

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 1678

DOCKETED 4/13/00

BEFORE THE PRESIDING OFFICER

In the Matter of)	Docket No. 40-9027-MLA
)	
CABOT PERFORMANCE MATERIALS)	(RE Site Decommissioning Plan)
)	
Reading, Pennsylvania)	ASLBP No. 99-757-01-MLA

NRC STAFF'S RESPONSE TO REQUEST FOR HEARING
FILED BY JOBERT, INC. AND METALS TRUCKING, INC.

I. INTRODUCTION

On August 28, 1998, Cabot Performance Materials (Cabot) submitted a Site Decommissioning Plan (SDP) and Radiological Assessment for its site in Reading, Pennsylvania. A revised SDP was submitted on March 21, 2000. Cabot is the holder of source material license SMC-1562 which authorizes it to possess a total 100 tons of contaminated material (elemental uranium and thorium) at its Reading and Revere, Pennsylvania sites. The contaminated material at the Reading site consists of slag and soil deposited on a slope. The SDP concludes that long-term doses from the contaminated material at current levels are well below the requirements for unrestricted release of the site, and that no additional decommissioning is required. The NRC staff (Staff) considered the submittal to be a license amendment request and, on October 28, 1998, caused a "Notice of Consideration of Amendment Request for Decommissioning the Cabot Performance Materials Reading, Pennsylvania, Site, and Opportunity for Hearing" to be published in the *Federal Register*. 63 Fed. Reg. 57715.

On November 23, 1998, Jobert, Inc. (Jobert) and Metals Trucking, Inc. (Metals Trucking) filed a motion for extension of time to file a request for hearing to December 11,

1998. The motion was granted by the Secretary of the Commission on November 27, 1998.¹ On December 11, 1998, Jobert and Metals Trucking filed their Request for Hearing. On April 3, 2000, Cabot submitted "Licensee's Answer to Request for a Hearing of Jobert, Inc. and Metals Trucking, Inc."

For the reasons stated below, Staff opposes the Request for Hearing.

II. BACKGROUND

Cabot Performance Materials operated a metals processing facility in the 1960's. Contaminated slag material produced as a result of that operation was deposited along the edge of a slope on the Reading site. The City of Reading's right of way, along with railroad tracks and the Schuylkill River, is located at the bottom of the slope. Site decontamination and decommissioning activities have been conducted. The on-site buildings have been decontaminated and released. The SDP and revised SDP both propose unrestricted release of the site, estimate that the total effective dose equivalent (TEDE) to the average member of the critical group will be far below 25 mrem per year, state that the residual dose will be as low as is reasonably achievable (ALARA), and conclude that no further decommissioning is required for the slag pile.²

The Staff has completed its acceptance review of the submittal, and recently began its environmental review and technical review of the SDP.

¹ On November 24, 1998, the Redevelopment Authority of the City of Reading and the City of Reading filed a Request for Hearing on the amendment request, pursuant to 10 C.F.R. 2.1205. On December 2, 1998, the Commission designated a Presiding Officer to rule upon the hearing request and, if necessary, to serve as the Presiding Officer in the event that an informal hearing is ordered.

² "Decommissioning Plan for Reading, Pennsylvania Slag Pile Site" (August 28, 1998) at 1-1 to 1-2, and "Decommissioning Plan for Reading Slag Pile Site" (March 2000) at 1-1 to 1-2.

III. DISCUSSION

A. Standing

It is fundamental that any person or entity that wishes to request a hearing (or intervene in a Commission proceeding) must demonstrate that it has standing to do so.

Section 189a(l) of the Atomic Energy Act, 42 U.S.C. § 2239(a), provides that:

In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license . . . , the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

In addition, pursuant to 10 C.F.R. § 2.1205(d), where a request for informal hearing is filed by any person other than the applicant, in connection with a materials licensing action under 10 C.F.R. Part 2, Subpart L, the request for hearing must describe in detail:

- (1) The interest of the requestor in the proceeding;
- (2) How that interest may be affected by the results of the proceeding, including the reasons why the requestor should be permitted a hearing, with particular reference to the factors set out in [§ 2.1205(h)];
- (3) The requestor's areas of concern about the licensing activity that is the subject matter of the proceeding; and
- (4) The circumstances establishing that the request for a hearing is timely in accordance with [§ 2.1205(d)].

