

**MARYLAND DEPARTMENT OF THE ENVIRONMENT  
AIR AND RADIATION MANAGEMENT ADMINISTRATION  
RADIOLOGICAL HEALTH PROGRAM**

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**FACSIMILE TRANSMITTAL SHEET**

**TO:**

Fred C. Combs  
Deputy Director

**FROM:**

Ray Mankin

MDE - ARMA - Radiological Health Program  
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**Date:**

4 126 12000

**# of pages (including this sheet):**

47

**COMMENTS:**

Additional NPI information

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STATE OF MARYLAND,  
DEPARTMENT OF THE  
ENVIRONMENT  
2500 Broening Highway  
Baltimore, Maryland 21224

Plaintiff

v.

NEUTRON PRODUCTS, INC.  
22301 Mt. Ephraim Road  
P.O. Box 68  
Dickerson, Maryland 20842

Defendant

Serve on:

Prentice-Hall Corp. System  
929 North Howard Street  
Baltimore, Maryland 21201  
Resident Agent

\* IN THE  
\* CIRCUIT COURT  
\* FOR  
\* MONTGOMERY COUNTY,  
\* MARYLAND

CASE NO. \_\_\_\_\_

\* \* \* \* \*

**PLAINTIFF'S MEMORANDUM IN SUPPORT  
OF ITS MOTION FOR PRELIMINARY INJUNCTION**

The Maryland Department of the Environment ("Department", "State" or "MDE") submits this memorandum in support of its Motion for Preliminary Injunction.

**Introduction**

On April 13, 1999, Defendant Neutron Products, Inc. ("NPI" or "Neutron"), by operation of law, lost its right to receive, possess, use, transfer, own or acquire radioactive material under a license issued by the Department, MD-31-025-01 (01 license). This occurred because Neutron failed to provide the required financial assurance by the regulatory deadline of October 15, 1998.

Defendant was required by § 8-301(a)(1)(iii) and (2)(iii) of the Environment Article

4/28/99

of the *Annotated Code of Maryland* (1996 Replacement Volume)<sup>1</sup> and the implementing regulations found in the Code of Maryland Regulations (COMAR) 26.12.01.01C.29 ("Section C.29") to have in place by October 15, 1998, financial assurance that was sufficient to decommission its licensed facilities. If such assurance was not in place by that date, Defendant had 180 days to shut down its operations and provide an adequate plan of decommissioning before it lost all of its rights under its license to possess, store, use or ship the licensed material. The regulation contemplates that licensees who are unable to obtain the required financial assurance will utilize this 180 day period to propose and receive approval for a plan for the orderly shut down of their licensed operations so as to provide adequate protection for the public health and, at the same time, to prevent the public from being burdened with large and increasing costs for clean-up should a financially irresponsible operation continue to operate.

The Department repeatedly reminded the Defendant, as well as all other licensees, of their responsibility and the upcoming termination of certain of their rights under their licenses should they fail or be unable to fulfill their responsibilities. Defendant, in particular, was repeatedly requested to propose or negotiate a plan for the orderly decommissioning of its facilities during the 180 day grace period. It was told repeatedly that the State had no intention to postpone the final deadline. With the sole exception of Defendant, every licensed facility in the State affected by these regulations is in compliance with the financial assurance requirements. Fletcher Affidavit at paragraph 9.

When the Defendant failed to provide the required financial assurance, the

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Unless otherwise indicated all Section references shall be to the Environmental Article of the *Annotated Code of Maryland* (1996 Replacement Volume).

Radiation Health
Received: <u>4/26/98</u>
File No: _____

Department proposed to the Defendant certain conditions which the Department considered necessary for the protection of the public health and the orderly decommissioning of the facilities at the site. These conditions were rejected. Therefore, to assure the protection of the public and the orderly termination of Defendant's operations under the 01 license,<sup>2</sup> the Department seeks the entry of a Preliminary Injunction. The relief requested is designed to protect the public interest and to prevent the financial burden of decommissioning Defendant's Facility from becoming worse. It is difficult to determine without a thorough assessment exactly what the cost of cleaning up this site will be, but the problem appears to be substantial. Manley Affidavit at paragraph 3.

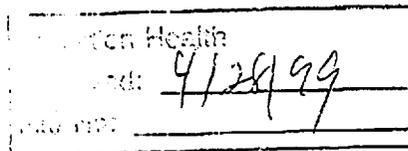
### Background

Neutron operates under four licenses issued by the Department. One license, MD-31-025-03 ("03 license") covers services provided by Neutron at customer locations and does not require proof of financial responsibility. The remaining three licenses are covered by the financial responsibility requirements set forth in Section C.29. A manufacturing license ("01 license") and two licenses for in-pool gamma irradiation devices, licenses No. MD-31-025-04 and MD-31-025-05 ("04 license" and "05 license").<sup>3</sup> Under the 01 license, Neutron receives radioactive cobalt-60 from a nuclear power reactor in Argentina. It uses this cobalt-60 to process and manufacture sealed radioactive sources for use in medical

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<sup>2</sup> While the regulation terminated certain *rights* under the license, the license itself was not terminated and the Defendant's *obligations* under the license to protect the public health and clean-up the site remain in place.

<sup>3</sup> There appears to be a good chance that financial responsibility will be in place for the 04 and 05 licenses very shortly as negotiations are currently being conducted on the wording of an Escrow Agreement to provide such assurances. If such negotiations fail, Plaintiff will file a supplemental memorandum asking for additional relief.



therapy devices and radioprocessing sources for irradiators. Manley Affidavit at paragraph 5. Under the 04 and 05 licenses, Neutron operates two such industrial irradiators. Fletcher Affidavit at paragraph 6.

Section C.29 provides a deadline which, as extended by letter of April 15, 1998, Attachment A to the Complaint, requires that Neutron must provide an approved decommissioning plan by October 15, 1998 along with sufficient financial resources to cover the projected cost of such decommissioning. In the alternative, Neutron may provide an initial certification that it has provided funds in an approved funding mechanism (such as trust funds, insurance or surety) at a level specified in the regulation (hereafter, the "certified amount"). For the 04 and 05 licenses, no further action is necessary after Neutron furnishes the initial certified amount. However, for the 01 license, after the initial certification, the licensee would have until October 15, 2000 to provide a final approved decommissioning plan and a decommissioning funding mechanism sufficient to cover the approved estimated cost of the final approved decommissioning plan.

The certified amount specified by Section C.29 is dependent upon the types and quantity of radioactive material that the licensee is authorized to possess at the site. For the 01 license, the certified amount required is \$750,000.00, while for the 04 and 05 licenses, the certified amount is \$75,000.00 each, for a total additional requirement of \$150,000.00. Thus, Neutron was required by the statute and regulations to provide a total of \$900,000.00 worth of financial assurance by October 15, 1998.

