design and sufficiency of the disposal cell site Fansteel proposes to use in its decommissioning plan. See State Request at 25-44.

The NRC Staff supports the State's request, arguing that Oklahoma has satisfied the requirements of standing and identified areas of concern germane to the present proceeding. The Staff argues that the harm the State asserts to its interests from the alleged defects in the decommissioning plan adequately allege an injury-in-fact within the zone of interests protected by the statutes governing the

proceeding and that the injuries asserted may be redressed through a favorable decision by the Presiding Officer. The Staff then identifies and details the areas of concern that it finds are germane to the proceeding. See NRC Staff's Response to Request for Hearing Filed By the State of Oklahoma (Nov. 5, 1999) [hereinafter Staff Response].

Fansteel opposes the State's request for a hearing and asserts Oklahoma lacks standing. It also argues that none of the concerns raised by Fansteel are germane to this proceeding. According to Fansteel, the injuries asserted by the State are too general, unfounded, and speculative and, therefore, insufficient to warrant its admission into the hearing. It also asserts that the State has failed to provide an explanation of how these speculative injuries might result from the decommissioning plan and that the Board is unable to favorably redress any of these injuries. Finally, Fansteel specifically addresses each of the State's areas of concern arguing that they are not germane to the proceeding and concludes that they are therefore inadmissible. See Fansteel Inc.'s Answer in Opposition to the Request for Hearing Filed by the State of Oklahoma (Oct. 29, 1999) [hereinafter Fansteel Response].

II. ANALYSIS

A. Standing

The State must satisfy the judicial requirements of standing by asserting an injury-in-fact that is fairly traceable to the proposed action and that is likely to be redressed by a favorable Board decision. Yankee Atomic Electric Co. (Yankee Nuclear Power Station),

CLI-98-21, 48 NRC 185, 195 (1998). See Bennett v. Spear, 520 U.S. 154, 167 (1997) (requiring a "concrete and particularized" injury that is "actual or imminent"); Steel Co. v. Citizens for a Better Environment, 118 S.Ct. 1003, 1017 (1998) (stressing the importance of "redressibility--a likelihood that the requested relief will redress the alleged injury"); Lujan v. Defenders of the Wildlife, 504 U.S. 555, 560-61 (1992). The alleged injury-in-fact must also be within the "zone of interests" protected by the Atomic Energy Act (AEA) or the National Environmental Policy Act (NEPA). See, Bennett v. Spears, 520 U.S. at 175. The State has the burden of establishing its standing; however, the Presiding Officer must construe the petitioner's statements in its favor. Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995).

The State has established that it has various interests that may be affected by Fansteel's proposed decommissioning plan. The State has demonstrated that it has a duty to protect the health and safety of the citizens and environment contained within its borders and that these interests, relative to the citizens who live, work and travel near the site, may be affected by the consequences of Fansteel's proposal. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 169, aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998). Previous agency decisions have recognized such a right of the sovereign, noting "the strong interest that a government body ... has in protecting the individuals and territory that fall under its sovereign guardianship establishes an organizational interest for standing purposes." Carolina Power &

Light Co. (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29 (1999). See Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), LBP-99-46, ___ NRC ___, ___ (slip op. at 13 (Dec. 16, 1999)). Oklahoma has also asserted a number of injuries to the streams, air, and property it owns at or near the Fansteel site from alleged discharges resulting from the decommissioning plan. State Request at 17-19. These alleged harms are sufficient to establish an injury-in-fact and these injuries fall within the interests protected by the Atomic Energy Act and NEPA. Furthermore, a determination that the State's asserted injury is fairly traceable to the proposed action "is not dependent on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible." Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994). That standard is met here. And, the State's alleged injuries to its interests, the harm to the citizens, and the potential injury to the environment at or near the Muskogee site, are all redressible by a Board decision favorable to the State's position such as the denial of the request for restricted release decommissioning. Accordingly, the State has established its standing.

B. Areas of Concern

In addition to satisfying the requirements of standing, a request for a 10 C.F.R. Part 2, Subpart L hearing must "describe in detail ... [t]he requestor's areas of concern about the licensing activity that is the subject matter of the proceeding." 10 C.F.R. § 2.1205(e)(3). The Presiding Officer must then determine that the State's "specified areas of concern are germane to the subject matter of the proceeding."

