

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

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

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

Docket No. 40-8027-MLA-5

CLI-03-06

MEMORANDUM AND ORDER

This case involves the application of Sequoyah Fuels Corporation ("SFC") for a materials license amendment to possess byproduct material at its site near Gore, Oklahoma. On May 1, 2003, the Presiding Officer certified two questions to the Commission: (1) should the State of Oklahoma be permitted to litigate in this proceeding whether the decommissioning waste present at the Gore site qualifies as byproduct material within the ambit of § 11e.(2) of the Atomic Energy Act ("AEA")¹ and (2) if so, should the State's 11e.(2) claim be considered by the Presiding Officer or by the Commission.² We decide that Oklahoma may raise the § 11e.(2) issue in this proceeding. We also set a briefing schedule so that we can decide the merits of the issue ourselves.

¹42 U.S.C. 2014e(2).

²See *Sequoyah Fuels Corp. (Gore, Oklahoma Site)*, LBP-03-07, 56 NRC __ (May 1, 2003). Pursuant to 10 C.F.R. § 2.1209(d), a presiding officer has the power to certify questions to the Commission for determination.

I. BACKGROUND

SFC formerly operated its Gore, Oklahoma facility to produce uranium hexafluoride from yellow cake (a uranium oxide) and to convert depleted uranium hexafluoride to uranium tetrafluoride. Various phases of SFC's operations produced radioactive waste streams. In conjunction with decommissioning planning, in 2001 SFC requested that the NRC determine if some of the waste material from the SFC yellow cake solvent extraction process could be classified as byproduct material under section 11e.(2) of the Atomic Energy Act -- so-called "11e.(2) byproduct material."³ After analysis the NRC Staff presented its views to the Commission and identified options in SECY-02-0095. The Staff recommended that the Commission approve SFC's request. On July 25, 2002, the Commission issued a Staff Requirements Memorandum ("SRM") responding to SECY-02-0095. The Commission SRM concluded that some of the waste at the SFC site could be classified as 11e.(2) byproduct material. That classification had implications for the type of decommissioning plan necessary to remediate the Gore site and terminate SFC's license.⁴

Following the Commission's SRM, SFC requested a materials license amendment to possess 11e.(2) byproduct material. After publication of notice of the amendment request and opportunity for a hearing under 10 C.F.R. Part 2, Subpart L,⁵ Citizens' Action for Safe Energy

³"The term 'byproduct material' means (1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (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. 2014e(2). Part (2) of the definition is at issue in this proceeding.

⁴A separate adjudicatory proceeding is underway with respect to SFC's proposed site decommissioning plan. Oklahoma has already established standing with respect to SFC's proposed site decommissioning plan for the Gore, Oklahoma conversion facility. See CLI-01-02, 53 NRC 9 (2001) (denying interlocutory review of LBP-99-46, 50 NRC 386 (1999), which granted Oklahoma's request for a hearing).

⁵See 67 Fed. Reg. 69,048 (Nov. 14, 2002).

("CASE"), the State of Oklahoma, the Cherokee Nation, and 15 individuals submitted hearing requests.⁶

SFC and the NRC Staff filed responses to the petitions of CASE and the individuals but requested an extension of time to file answers to the hearing requests of the State and the Cherokee Nation while SFC, Oklahoma and the Cherokee Nation attempted to resolve the issues without litigation. The Board granted the request,⁷ as well as a later request for an additional extension.⁸ The Cherokee Nation withdrew its hearing request on April 15, 2003. The Staff and SFC have filed oppositions to the Oklahoma hearing request and claim that none of the petitioners has established standing or identified an area of concern germane to the proceeding.⁹ The Presiding Officer has not yet issued an order on standing or germaneness.¹⁰

II. DISCUSSION AND CONCLUSION

The Presiding Officer has stated that the viability of Oklahoma's claim rests on whether Oklahoma is precluded from "insisting that the waste on the Licensee's site in question does

⁶The individual petitioners are Bill Bryant, Margaret Cox, Mike Fuller, Barbara A. Geary, Richard Geary, Jacquelyn C. Longacre, Mike Marshall, Bob Nichols, James Nimmo, Carl Hoot Reynolds, Christopher T. Robinson, Billye Van Schuyver, Anthony Oliver Smith, Darla Reynolds Sparks, and Kirk F. Williams.