Section C.29(e) describes the three methods which are available to Neutron to provide the certified amount of financial assurance. They consist of:

- a. Prepayment into a trust fund;

Radiation Health
Received: 4/28/99
File No: _____

b. A surety method (consisting of either surety bond by an approved bonding company, escrow account or a standby letter of credit or standby line of credit from a state or federally supervised financial organization), insurance or guarantee (self-guarantee or parent guarantee); and

c. A sinking fund, but the fund may only be used in combination with one of the two mechanisms listed above. A sinking fund is a device which would reduce the amount of financial assurance needed as the value of the sinking fund grows.

Section C.29 allows licensees that meet certain financial requirements (set forth in Appendix G of the Regulation) to self-guarantee. As explained more fully below, Neutron does not meet the self-guarantee requirements contained in the State of Maryland's Regulations.<sup>4</sup> Fletcher Affidavit at paragraph 15. Another mechanism, the parent guarantee, is equally unavailable because Neutron does not have a parent and because Neutron would, in any case, be unable to meet the financial requirements for a parent guarantee. Fletcher Affidavit at paragraph 17. (Parent guarantee requirements are found in Section C.29, Appendix F.)

By letter dated October 15, 1998, Neutron submitted a "Certification of Financial Assurance" in which it stated that the surety method and insurance mechanisms were not

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<sup>4</sup> Among other requirements, this self-guarantee is only available to companies that issue rated bonds or SEC approved stock, neither of which applies to NPI. The State anticipates that NPI will assert that regulations recently adopted by the Federal Nuclear Regulatory Commission (NRC) should be applied to it as opposed to the existing Maryland regulations. These NRC regulations slightly expand the Federal self-guarantee and apply them to non-stock and bond issuing entities. However, these regulations do not apply to entities regulated by the State of Maryland unless and until their substance is adopted by the State. The State is under no obligation to adopt these particular regulations. Furthermore, even if the State eventually adopted the Federal regulations, Neutron has stated that it could not satisfy the NRC regulations as written. Fletcher Affidavit at paragraph 16.

Registration No.	4128199
File No.	

viable for Neutron and attempted to self-guarantee its 01, 04 and 05 licenses based upon the purported value of the fixed assets at the Facility. (Attachment B to the Complaint.)

By letter dated December 30, 1998, the Department rejected the proposal contained in the October 15th letter, pointing out that the self-guarantee mechanism was not available to Neutron under Section C.29, Appendix G, because it had not established that it could meet those minimum requirements necessary before a company would be allowed to self-guarantee. See Attachment C to the Complaint and Fletcher Affidavit at paragraph 15. The Department requested that Neutron, within ten days, designate where it would obtain funds for the decommissioning funding. The Department pointed out that if funds were not available, it was important that planning be commenced immediately for the orderly decommissioning of the site since Neutron's right to use, own, hold or ship nuclear material would cease to exist by operation of law on April 13, 1999.

Neutron, by letter dated January 8, 1999 (Attachment D to the Complaint), responded to the Department's December 30, 1998 letter. Neutron requested an additional forty-five days to respond and stated that it could satisfy the financial assurance requirements of Section C.29. It also requested an opportunity to meet and negotiate on the Section C.29 issues before it formulated its full response to the Department's December 30, 1998 letter. However, Neutron failed to respond to the Department's request for an identification of liquid assets which were available to the company and could be used to fund the certification amount of \$750,000.00 required for the 01 license. Fletcher Affidavit at paragraph 16.

In contrast to the total lack of information as to how it planned to fund the financial responsibility requirements for the 01 license, Neutron, in its January 8, 1999 letter, gave

Radiation Health
Received: 4/28/99
File No: _____

specific details on how it intended to fund the \$150,000.00 necessary for the 04 and 05 irradiator licenses. With regard to these licenses, Neutron stated that it intended to negotiate a standby letter of credit backed by listed securities owned personally by Neutron's president. However, this commitment was conditioned upon "good faith negotiation" toward an overall resolution of the "decommissioning cost issue".<sup>5</sup>

By letter dated January 21, 1999 (Attachment E to the Complaint), the Department responded to Neutron's letter of January 8, 1999, reiterating that self-guarantee was not available to Neutron under the current regulations. In addition, it inquired specifically as to where Neutron intended to obtain the financial resources for the \$750,000.00 required for the 01 license, noting that if Neutron did not have such financial resources it was important to immediately begin planning for the orderly decommissioning of the 01 license. The Department pointed out that, without evidence of financial responsibility, Neutron's authority to use, store or handle radioactive material would be terminated on April 13, 1999. Neutron was also required to make an immediate and unqualified commitment to fund the standby letter of credit for the 04 and 05 licenses and to furnish the Department a list of the securities which would be used as collateral for the letter of credit. Neutron was given ten days from the receipt of the letter to respond.

Neutron's response to the Department's letters and to meetings held on December 13, 1998 and February 8, 1999, is dated February 10, 1999. (This letter will be produced to the Court under seal.) In this letter, Neutron generally indicates an intention to fund the financial responsibility plans for the two irradiators for \$150,000.00, but continued to argue

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<sup>5</sup> Later Neutron offered an Escrow Agreement for the 04 and 05 licenses that is currently under negotiation. Fletcher Affidavit at paragraph 10.

Radisson Health
Received: 4/28/99
File No: _____

that it should not have to create a separate source of funds for the \$750,000.00 required for the 01 license.

The April 13, 1999 deadline passed without any further indications from Neutron as to sources from which it might obtain the resources necessary for it to be allowed to continue its 01 operations. Nor has Neutron made any serious proposal as to how it could bring itself into compliance with the law. Despite the Department's extensive efforts to bring Neutron into compliance with the statute and regulations, Neutron has failed to provide financial assurance for its 01 license and is therefore in violation of both § 8-301(a)(1)(iii) and (2)(iii) and COMAR 26.12.01.01.C.29 and has been since October 15, 1998. The 180 day grace period has passed without any constructive offer from Neutron as to how it could commence decommissioning the 01 portion of its operations. Instead, Neutron has provided only arguments that it should be given special consideration and the regulations essentially be waived. Fletcher Affidavit at paragraph 15.

Neutron has not only failed to obtain the required financial responsibility during the 180 day grace period, it has also failed to take any steps, despite repeated requests from MDE, to propose a procedure for an orderly shut-down of the site once it became clear that there was no possibility of meeting the statutory and regulatory requirements. The State is seeking a preliminary injunction which will protect the public health and preserve the site in its current condition pending the resolution of the Department's Complaint for permanent injunction. The Department proposes that Neutron be required to continue abiding by the regulations and permit conditions so as to protect the radioactive material presently on site. The State is also requesting that no more radioactive material be brought onto the site. Since Neutron no longer has a right to receive such material and cannot produce the

Radical Health
Classified: 4/28/99
File No: _____

financial assurance necessary for the material already on site, it makes fundamental sense to prohibit the importation of additional material.