10 C.F.R. § 2.1205(h). Accordingly, a statement of concern "must provide enough specificity to afford the Presiding Officer the ability to link the concern with the subject matter of the proceeding in order to make a decision to admit the statement for litigation." Sequoyah Fuels Corp., LBP-94-39, 40 NRC 314, 316 (1994). Areas of concern must contain information specific enough to establish that they are "generally" within the range of matters subject to challenge in this proceeding. See 54 Fed. Reg. 8269, 8272 (1989) (Statement of considerations, informal hearing procedures for materials licensing adjudications). The level of description in these areas of concern "need not be extensive but must fall generally within the scope of the hearing." Babcock and Wilcox (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-94-4, 39 NRC 47, 52 (1994). This standard differs from the standard that governs the admission of contentions in formal hearings in that the informal standard is easier to satisfy. See Hydro Resources, Inc. (Albuquerque, New Mexico), LBP-98-9, 47 NRC 261, 280 (1998).

The State identifies several areas of concern that it alleges are germane to the present proceeding. First, Oklahoma claims that the NRC did not intend for 10 C.F.R. § 20.1403 restricted release decommissioning to be applied to the Fansteel site because of the presence of uranium and thorium, which have extremely long half-lives. Oklahoma maintains that the NRC intended for this regulation to be applied only to facilities where radioactive contaminants will decay to unrestricted dose levels within a finite period of institutional control. State Request at 27. In response, Fansteel argues that

there is no language restricting section 20.1403 to sites contaminated with short-lived nuclides. Fansteel Response at 24-26. The State's area of concern merely presents a legal question involving regulatory construction. The merits of this legal issue are not to be determined at this initial point in the proceeding. Contrary to the Staff's claims, this area of concern is not an impermissible attack on NRC regulations; rather it raises a garden variety issue of regulatory interpretation. This area of concern with regard to the meaning of section 20.1403 is, therefore, accepted as germane to the subject matter of this proceeding.

Next, the State claims that the proposed decommissioning plan does not comply with the requirements of 10 C.F.R. § 20.1403(a) because it fails (1) to demonstrate that residual levels of radioactivity are ALARA or (2) to show that any further reductions in residual radioactivity necessary to achieve unrestricted decommissioning would result in net public or environmental harm. Alleging that the "ALARA analysis is entirely too simplified to be of any analytical value," Oklahoma challenges values and figures used by Fansteel and asserts that public and environmental harm will result. State Request at 31. At this initial stage of the proceeding the Presiding Officer's task is not to determine the merits of the proffered claims as Fansteel would have it. Thus, Fansteel's challenges to the State's proffered areas of concern contain a level of detail that is unnecessary and improper before the hearing file is made part of the proceeding record. Previous decisions have held alleged failures to satisfy applicable requirements to be admissible

areas of concern. See Hydro Resources, LBP-98-9, 47 NRC at 281-82. Thus, the State's claim here advances an area of concern germane to this proceeding.

Oklahoma's next area of concern, Fansteel's compliance with 10 C.F.R. § 20.1403(e), which requires assurance that TEDE levels would not exceed applicable limits in the event that institutional controls fail, is also admitted as germane to the current proceeding. See State Request at 33-34. The State supports its area of concern by identifying what it alleges are errors in Fansteel's modeling. Once again, a determination on the admissibility of an area of concern is not a determination of the merits and Fansteel's detailed arguments go to the merits of the issue, not to the question of germaneness.

In order for the Fansteel to employ restricted release decommissioning it also must comply with the requirements of 10 C.F.R. § 20.1403(b). The State's fourth area of concern asserts that the plan does not comply with this section because it fails to demonstrate legally enforceable institutional controls and long-term custodianship that provides assurance that the TEDE from residual radioactivity distinguishable from the background to the average member of the critical group will not exceed 25 mrem/year. Staff Request at 34-36. It should be noted that the Staff asserts that it is unable to determine "whether the physical controls are legally enforceable or whether the site will meet the dose limit requirements of section 20.1403." Staff Response at 13. Similarly, the Staff states it must also undertake further review "to determine whether public health and safety will be assured if Fansteel were permitted to decommission the

site for restricted release with an on-site containment cell." Id. Thus, with the existence of such a dispute, this area of concern is obviously germane to the proceeding and is accepted as an area of concern.