Pursuant to 10 C.F.R. § 2.1205(h), the Presiding Officer must determine whether “the requestor meets the judicial standards for standing,” and shall consider, among other factors:

- “(1) [t]he nature of the requestor's right under the Act to be made a party to the proceeding;
- (2) [t]he nature and extent of the requestor's property, financial, or other interest in the proceeding; and

(3) [t]he possible effect of any order that may be entered in the proceeding upon the requestor's interest.”

The Commission has long held that contemporaneous judicial concepts of standing will be applied in determining whether a petitioner for leave to intervene has sufficient interest in a proceeding to be entitled to intervene as a matter of right under Section 189a of the Act. *See, e.g., Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327, 332 (1983); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units I and 2), CLI-76-27, 4 NRC 610, 613 (1976); *Envirocare of Utah, Inc.* (Byproduct Material Waste Disposal License), LBP-92-8, 35 NRC 167, 172 (1992); *Babcock and Wilcox* (Apollo, PA Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 80-81 (1993); *Sequoyah Fuels Corp.* (Source Material License No. SUB-1010), LBP-91-5, 33 NRC 163, 164-65 (1991); *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 312-13 (1989). These judicial standards are applicable to informal hearings held pursuant to Subpart L. *Chemetron Corp.* (Bert Avenue, Howard Avenue, McGean-Rohco Sites, Newburgh Heights and Cuyahoga Heights, Ohio), LBP-94-20, 40 NRC 17, 18 (1994).

To show an interest in the proceeding sufficient to establish standing, the requestor must show that the proposed action will cause “injury in fact” to its interest and that its interest is arguably within the “zone of interests” protected by the statutes governing the proceeding. *Georgia Power Co.* (Vogtle Electric Generating Plant, Units I and 2), CLI-93-16, 38 NRC 25, 32 (1993); *Three Mile Island, supra*, 18 NRC at 332-33; *Pebble Springs, supra*, 4 NRC at 613-14. In proceedings before the NRC, the petitioner must establish an injury to its public health and safety interests protected by the Atomic Energy Act (AEA) or to its environmental interests protected by the National Environmental Policy

Act (NEPA). *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 215 (1983). See *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 312-13 (1989); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 432, 437 (1991); and *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility) LBP-93-4, 37 NRC 72, 80 (1993). Further, it has been held that in order to establish standing, the petitioner (or requestor) must establish that he personally has suffered or will suffer "distinct and palpable" harm that constitutes injury in fact, that the injury can fairly be traced to the challenged action, and that the injury is likely to be redressed by a favorable decision in the proceeding. *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988); *Vogtle, supra*, CLI-93-16, 38 NRC at 32; *Babcock and Wilcox, supra*, LBP-93-4, 37 NRC at 81; *Envirocare, supra*, LBP-92-8, 35 NRC at 173. See also *Warth v. Seldin*, 422 U.S. 490, 504 (1974). A petitioner (or requestor) must have a "real stake" in the outcome of the proceeding in order to establish injury in fact for standing. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48 (1979). While the petitioner's stake need not be a "substantial" one, it must be "actual", "direct" or "genuine." *Id.* at 448.

In a proceeding not involving a reactor construction permit or operating license, "a petitioner who wants to establish 'injury in fact' for standing purposes must make some specific showing outlining how the particular radiological (or other cognizable) impacts from the . . . materials involved in the licensing action at issue can reasonably be assumed to accrue to the petitioner." *Atlas Corp.* (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 426 (1997), citing *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 247-48 (1966).

The Supreme Court of the United States has recently reiterated the "irreducible constitutional minimum" requirements for standing -- that the plaintiff suffer an "injury in fact" which is "concrete and particularized and . . . actual or imminent, not conjectural or hypothetical," that there is a causal connection between the alleged injury and the action complained of, and that the injury will be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. 154, 167, 117 S. Ct. 1154, 1163 (1997). In addition, the petitioner must meet the "prudential" standing requirement that the complaint must arguably fall within the "zone of interests" of the governing law. *Id.* at 1167. *See also Vogtle, supra*, 38 NRC at 32; *Three Mile Island, supra*, 18 NRC 327; and *Pebble Springs, supra*, 4 NRC at 613-14.