The State is also requesting that Neutron be prohibited from removing radioactive material from the Limited Access Area without the permission of the MDE. The material contained in the Limited Access Area is subject to special controls because it is more dangerous. It should not be removed from this area unless Neutron can demonstrate that such removal will be under conditions which will protect the public health and not create additional costs for the eventual clean-up. Manley Affidavit at paragraph 6.

The State is also requesting that there be a prohibition on further manufacturing activity at the site. Any such manufacturing activity is inherently hazardous and produces additional waste that must be removed and disposed of. Manley Affidavit at paragraph 5.

Finally, the State is requesting that Neutron be prohibited from selling or shipping any radioactive material from the site without the permission of the Department.

### Argument

The State is asking that the Court:

- Require Neutron to abide by the applicable Regulations and Permit Conditions;
- Prohibit the receipt of any additional Radioactive material on site;
- Prohibit the removal of any radioactive material from the Limited Access Area; and
- Prohibit any cobalt-60 manufacturing activity on site<sup>6</sup>.

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<sup>6</sup> Under an order of the Circuit Court for Montgomery County dated November 12, 1997, Neutron cannot conduct any additional manufacturing activity until it encloses its courtyard, a project which is presently in the permitting stage. See

Notification Health
Received: 4/28/99
File No: _____

- Prohibit any sale or shipment of radioactive material without the Department's written permission.

Given that Neutron has lost its right to perform any of these functions under the 01 license by operation of law, these limitations are no more than it should do voluntarily. Further, they are necessary to protect the public health, to avoid the dissipation of assets, and to avoid creating additional decommissioning costs which may become a burden to the public.

**I. The State is entitled to Injunctive Relief Under Traditional Standards.**

When private parties seek a preliminary injunction, the courts traditionally require that the Plaintiff meet a four part test:

- (1) likelihood of success on the merits;
- (2) the "balance of convenience" (i.e. balance of hardship);
- (3) irreparable injury (lack of an adequate remedy at law); and
- (4) public interest.

*Fogle v. H. & G. Restaurants, Inc.*, 337 Md. 441 (1995), citing *Department of Transportation v. Armacost*, 299 Md. 392, appeal after remand 311 Md. 64 (1984).

In this case, the State clearly meets these requirements even though, as is discussed in Section II below, it is only required to meet the first two prongs of the test.

**A. Plaintiff is Likely to Succeed on the Merits.**

Neutron is undisputedly operating in violation of the actual wording of the statute and regulation. The Section C.29 is quite clear, unless the Licensee has an approved plan

Manley Affidavit at paragraph 7.

Radiation Health
Received: 4/28/99
File No: _____

of financial responsibility in place on October 15, 1998, it loses all right to use, receive or ship radioactive material. Neutron made only one real effort to meet these requirements for its 01 license by filing a document on October 15, 1998 stating that it should be allowed the right to self-insure. When the Department rejected this effort because it clearly did not meet the requirements for self insurance contained in the Regulations, in particular Appendix G to Section C.29, Neutron made no further serious submissions to the Department with regard to the 01 license. Neutron has argued that if the Department applied a current rule of the NRC and then waived some of its provisions, it could find Neutron in compliance. Neutron did not even assert that it could meet the current NRC rule as it is presently worded. Fletcher Affidavit at paragraph 16. Therefore, there is no real question that Neutron is in violation of the Maryland financial responsibility rules and the Department will succeed on the merits.

**B. The Balance of Convenience**

The continued operation of Defendant's 01 manufacturing facility would amount to an illegal operation because Neutron's right to operate has already terminated by action of law. The Defendant has no right to such continued operation See *Joy v. Anne Arundel County*, 52 Md. App. 653, 658-60 (1982), *cert. denied* 295 Md. 440 (1983). If a preliminary injunction is entered against Neutron, it will merely be obliged to do that which the law already requires it to do: refrain from manufacturing operations for which there is no financial assurance. These operations have already been curtailed in part by the November 12, 1997 order of the Circuit Court for Montgomery County. See Manley Affidavit at paragraph 7.

The entry of an injunction will reduce Neutron's future liabilities under the 01 license

Sanitation Health
Received: 4/28/99
File No: _____

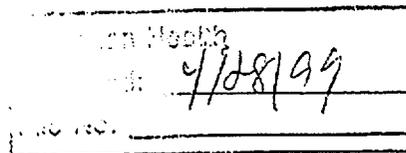
because it will prevent Neutron from increasing the quantity of radioactive material and radioactive waste material that will ultimately require disposal by Neutron or by the public if Neutron is financially unable to undertake the task. In addition, a preliminary injunction will prevent Neutron from further contaminating the facility, thus reducing future decommissioning costs. See Manley Affidavit at paragraphs 3 and 5. Furthermore, based on Neutron's inability to obtain financial assurance in the four years since the regulation was promulgated, it is clear that Neutron has no real prospect of obtaining \$750,000.00 in financial assurance. Allowing Neutron to continue to operate merely delays the inevitable. Finally, the relief sought is narrow and does not unnecessarily restrict Neutron's other business activities at this time.<sup>7</sup>

By contrast, if this court denies the preliminary injunction, Neutron will be able to continue to generate and accumulate radioactive waste which it apparently cannot afford to dispose of. Further, in light of Neutron's past experience, its continued operation under the 01 license could result in additional contamination of the surrounding land, which contamination Neutron has failed to correct despite a court order to do so. Manley Affidavit at paragraphs 3 and 5.

Neutron's continued operation creates an affirmative burden on the public, which may ultimately have to clean up the site, and on residents of the surrounding community who will have ever increasing amounts of radioactive material stored in their midst. In addition to the financial burden on the public, allowing Neutron to continue to operate will defeat the express purpose of the statute requiring financial assurance and will undermine

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<sup>7</sup> For example, the Department could seek preliminary injunction to prohibit operation under the 04 and 05 licenses but has not done so at this time because financial assurance appears likely to be forthcoming for those licenses.



MDE's regulatory scheme. Neutron is the only licensee in the State which has failed to come into compliance with the financial assurance requirements. Fletcher Affidavit at paragraph 9. Other licensees who could not obtain financial assurance voluntarily reduced their operations. *Id.* It would be unjust to allow Neutron to avoid its financial assurance obligations, reaping profits without addressing the attendant environmental harm, when other licensees have acted responsibly and come into compliance.