The State also asserts that the decommissioning plan fails to comply with 10 C.F.R. § 20.1403(c) financial assurance requirements because Fansteel incorrectly calculates the cost of long-term site control. Oklahoma details a number of considerations, not taken into consideration by Fansteel, that it believes will increase the amount of money needed for long-term stewardship of the site. State Request at 36-37. Previous Board decisions have held inadequate financial assurance to be a germane area of concern. See, Sequoyah Fuels, LBP-99-46, (slip op. at 28-30); Hydro Resources, LBP-98-9, 47 NRC at 282. This area of concern is admitted because Fansteel's proposed financial assurance plan does not provide the detail necessary to determine definitively at this time whether it has sufficiently provided for the long-term control of the site. In this regard, it should be noted that after the hearing file is made part of the proceeding record and the parties have made their initial presentations some, or all, of the State's specific charges regarding the inadequacies of Fansteel's decommissioning plan with respect to financial assurance may be shown to be inappropriate. But the time to deal with such specifics is on the merits of the area of concern, not in determining whether the State's concern is relevant and, hence germane, to the proceeding.

The State's final area of concern, a challenge to the design and sufficiency of the disposal cell site Fansteel proposes to use in its decommissioning plan, is also accepted as germane to this proceeding. Oklahoma alleges the following in this area of concern: the disposal cell is inadequate to prevent contamination of groundwater beneath the site because the plan does not include a liner or leachate collection system; the placement of the disposal cell will create a "superhighway" for contaminants to enter groundwater in the site; plugging wells will not prevent a direct pathway for further groundwater contamination; the Fansteel plan will place the disposal cell directly in the probable maximum flood plain; and that the decommissioning plan does not account for the fact that the disposal cell will be placed near an existing sewer main and gas line or the damage to the disposal cell if these lines ever require repair. State Request at 38-43. It should be noted that the Staff intends to analyze these issues as part of its 10 C.F.R. Part 51 technical and environmental review. Staff Response at 18-20. Accordingly, this area of concern is obviously relevant to the proceeding and is admitted as germane to the proceeding.

III. CONCLUSION

With regard to its request for a Subpart L informal hearing, the State of Oklahoma has established its standing and set forth several areas of concern germane to Fansteel's proposed amendment to its source material license. Therefore, the State's October 14, 1999, request for a hearing regarding Fansteels' application to amend its

source material license for restricted release decommissioning is granted.

This order is subject to appeal to the Commission in accordance with the terms of 10 C.F.R. § 2.1205(o). Any appeal must be filed within ten (10) days of service of this Order. The appeal may be supported or opposed by any party by filing a counter-statement within fifteen (15) days of the service of the appeal brief.

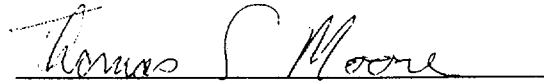
Further, pursuant to 10 C.F.R. § 2.1231(a) the Staff shall prepare and file the hearing file by January 31, 2000. The hearing file shall contain a chronologically numbered index of each item comprising the hearing file. Each item in the hearing file shall be separately tabbed in accordance with the index and each item shall be separated from the other hearing file items by a substantial colored sheet of paper that contains the tabs for the hearing file item that follows.

Finally, while the Staff is preparing the hearing file, the Presiding Officer will issue an order setting forth a schedule and directives for the conduct of the proceeding. In that regard, the Presiding Officer intends to hold a telephone conference with the parties at 10:30 a.m. EST on Wednesday, January 12, 2000. Therefore, counsel for each party shall file with the Presiding Officer by January 7, 2000, a filing setting forth the name and telephone number

of the counsel who will participate in the telephone conference.

It is so ORDERED.

By the Presiding Officer

A handwritten signature in cursive script that reads "Thomas S. Moore". The signature is written in dark ink and is positioned above a solid horizontal line.

Thomas S. Moore
ADMINISTRATIVE JUDGE

Rockville, Maryland

December 29, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

FANSTEEL, INC.

(Muskogee, Oklahoma Facility)

Docket No.(s) 40-7580-MLA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing M&O GRANTING HEARING REQUEST 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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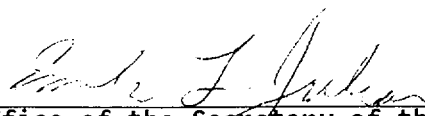
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Dated at Rockville, Md. this
29 day of December 1999


Office of the Secretary of the Commission

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

FANSTEEL, INC.

(Muskogee, Oklahoma Facility)

Docket No.(s) 40-7580-MLA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing M&O -- LBP-99-47* -- RE-SERVED 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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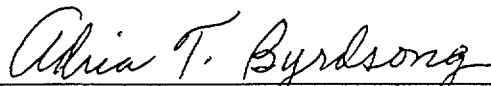
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Dated at Rockville, Md. this
4 day of January 2000


Office of the Secretary of the Commission