(1) Request of Metals Trucking, Inc.

Metals Trucking alleges that it is the owner of the property on which the slag pile is located.³ Request for Hearing at 2. Jobert is the former owner and holds a purchase money mortgage for the property. Metals Trucking is the mortgagee. Jobert and Metals Trucking have left the slag pile undisturbed and gave Cabot access to the pile. *Id.* Metals Trucking has erected a fence around the slag pile. *Id.* at 3. Cabot, Jobert and Metals Trucking have negotiated an agreement which provides Cabot with access to the slag pile and which reimburses Metals Trucking for the cost of the fence. Metals Trucking is interested in developing the property or selling it. Metals Trucking wants to protect its

³ Cabot argues that because the Redevelopment Authority of the City of Reading recently filed papers to condemn the property, any injury to the property interest of Metals Trucking and Jobert is moot. "Licensee's Answer to Request for a Hearing of Jobert, Inc. and Metals, Trucking, Inc." (April 3, 2000) at 6. The property interest of Metals Trucking and Jobert, however, will not be extinguished until the condemnation action is final. Since it is possible that the interest of Metals Trucking and Jobert may be extinguished, the Staff suggests that, should the Presiding Officer grant the request for hearing of either Metals Trucking and/or Jobert, Metals Trucking and/or Jobert be required to periodically report on the status of the condemnation action and to report its final outcome.

property interest in a hearing and has concerns over liability it might have with regard to the slag pile. Any action by the NRC which would restrict the use or redevelopment of the property would “substantially and adversely affect the desires of Metals Trucking” to redevelop or sell the property. *Id.* Even if the NRC places no restrictions on the use of the property, the presence of the slag pile would reduce the redevelopment alternatives and the attractiveness of the property to potential lenders. *Id.* at 3-4. Jobert wishes to protect its security interest in the property during a hearing. *Id.* at 4. Metals Trucking alleges that neither the NRC, Cabot, the City of Reading nor the Redevelopment Authority can protect the property or financial interests of Jobert and Metals Trucking. *Id.*

Metals Trucking fails to demonstrate standing because it does not allege an injury in fact to an interest within the zone of interests protected by the AEA or NEPA. Metals Trucking must establish an injury in fact to either health or safety interests protected by the AEA or to environmental interests protected by the National Environmental Policy Act (NEPA). *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 215 (1983). *See Northern States Power Co.* (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 312-13 (1989); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 432, 437 (1991); and *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility) LBP-93-4, 37 NRC 72, 80 (1993). This Metals Trucking has failed to do. Instead, Metals Trucking alleges injury to its purely economic interests, specifically adverse effects upon the value of the property for sale or development and financial injury from unspecified potential liability. Metals Trucking cites no authority to demonstrate that such economic interests are protected by the AEA or NEPA. Alleged injury to purely economic interests do not come within the ambit of

interests protected by either the AEA or NEPA. *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1420-1421 (1977). Economic concerns such as injury to property values are not within the proper scope of issues to be litigated before the NRC. *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 94 n. 64 (1993). Injury to economic interests, unless linked to radiological harm, does not form the basis for standing under the Atomic Energy Act. *Quivira Mining Company* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 10 (1998), *rev. den. Envirocare, Inc. v. NRC*, 194 F. 3d 72 (D.C. Cir. 1999). Economic injury can give standing under NEPA only if it results from environmental damage. *Quivira Mining Company, supra*, 48 NRC at 8-10; *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56-57 (1992), *aff'd Environmental and Resources Conservation Organization v. NRC*, 996 F. 2d 1224 (9th Cir. 1993) (Table). Metals Trucking does not allege injury to its economic interests arising from radiological harm or environmental damage.