The legislature essentially predetermined the balancing issue by enacting § 8-301(a)(2)(iii) requiring the Secretary of Environment to adopt rules requiring the "establishment of financial plans to ensure the decommissioning of facilities operating under these licenses . . .". The statute and the subsequent Regulations, in particular Section C.29(g)(2), do not contemplate the continued operation of facilities that cannot provide financial assurance. Whatever the burden on Defendant, there is no justification for continuing operations which will increase the ultimate burden on the public in the light of the clear mandate that only financially responsible parties are to be permitted to operate.

The Defendant cannot reasonably argue that it is unfairly burdened because it is not allowed to continue operations which will generate radioactive waste that may, in light of Neutron's inability to obtain financial assurance, ultimately have to be disposed of at public expense.

Radiation Health Received: 4/28/99 File No: _____
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**C. Irreparable Injury**

Although by statute the State does not have to prove irreparable injury, see Section 11 below, such injury is clearly present in this case. Defendant is already putting the public at risk because it does not possess the financial ability to remediate the site should it close for any reason. Every day of continued operation increases the cost of clean-up and

thus the ultimate expense which the public bear.

The whole foundation of the financial assurance scheme is that licensees presenting special risks should not be permitted to operate unless they can establish sufficient financial resources to clean-up when their facility is eventually closed. Allowing Defendant to continue its operations would obviously be destructive of this scheme. The entry of the proposed preliminary injunction will establish a reasonable framework by which limited operations at this facility can proceed while a hearing on the permanent injunction is conducted without the fear that a serious problem will be made substantially worse during the pendency of this action.

**D. Public Interest**

It is clearly in the public interest to enter an order preserving and protecting the community from the accumulation of even more radioactive material and radioactive waste material at this site and to provide a framework for orderly operations at the site rather than allow continued operations in violation of the law. See *Joy v. Anne Arundel County*, 52 Md.App. at 653, 658-60 (1982); *Thomas v. Department of Health and Mental Hygiene*, 62 Md.App. 166, 175 (1985).

Thus, under the traditional four-pronged test, the State is entitled to prevail and to the entry of an order which will preserve the site and regularize its operation during the pendency of this action.

**II. Injunctive Relief is Especially Appropriate Under Standards Which Apply to the Government As Plaintiff**

Although plaintiff clearly meets the four-pronged test for the granting of injunctive relief set forth above, it is important to note that where, as here, the moving party is the

Radiation Health
Received: 4/28/99
File No: _____

State, the standard for granting an injunction is significantly less burdensome.<sup>6</sup> As is discussed below, the State must show that the conduct sought to be enjoined violates or is about to violate a law or regulation designed to protect the public health and welfare.

It is established in Maryland that "in litigation between the government and a private party, the court is not bound by the strict requirements of traditional equity as developed in private litigation." *State Department of Health and Mental Hygiene v. Baltimore County*, 281 Md 548, 555 (1977), *quoted in Joy v. Anne Arundel County* 52 Md.App. at 660, and *Thomas v. Department of Health and Mental Hygiene*, 62 Md. App. at 175. *See also, Space Aero v. Darling*, 238 Md. 93, 128 (1965) (courts of equity "may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.") These cases establish that a government agency acting for the public interest and under legislative authority, has the capacity to resort to injunctive relief even where such relief may be unavailable to a private litigant.

In *Joy v. Anne Arundel County*, the Court of Special Appeals held that a citizen's lack of compliance with laws for the protection of public health and welfare entitles the

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<sup>6</sup> This is reflected in Section 8-507 which provides:

(a) *Generally*--The Department may bring an action for injunction against any person who violates any provision of this title or any regulation, order, or permit adopted or issued by the Department under this title.

(b) *Lack of remedy at law not required* -- On a showing that any person is violating or is about to violate this title or an regulation, order, or license adopted or issued by the Department, the court shall grant an injunction without requiring a showing of a lack of an adequate remedy at law.

Mediation Module
Received: 4/28/99
File No: _____

government to an injunction restraining the non-compliance:

When a political subdivision seeks injunctive relief against a zoning violation, it needs not prove damages or irreparable injury to it. That is because the political subdivision 'may be considered to be acting on behalf of all property owners within [it] to enforce their right to require conformity with the ordinance' . . . (citations omitted)

52 Md. App. at 600 (emphasis added).

More recently in *Thomas v. Department of Health and Mental Hygiene*, 62 Md.App. 166, the Court of Appeals upheld a trial court injunction ordering appellant to cease the unpermitted disposal of refuse, controlled hazardous substances and pollutants in violation of the Maryland's environmental laws and to undertake extensive remedial action. The Court, quoting its holding in *Joy*, declared "that failure to obtain necessary governmental permits itself forms sufficient basis for granting injunctive relief." *Id.* at 175, quoting *Joy*, 52 Md. App. at 659-60.

The *Joy* and *Thomas* cases are clearly applicable to the present litigation where Defendant intends to continue operating in violation of the Regulations at a site containing dangerous radioactive material and where such continued operation would be in direct contravention of the essential purpose of the financial responsibility provisions and in derogation of the public interest. How much stronger is this case than the situation in *Joy* where a simple zoning violation was involved.

In conclusion, under both traditional standards and the special standards for government entities, the Department of the Environment is entitled to a Preliminary Injunction against the Defendant.

#### The Order Provisions

The State is requesting a Preliminary Injunction containing four provisions:

Received:	4/28/00
File No:	

1. Requiring Neutron to abide by the applicable regulations and permit conditions;
2. Prohibiting the receipt of any additional radioactive material on site;
3. Prohibiting the removal of any radioactive material from the Limited Access Area without permission of the Department of the Environment;
4. Prohibiting any cobalt-60 manufacturing activity on site; and
5. Prohibiting any sale or shipment of radioactive material without the prior written approval of the Department of the Environment

With regard to the first provision, because Neutron failed to demonstrate the financial responsibility required by the law, it is particularly important that Neutron be held strictly to those terms of its permit and the applicable regulations which are designed to protect public health and to prevent the further contamination at the site and in the community.

The second provision is necessary to prevent Neutron from increasing the potential costs to the public where Neutron has failed to demonstrate that it has the basic financial ability required by law even to correct the existing situation at the site.

The third provision is necessary because existing controls at the site are directed toward safely maintaining control of unsealed sources of radioactive material within the Limited Access Area. Any removal from this area must be done under carefully controlled conditions in order to prevent dangers to the environment and to the public health. For each removal the Department must be on notice and approve the necessary safeguards against the release of the radioactive material.

The fourth provision is necessary because manufacturing activity inherently

Radiation Health
Received: 4/28/99
File No: _____

produces substantial amounts of radioactive waste product which must eventually be disposed of at substantial cost.

The final provision is necessary because close controls are required over all handling of hazardous radioactive material and because proceeds from the sale of assets generated under the 01 license may be necessary for the decommissioning activities. Assets arising out of the 01 license should be preserved to meet the licensee's obligation to decommission that license.