⁷See unpublished Order (Granting Joint Motion for Extension of Time to File Answers) (Dec. 26, 2002).

⁸See unpublished Memorandum and Order (Granting in Part Joint Motion for Further Extension of Time to File Responses) (Jan. 29, 2003).

⁹See 10 C.F.R. §§ 2.1205(e) and (h). A hearing request must describe the interest of the requestor in the proceeding, how the interests may be affected by the results of the proceeding, and the requestor's areas of concern about the licensing activity that is the subject of the proceeding.

¹⁰On the basis of its technical review, which occurs concurrently with this license amendment adjudicatory proceeding, the NRC Staff has issued the license amendment. Depending on the outcome of this adjudicatory proceeding, however, the Presiding Officer and the Commission have the authority to reverse the Staff's decision and rescind the license amendment.

not qualify as section 11e.(2) byproduct material (in other words does not meet the definition of byproduct material set forth in that section of the AEA).”¹¹ Because the Commission earlier approved the classification by SRM, the Presiding Officer is understandably reluctant to entertain Oklahoma’s position, which “represents a challenge to a decision reached by the Commission itself.”¹² Accordingly, the Presiding Officer has certified to us the following questions:

1. Should the State of Oklahoma be permitted to raise in this pending materials license amendment proceeding the question whether the decommissioning waste present on the site of the Licensee Sequoyah Fuels Corporation qualifies as byproduct material within the ambit of section 11e.(2) of the Atomic Energy Act . . . ?
2. If the answer to that question is in the affirmative, does the Commission wish to entertain Oklahoma’s assertions on the issue itself or, alternatively, does it want the State’s section 11e.(2) claims to be considered in the first instance by this presiding officer?¹³

For the reasons stated below, we answer the first question affirmatively. And, because resolution of the 11e.(2) issue hinges on law rather than fact, and has previously been addressed by the Commission (in an SRM), the Commission will address it directly.

A Commission SRM is an internal agency pronouncement. It is binding inside the Commission only. It is neither a regulation resulting from notice-and-comment rulemaking under the Administrative Procedure Act nor a Commission adjudicatory decision. It thus lacks the “force and effect of law.”¹⁴ Hence, an SRM may be reconsidered in the context of an adjudication.

¹¹See LBP-03-07, 56 NRC at ___, slip op. at 2.

¹²See *id.*, slip op. at 6.

¹³*Id.* at 7.

¹⁴See *United States v. Mead*, 533 U.S. 218 (2001); *Citizens Awareness Network, Inc. v. NRC*, 59 F.3d 284 (1st Cir. 1995).

The Commission recognizes that this adjudicatory proceeding appears to be the only opportunity that Oklahoma may have to argue its position, which is contrary to that of the NRC Staff and the licensee. Consequently, we find that Oklahoma should be permitted to raise the 11e.(2) issue in this materials license amendment proceeding. Although the Commission has previously considered the 11e.(2) issue in connection with an SRM, the Commission did not do so in an adjudicatory setting, with the benefit of adverse parties' briefs. It is possible that review of the issue from that perspective will shed new light on it. Certainly, in view of the SRM, the Commission rather than the Presiding Officer is the right forum to consider the issue.

Accordingly, we seek briefs from Oklahoma and any other hearing petitioners, the licensee, and the NRC Staff on the question whether, in view of the initial processing of yellow cake at the Gore site, any portion of the SFC waste can be considered as 11e.(2) byproduct material. The briefs shall not exceed 25 pages and should be filed simultaneously by July 3, 2003. Reply briefs, containing only rebuttal, shall not exceed 10 pages and should be filed simultaneously by July 18, 2003.

After considering the arguments afresh, the Commission itself will decide the 11e.(2) issue. After deciding the threshold 11e.(2) issue we will return this case to the Presiding Officer for appropriate disposition.

IT IS SO ORDERED.

For the Commission¹⁵

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 13th day of June, 2003.

¹⁵ Commissioners Dicus was not present for the affirmation of this Order. If she had been present, she would have approved it.