Even if it could be concluded that Metals Trucking alleges an injury in fact to an interest protected by the AEA or NEPA, Metals Trucking fails to demonstrate standing because it does not establish redressibility. In ruling upon a request for hearing, the Presiding Officer "shall determine that the requestor meets the judicial standards for standing and shall consider, among other factors—[T]he possible effect of any order that may be entered in the proceeding upon the requestor's interest". 10 C.F.R. § 2.1205(h)(3). Judicial concepts of standing require that the petitioner demonstrate that the alleged injuries will be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. 154, 167, 117 S. Ct. 1154, 1163 (1997); *Dellums v. NRC*, 863 F. 2d 968, 971 (D.C. Cir. 1988);

Babcock and Wilcox (Apollo, PA Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 81 (1993); and *Envirocare of Utah, Inc.* (Byproduct Material Waste Disposal License), LBP-92-8, 35 NRC 167, 173 (1992). To establish standing, Metals Trucking must show the likelihood that the alleged injuries to its interests would be redressed by a favorable decision. *Westinghouse Electric Corporation* (Nuclear Fuel Export License for Czech Republic-Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 332 (1994). Metals Trucking requests no remedy for its alleged injury. It is not apparent how any decision in this proceeding could redress the alleged injury, nor does Metal Trucking explain how. To the contrary, Metals Trucking states that “[n]either the NRC, Cabot, nor the City of Reading and the Redevelopment Authority can protect the property or financial interests of Metals Trucking”. Request for Hearing at 4.

(2) Request of Jobert, Inc.

Jobert is the former owner and holds a purchase money mortgage for the property. Metals Trucking is the mortgagee. Request for Hearing at 2. Jobert is interested in developing the property or selling it.⁴ *Id.* Jobert, however, fears that even if the NRC placed no restrictions on the use of the property, the presence of the slag pile would reduce the redevelopment alternatives and the attractiveness of the property to potential lenders. *Id.* at 3-4. Jobert wishes to protect its security interest in the property during a hearing. *Id.* at 4. Jobert alleges that the NRC cannot protect the property or financial interests of Jobert. *Id.*

Jobert fails to demonstrate standing because it fails to allege an injury in fact to an interest within the zone of interests protected by the AEA or NEPA, for the same reasons

⁴ It is not clear how Jobert could accomplish this since it no longer owns the property.

that Metals Trucking fails to do so. *See pp. 7-8, supra.* Jobert alleges injury to its purely economic interest, specifically adverse effects upon the value of the property in which it holds a security interest. Injury to purely economic interests is not protected by the Atomic Energy Act or NEPA. To demonstrate standing, Jobert must allege injury in fact to a health or safety interest protected by the AEA or to an environmental interest protected by NEPA. This Jobert fails to do.

Even if it could be concluded that Jobert alleges an injury in fact to an interest protected by the AEA or NEPA, Jobert fails to demonstrate standing because it fails to establish redressibility. Jobert requests no remedy for its alleged injury. It is not apparent how any decision in this proceeding could redress the alleged injury, nor does Jobert explain how. Jobert does not allege that there is any likelihood that its security interest would be affected by any decision in this proceeding. There is no allegation that the collateral could become insufficient, that a default could occur due to any action the NRC may take in this matter, or that its security interest could be protected by any decision in this proceeding. To the contrary, Jobert alleges that the NRC cannot protect the property or financial interests of Jobert. Request for Hearing at 4.

B. Areas of Concern

The petitioner (or requestor) must identify its areas of concern about the licensing activity which is the subject matter of the proceeding. 10 C.F.R. § 2.1205(d)(3). The Presiding Officer must determine whether the proposed areas of concern are germane to the subject matter of the proceeding. 10 C.F.R. §2.1205(h). The petitioner's statement of its areas of concern must be sufficient to establish that the issues the petitioner wishes to litigate generally fall within the range of matters properly subject to challenge in such a

proceeding. *Statement of Consideration*, "Informal Hearing Procedures for Materials Licensing Adjudications", 54 *Fed. Reg.* 8269, 8272 (February 28, 1989). The proposed area of concern must be rationally related to the challenged action. *Babcock and Wilcox* (Pennsylvania Nuclear Services Operation, Parks Township, Pennsylvania), LBP-94-12, 39 NRC 215, 217 (1994). The proposed area of concern must be sufficiently specific such that the Presiding Officer can determine whether the petitioner has stated an area of concern relevant, and thus germane, to the challenged action. *Sequoyah Fuels Corporation*, LBP-94-39, 40 NRC 314, 316 (1994). The petitioner is not obliged to put forth a comprehensive exposition in support its proposed area of concern, *Babcock and Wilcox* (Apollo, PA Fuel Fabrication Facility), LBP-92-24, 36 NRC 149, 154 (1992), but must provide the minimal information necessary to ensure that the petitioner wishes to litigate an issue germane to the challenged action. *Sequoyah Fuels Corporation*, LBP-94-39, 40 NRC 314, 316 (1994).