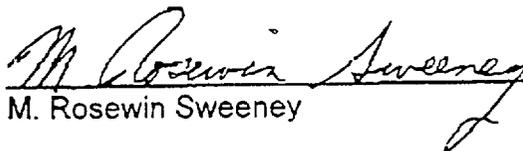
These are the minimum restrictions necessary under the circumstances.

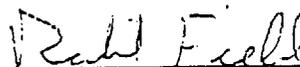
Conclusion

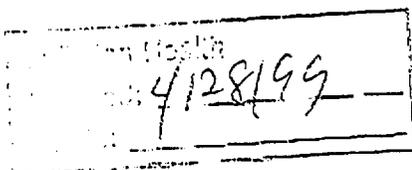
The State is entitled to the entry of an order as described herein in the form attached.

Respectfully submitted,

J. JOSEPH CURRAN, JR.  
ATTORNEY GENERAL OF MARYLAND

  
M. Rosewin Sweeney

  
Robert Field  
Assistant Attorneys General  
Maryland Department of the Environment  
2500 Broening Highway  
Baltimore, Maryland 21224  
(410) 631-3053



**AFFIDAVIT**

The undersigned is over 18 years of age and competent to testify to the following facts and matters:

1. I am the Program Manager of the Radiological Health Program of the Air and Radiation Management Administration, Maryland Department of the Environment. My responsibilities include the oversight of those Department personnel assigned to regulate Neutron Products Inc.'s ("Neutron") licensed radiological activities.

2. I am personally familiar with the record keeping practices for documents required to be maintained by the Radiological Health Program. I hereby certify that the documents attached to the "Complaint for Permanent Injunctive Relief" as Attachments A-E are duplicates of records taken from the files of that Program. The documents were prepared and maintained as a regular practice in the course of the Department's regularly conducted business activities.

3. I am familiar with the actions taken to date concerning the financial responsibility required for licenses issued to Neutron. These licenses are a manufacturing license MD-31-025-01 (01 license) and two licenses for in-pool gamma irradiation devices—licenses number MD-31-025-04 and MD-31-025-05 (04 and 05 licenses). Neutron also holds a fourth license, MD-31-025-03 (03 license), which does not require financial assurance and is therefore only indirectly involved in these proceedings.

4. The currently effective Maryland Regulations applicable to licensees licensed to use products containing ionizing radiation contain the requirement that certain of such licensees maintain financial assurance for decommissioning. These regulations thus

Radiation Health
Received: 4/28/99
File No: _____

assure that funds will be available for decommissioning the licensed facilities should the licensee go out of business or if the site must be decommissioned for any other reason.

5. For those licensees required to provide financial responsibility for decommissioning, the regulations require either: a) an approved decommissioning plan with an approved cost estimate be used to determine the amount of the financial responsibility required, or b) that a "certified amount" be provided based upon the type and amount of radioactive material the licensee is licensed to possess. The only exceptions to this requirement are for companies that qualify to either self-guarantee or qualify for a parent guarantee.

6. For the 04 and 05 licenses for irradiators, the certified amount is \$75,000.00 for each irradiator or a total of \$150,000.00. The certified amount is based on the quantity of radioactive material which may be stored under these licenses and also on the fact that this material is to be maintained only in a sealed condition.

7. For the 01 manufacturing license, the amount required is \$750,000.00. This is based upon the quantities of material Neutron is licensed to possess and the fact that the license allows possession of unsealed sources of radioactivity.

8. The initial deadline for providing evidence of financial responsibility was October 15, 1996, but this deadline was administratively extended for all licenses until October 15, 1998.

9. Of the more than thirty licensees supervised by the Department who were initially required to demonstrate financial responsibility, all but Neutron satisfied the requirements of the Regulations by either accepting lower possession limits in their

Radionuclide:	
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licenses so as to fall outside the financial assurance requirement, or providing acceptable financial responsibility instruments.

10. Neutron has stated a willingness to furnish the required financial assurance for the 04 and 05 licenses, but did not submit an acceptable financial instrument prior to the deadline. The parties are presently in negotiations concerning the form of this assurance.

11. MDE expects these negotiations to conclude within the next few days. If the negotiations fail, the Department will seek relief from the court concerning the 04 and 05 licenses.

12. The only document submitted by Neutron purporting to fulfill the financial responsibility requirements for the 01 license is the letter dated October 15, 1998, Attachment B to the Complaint.

13. The letter of October 15th does not meet the clear requirements of the Regulations.

14. The letter does not offer any kind of financial responsibility documents at all. It proposed no insurance, bonds, escrow account, prepayment account or any other financial mechanism. Instead it argues that Neutron should be allowed to self-guarantee.

15. The requirements for self-guarantee are clearly set forth in Appendix G to COMAR 21.12.01.01 C.29 and require that companies that self-guarantee must, among other things, present an audited financial statement, issue rated bonds and issue at least one general class of stock under the 1934 Securities Exchange Act which requires SEC approval. Neutron has never demonstrated that it has an audited statement, in fact it has stated that it does not have one. Neither in the October 15th letter nor in any other

The Honorable Date: 4/28/99 Signature: _____
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communication with the Department has Neutron indicated that it has issued either stocks or bonds meeting the specifications.

16. In the documents received from Neutron and in meetings with their representatives, and despite specific requests to do so, Neutron never identified a specific source of funds which could be available to furnish the \$750,000.00 required for the 01 license. The company's main argument appeared to be that MDE should evaluate Neutron under a recently adopted Federal NRC regulation concerning self-funding. However, Neutron stated it could not meet the NRC's new regulation as written, and stated that certain of its requirements would need to be waived.

17. Neither in the October 15th letter, nor in any other communication, has Neutron indicated that it has a parent corporation, much less that it has a parent corporation that meets the requirements contained in the Regulation for Parent Guarantees. Thus, Neutron has not established that it has a parent, nor that Appendix F, Guarantee by a Parent Corporation, would be available to it.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true.

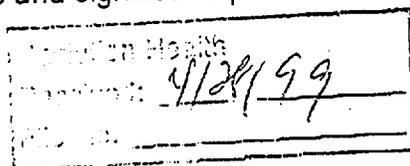
  
Roland G. Fletcher

Division of Health
File No: 4/28/99
File No: _____

AFFIDAVIT

The undersigned is over 18 years of age and competent to testify to the following facts and matters:

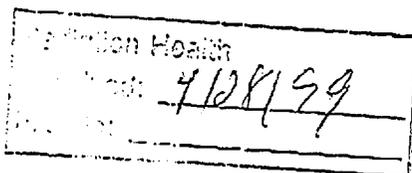
1. I am a health physicist employed by the Radioactive Materials Licensing and Compliance Division of the Radiological Health Program of the Air and Radiation Management Administration of the Maryland Department of the Environment.
2. As part of my responsibilities, I have become familiar with the operations of Neutron Products, Inc. ("Neutron") in Dickerson, Maryland. I am familiar with licenses MD-31-25-01, 03, 04 and 05 under which Neutron operates. I have visited the site numerous times over the last 10 years. I have been involved with overseeing Neutron's compliance with State regulations and its permit conditions.
3. There are numerous problems at Neutron's Dickerson Facility. For example, since at least 1988, Neutron has shipped for disposal less radioactive waste than its operations generate, resulting in a significant accumulation of radioactive waste. There is also a considerable quantity of radioactive material on site which Neutron identifies as useful product, but which in all probability can never be used or sold. Furthermore, under condition 13.N of Neutron's 01 license and the orders of the Circuit Court for Montgomery County which are Attachment 1 and 2 hereto, Neutron was obligated to remove contaminated soil surrounding the facility by June 1, 1994. These soils had become contaminated as a result of Neutron's manufacturing activities. Although Neutron removed some contaminated soil, it has never met the level required by Condition 13.N and the Court's Orders and significant quantities of soil must still be removed in order to achieve



the standard set forth in both the Permit and the Court Order. It is difficult, without a thorough engineering study, to calculate the cost of cleaning up this site for unrestricted use, but based on my knowledge of other sites, the cost is likely to be in the millions of dollars.

4. In order to return the Neutron Facility to unrestricted use, all of the material referred to in paragraph 3 will need to be disposed of. Further, any material which is actually useful product will also need to be removed.

5. Any further operation of the 01 manufacturing facility would increase the amount of radioactive material waste present at this site. The major portion of activities conducted at this facility, as authorized under its 01 license, involves the use of cobalt-60 received from a nuclear power reactor in Argentina. This cobalt-60 is processed to create sealed radioactive sources for use in medical therapy devices and radioprocessing sources for irradiators. These manufactured sources are shipped to customers or, in the case of radioprocessing sources, can be used in conjunction with Neutron's 04 and 05 licenses. The processing of cobalt-60 for medical sources discussed above requires the melting of bare cobalt-60 which results in the generation of significant and hazardous quantities of radioactive material waste. The production of radioprocessing sources also creates radioactive material waste, though to a lesser degree. These processes inevitably, even when conducted correctly, produce as a byproduct increased quantities of radioactive material waste. Furthermore, as has happened, Neutron's errors or lack of attention to detail regarding manufacturing of these sources can substantially increase the volume of radioactive material waste.



6. Under the 01 license, the most dangerous material and the most dangerous operations are confined at the facility to the "Limited Access Area." This area is subject to special controls including the requirement that everyone entering the area must carry a badge to record his radiation exposure. Any removals of radioactive material from this area requires the closest supervision and control to prevent the uncontrolled release of radioactive material into the environment or exposure to workers.

7. The order of the Circuit Court for Montgomery County which is Attachment 3 hereto allowed Neutron to conduct one additional cobalt-60 melting campaign. Under the order, additional campaigns could not occur until a courtyard enclosure was built. The single melting campaign allowed by the order has occurred and the courtyard has not yet been enclosed. Therefore, no more melts can take place for now.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true.

  
 \_\_\_\_\_  
 Raymond E. Manley

Radiation Health Received: <u>4/28/99</u> File No: _____
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RECEIVED

JUL 12 1999

Office of the Attorney General  
Department of the Environment

STATE OF MARYLAND,  
DEPARTMENT OF THE  
ENVIRONMENT

IN THE  
CIRCUIT COURT

Plaintiff/Counter-Defendant

FOR

v.

MONTGOMERY COUNTY,

NEUTRON PRODUCTS INC.

MARYLAND

Defendant/Counter-Plaintiff

Case No. 199036

\* \* \* \* \*

ORDER

Upon consideration of the Motion for Preliminary Injunction filed by Plaintiff and the Cross-Motion for Preliminary Injunction filed by Defendant, and a hearing having been held, it is this 15<sup>th</sup> day of July, 1999:

ORDERED, that the Motion and Cross-Motion for Preliminary Injunction be and the same are hereby denied except to the extent set forth below;

ORDERED, that, during the pendency of this case, Neutron Products Inc. may continue operations under its Maryland License #MD-31-025-01 (the "01 License") subject to whatever enforcement actions or penalties Neutron may be subject to under any valid statute, regulation order or license provided that it shall not exceed the limits specified below with regard to radioactivity levels within the various locations described, unless otherwise authorized by this Court.

ENTERED

- 1. Neutron shall not exceed the following limits:

JUL 08 1999

Clerk of the Circuit Court  
Montgomery County, Md

- a. for radioactive waste material located in the courtyard, South waste room, and North waste room, the total limit for all three locations shall be 300 curies;
- b. for radioactive waste material stored in its main storage pool, the limit shall be 5,000 curies; and
- c. for radioactive waste in dry storage within the far North canal, the limit shall be 190 curies.

The levels for maximum waste storage set forth above are based on estimates, as of December 31, 1998 that were forwarded to the Department by Neutron on June 21, 1999. For the purpose of determining compliance with this Order, waste activities shall be determined by subtracting from these estimates the curies lost to decay and/or shipped to authorized recipients, and adding thereto the estimates of waste newly generated in the course of conducting its operations. Should either party characterize as "waste" any contents of the main storage pool in Dickerson not so defined in the above-referenced estimate of waste inventory on site, the limit set forth above shall be increased by an amount equal to the amount of inventory that is reclassified as "waste".

2. The total Cobalt-60 inventory at the Dickerson site under the 01 License shall not exceed:

**ENTERED**

JUL 08 1999

Clerk of the Circuit Court  
Montgomery County, Md

- a. 2.5 million curies maximum total activity at any time or the maximum limit under the effective 01 License, whichever is lower. However, in the event that the license limit decreases to less than 2.5 million curies, Neutron will have 90 days under this order to comply;
- b. 1.88 million curies as a running twelve month average to be calculated by taking the sum of the total activity on the first of each month for the past twelve months divided by twelve.

ORDERED that Neutron shall maintain and submit monthly to the Department by the 15th day of each month an inventory of Cobalt-60 on hand under the 01 license at the close of the preceding month;

ORDERED that Neutron shall maintain and make available to the Department at the Dickerson site by the 15th day of each month:

- a. a list of all in-coming and out-going shipments of Cobalt-60 during the preceding month;
- b. all manifests for shipment and receipt of Cobalt-60.



Paul A. McGuckian, Judge

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**ENTERED**

JUL 08 1999

Clerk of the District Court  
Montgomery County, Md.