The proposed SDP is the subject matter of the proceeding. Because the SDP proposes unrestricted release, the NRC requirement applicable to the SDP is 10 C.F.R. § 20.1402, "Radiological criteria for unrestricted use". Section 20.1402 requires that the TEDE from residual radioactivity distinguishable from background will not exceed 25 mrem per year to the average member of the critical group, and that the residual radioactivity will be reduced to levels that are as low as reasonably achievable (ALARA). The proposed SDP, and the revised SDP of March 21, 2000, both estimate that the TEDE will be well below 25 mrem per year and state that the residual radioactivity will be ALARA. See n. 2, *supra*.

(1) Request of Metals Trucking, Inc.

Metals Trucking states that it is concerned with possible liability that it might have with regard to the slag pile. Request at 3. It is concerned with NRC actions which may restrict the use or redevelopment of the property and that the existence of the slag pile on the property would limit redevelopment alternatives and make the property less attractive to potential lenders. *Id.*

Metals Trucking does not allege an area of concern at all, much less a germane area of concern. Metals Trucking does not allege that the SDP fails to meet any applicable requirements, or that SDP will create any health, safety or environmental hazard. Metals Trucking does not challenge the SDP's estimates that the TEDE from residual radioactivity will be within the applicable 25 mrem limit, or the SDP's assertion that residual radioactivity at the site is ALARA. Metals Trucking does not allege that the SDP is technically deficient or inadequate in any way. Metals Trucking does not allege that any activities at the site will create any health, safety or environmental hazard. Metals Trucking is simply concerned that it might face some unspecified liability and that the property may be unattractive to future purchasers or lenders. Because there is no regulatory basis upon which to litigate Metals Trucking's concerns, they are not germane areas of concern. *Babcock and Wilcox Company*, LBP-94-12, 39 NRC 215, 217-128 (1994).

(2) Request of Jobert, Inc.

Jobert is interested in developing or selling the property. Request for Hearing at 2. Jobert, however, fears that even if the NRC placed no restrictions on the use of the property, the presence of the slag pile would reduce the redevelopment alternatives and the

attractiveness of the property to potential lenders. *Id.* at 3-4. Jobert wishes to protect its security interest in the property during a hearing. *Id.* at 4.

Jobert does not allege an area of concern at all, much less a germane area of concern. Jobert does not allege that the SDP fails to meet any applicable requirements, or that SDP will create any health, safety or environmental hazard. Jobert does not challenge the SDP's estimates that the TEDE from residual radioactivity will be within the applicable 25 mrem limit, or the SDP's assertion that residual radioactivity at the site is ALARA. Jobert does not allege that the SDP is technically deficient or inadequate in any way. Jobert does not allege that any activities at the site will create any health, safety or environmental hazard. Jobert is simply concerned that the property may be unattractive to future purchasers or lenders. Because there is no regulatory basis upon which to litigate Jobert's concern, it is not a germane area of concern. *Babcock and Wilcox Company*, LBP-94-12, 39 NRC 215, 217-128 (1994).

CONCLUSION

Based upon the foregoing, the Staff opposes the "Request for Hearing" of Jobert, Inc. and Metals Trucking, Inc.

Respectfully submitted,

Giovanna M. Longo */RA/*
Counsel for NRC staff

Dated at Rockville, Maryland
this 13th day of April 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of)	Docket No. 40-9027-MLA
)	
CABOT PERFORMANCE MATERIALS)	(Re: Site Decommissioning Plan)
Reading, Pennsylvania)	
)	ASLBP No. 99-757-01-MLA

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO REQUEST FOR HEARING FILED BY JOBERT, INC. AND METALS TRUCKING, INC." in the above-captioned proceeding have been served on the following by deposit in the United States mail or by e-mail or by facsimile transmission, or through deposit in the Nuclear Regulatory Commission's internal mail system as indicated with a single asterisk, and transmitted to the Office of the Secretary (SECY) for entry into the NRC's ADAMS system, and for subsequent distribution by SECY to the internal recipients listed below on this 13th day of April 2000.

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