*Kelant*

*Wade*

NEUTRON PRODUCTS, INC.

\* BEFORE THE SECRETARY  
\* MARYLAND DEPARTMENT  
\* OF THE  
\* ENVIRONMENT

V.

\* OAH CASE NO.  
\* 96-MDE-047-106

STATE OF MARYLAND  
DEPARTMENT OF THE ENVIRONMENT

FINAL DECISION

This Decision addresses whether the Maryland Department of the Environment properly exercised its authority in accordance with Md. Code Ann., Envir. Title 8 (1996 repl. vol.), when it issued Amendment 43 to Neutron Products Inc.'s radioactive materials license. Neutron Products, Inc. contested certain provisions of the amendment to the license and requested a hearing on the matter. Neighboring citizens of the Neutron Products, Inc. facility also moved to intervene in the matter and their motion was granted. The Office of Administrative Hearings held a hearing on this matter in the fall of 1997 and January of 1998 and issued a Proposed Decision on June 26, 1998. This matter came before the Secretary of the Maryland Department of the Environment on August 10, 1998 when Neutron Products, Inc. filed Exceptions to the Proposed Decision of the Office of Administrative Hearings.

The exceptions process is governed by Md. Code Ann., State Gov't., section 10-201 et seq. (1995 repl. vol.) and COMAR 26.01.02 et seq. and 28.02.01 et seq. Those regulations govern contested case hearings and allow a party to take exception to any portion of the hearing examiner's determination. A party taking exception must describe the asserted basis for each exception. See COMAR 26.01.02.35(D). This Decision is limited to consideration of the specific exceptions taken by Neutron Products, Inc. and its asserted basis for each.

After consideration of the administrative record, the Proposed Decision of the Office of Administrative Hearings, the Exceptions filed by Neutron Products, Inc., Responses to the

Exceptions filed by the Intervenors and Maryland Department of the Environment and oral arguments, five exceptions filed by Neutron Products, Inc. are granted and six new findings of fact proposed by Neutron Products, Inc. are adopted as described below. The Proposed Decision issued by the Office of Administrative Hearings is otherwise adopted as the Secretary of the Maryland Department of the Environment's Final Decision in this matter.

### STATEMENT OF THE CASE

The Maryland Department of the Environment ("MDE"), through an agreement with the Nuclear Regulatory Commission ("NRC"), is authorized to protect public health and safety from radiation hazards through its regulatory and licensing program. 42 U.S.C. 2021(b). Neutron Products, Inc. ("Neutron Products") manufactures teletherapy and irradiation sources using Cobalt 60.

On January 18, 1996, MDE issued Amendment 45 to Neutron Products, Inc. This license established the conditions upon which Neutron Products manufactures the teletherapy and irradiation sources. On March 12, 1996, Neutron Products requested a hearing to contest certain conditions in the license. The Office of Administrative Hearings held a hearing lasting a total of nineteen days during September and October of 1997 and January of 1998. Judith Finn Plymyer, the Administrative Law Judge, issued a Proposed Decision in the matter on June 26, 1998.

On August 10, 1998, Neutron Products filed Exceptions to the Proposed Decision. On September 8, 1998, two of the neighbors living in the area, the Oberdofers, as Intervenors, responded to those Exceptions. On the following day, MDE also responded to those Exceptions. On September 9, 1998, Neutron Products filed "Errata to Neutron Products' Exceptions to the Proposed Decision." On September 19, 1998, MDE filed a Motion to Strike the "Errata to

Neutron Products' Exceptions to the Proposed Decision." The Motion to Strike the Errata was granted on February 22, 1999. A hearing on the Exceptions, filed by Neutron Products, was held on February 26, 1999. Neutron Products, MDE and Michael and Carol Oberdorfer, as Intervenors, presented oral arguments at that hearing.

In its Exceptions, Neutron Products asserted that the Administrative Law Judge's Proposed Decision erred with respect to a number of findings including: failure to accord certain witnesses proper credibility, failure to find that certain provisions of the license are not tied to protection of public health and the environment, and improper application of the "as low as reasonably achievable" or "ALARA" standard. Neutron Products also alleged that certain provisions of the license unnecessarily restrain Neutron Products' ability to trade in the marketplace. Neutron Products seeks further negotiation with MDE over particular license provisions. Last, Neutron Products would like the Final Decision to address each license condition point by point. Although each request is noted, this Decision addresses Neutron Products' exceptions relating to issues of law, specific license conditions, the proposed findings of fact, new findings of fact proposed by Neutron Products and concludes with a discussion of the Intervenors.

### CONCLUSIONS OF LAW

#### Burden of Proof

(Neutron Products Exception no. 26)

Neutron Products took exception to the finding by the Administrative Law Judge that Md. Code Ann., Envir., Section 1-601 et. seq. (1996 repl. vol.) did not apply to this matter. Since this matter involves a radiation license, the Administrative Law Judge found that COMAR 26.12.01.01 established the specific procedures for contesting the license issued and that Neutron

Products, as the party contesting the issuance of a license, carried the burden of proof to demonstrate that the license conditions were improperly issued. (Proposed Decision at pp. 43 – 46.) I agree that the specific hearing regulations promulgated by MDE govern this matter.

Md. Code Ann., Envir., sections 1-601 et. seq. (1996 repl. vol.) generally governs the rights and procedures for entities other than the licensee to contest the issuance of a permit. This section of the Environment Article is titled, “Public Participation in the Permitting Process” and generally provides that an applicant for a license may contest a decision. That same section provides a specific list of licenses that the section covers. A radioactive materials license is not included in that list. As the Administrative Law Judge discussed, there are regulations that more specifically address the procedure regarding the implementation of a radioactive license. (COMAR 26.12.01.01 et seq. and Proposed Decision at pp.46-47.)

Regardless of whether this subtitle of the Environment Article applies, COMAR 26.12.01.01 et seq. applies, or both apply, the outcome for Neutron Products would be the same with respect to the burden of proof. Neutron Products, as the licensee, challenged the license conditions and must show that either MDE exceeded its authority in issuing the license or provide a sound, factual basis for a finding that the conditions were based on an erroneous fact or assumption. The Administrative Law Judge correctly concluded that the licensee, Neutron Products, carried the burden of proof.

#### Procedural Issues

(Neutron Products Exception nos. 12, 27, 28 and 29)

Several of Neutron Products' Exceptions relate to procedures used for the renewal of a license. Relying on Md. Code Ann., Envir., section 1-601 et. al. (1996 repl. vol.), Neutron Products contends that MDE did not follow the proper procedural process when it issued the

license and that Neutron Products should have been afforded an opportunity to review a tentative determination of the license and provide formal comments to MDE. Since COMAR 26.12.01.01 regulates the renewal of a radioactive license, a tentative determination of the license and formal comment period are not required.

Neutron Products also contends that, rather than a renewal of its license, MDE modified an existing license in violation of COMAR 26.12.01.01 et seq. While MDE does have the authority to take such action, the Administrative Law Judge correctly found that this was not a "modification." (Proposed Decision at pp. 47 - 49.) While the record does describe regulatory problems at Neutron Products, the Administrative Law Judge determined the renewal of the license was initiated by Neutron Products. MDE did not initiate this action nor did it amend the license as a punitive remedy pursuant to COMAR 26.12.01.01.C50. "Amendment 43," although titled as an amendment, is a new license granted to Neutron Products to replace the existing license. While it may, indeed, be confusing to title a renewal of a license an "amendment," the determinative issue is whether MDE's actions were taken pursuant to COMAR 26.12.01.01.C50 as a punitive action. There is no evidence MDE followed any enforcement type of procedure or otherwise relied on the regulation that allows for a change to the license as a punitive measure. Moreover, there is no evidence in the record that would demonstrate this was intended by MDE to be a punitive action. Therefore, these Exceptions are denied.

#### Scope of Hearing

(Neutron Products Exception nos. 4, 13, 25 and License Condition 22A)

Neutron Products took exception to the fact that the hearing was limited to license conditions only. Neutron Products also wanted to address "the way in which [Neutron Products] is regulated." MDE regulates Neutron Products through state statutes, regulations and, more

specifically, through the license that enables Neutron Products to operate. The record refers to several attempts between the parties to negotiate conditions of the license to which Neutron Products objects. As the Administrative Law Judge found, the purpose of this proceeding is to determine whether the license conditions MDE required were properly imposed. (Proposed Decision at pp. 43 – 48.) The Administrative Law Judge properly focused the hearing on those issues which directly answer that question. Therefore, these exceptions are denied.

Neutron Products also took exception to the fact that License Condition 22A was not addressed at the hearing and now objects to that condition being imposed. Since License Condition 22A was not raised at the pre-hearing conference which was held to outline the issues to be addressed at the hearing, the Administrative Law Judge did not include a discussion of that condition in the Proposed Decision. She did, however, indicate in the Proposed Decision that Neutron Products agreed with License Condition 22A in a settlement agreement. (Proposed Decision at pp. 36 – 37.) The Administrative Law Judge properly did not include a decision on that License Condition. Consequently, this Exception is denied.

#### Restraint of Trade

(Neutron Products Exception no. 36 and License Condition 14)

Neutron Products argues that these license conditions create a restraint of trade. The Administrative Law Judge found no specific evidence regarding a loss of business or the potential loss of future business as a result of the regulatory requirements. The Administrative Law Judge addressed each of the conditions that Neutron Products contended restrained its ability to conduct business and considered the law. Neutron Products argued that the license conditions, in effect, illegally restrict Neutron Products' ability to conduct business. Without a

showing of specific damages, that MDE exceeded its authority, or was otherwise arbitrary or capricious, there is no evidence supporting a restraint of trade.

Neutron Products interprets Md. Code Ann., Envir., section 1-802 (1996 repl. vol.) to include "economic criteria" and to require MDE to take into account the economic impact of regulatory requirements. The Administrative Law Judge determined that the statute merely required MDE to balance requirements for the protection of public health and the environment with the cost of implementing the requirements. (Proposed Decision at pp. 54 – 59.) I agree with this finding. Without specific evidence or a showing that MDE misused its authority, these exceptions are denied.

**Potential Testimony of James V. Muckerheide**  
(Neutron Products Exception nos. 3 and 35)

Neutron Products argued that the expert testimony of James V. Muckerheide, concerning the ALARA principle, was improperly denied. This exception is denied because any expert testimony that Mr. Muckerheide may have offered on the issue of whether the federal interpretation of the ALARA principle is irrelevant to this proceeding. The Administrative Law Judge correctly found that MDE is required to implement, at a minimum, the federal standard which incorporates the ALARA principle. (Proposed Decision at pp. 57 – 59.) The fact that Neutron Products disagrees with this standard is not at issue before the Administrative Law Judge. Any testimony offered as to the merits of this standard would not have been relevant. This Exception is denied.

**Evidence and Testimony – Robert Alexander**  
(Neutron Products Exception nos. 30, 31, 33 and 37)

Neutron Products also excepted to the weight of credibility accorded to the testimony and opinions of Robert Alexander. Neutron Products alleged that Mr. Alexander was not called to

testify regarding the topics cited by the Administrative Law Judge as illustrating the limits of his knowledge. The Administrative Law Judge's references to the testimony were relevant and appropriate. For example, the fact that Mr. Alexander was asked to testify to the health and safety benefit provided by the 2 million curie limit on the facility and the fact that he was not aware of what resources were available to close the facility impairs the credibility of his opinion in that regard. (Proposed Decision at pp. 50-51.) Additionally, the observations of the Administrative Law Judge must be given special deference absent a strong reason to the contrary. The Administrative Law Judge provided a basis for her reasoning concerning the testimony of Mr. Alexander. Although Neutron Products may disagree, this will not suffice to change the ultimate decision reached by the Administrative Law Judge. (Proposed Decision at pp. 50-51.) Neutron Products' Exceptions raise no strong reason as to why the Administrative Law Judge's observations should be overruled.

#### **Evidence and Testimony - Al Jacobson**

At the hearing on the exceptions, Neutron Products objected to the fact that Mr. Jacobson was admitted an expert for two reasons. First, Neutron Products objected that the Administrative Law Judge asked whether Mr. Jacobson was to be admitted as an expert after the conclusion of his testimony. Second, Neutron Products objected to Mr. Jacobson's qualifications as an expert. (Exception Hearing transcript at p. 19) Although these objections are noted, the Administrative Law Judge has broad discretion in conducting a hearing absent being prejudicial or unfair. Neutron Products had full opportunity to question Mr. Jacobson and challenge, among other things, his credentials. The Administrative Law Judge was in the best position to make decisions regarding Mr. Jacobson and the record fails to reflect any prejudice or unfairness as a result of her decision to admit him as an expert. These exceptions are denied.

### Other Witnesses

Neutron Products also challenged the general weight of credibility given to its other witnesses. Again, absent a strong showing as to why the Administrative Law Judge's observations should not be followed, the weight of the testimony accorded to these witnesses must be followed. The Administrative Law Judge detailed her assessment of the credibility of the witnesses. (Proposed Decision at pp. 52 – 54, 56.) She concluded that the testimony of MDE witnesses was "detailed, candid, responsive and credible." This is within her discretion. The Administrative Law Judge also found that Neutron Products employees were clearly knowledgeable about the Dickerson facility and other issues. The Administrative Law Judge's assessment of the testimony is objective. Neutron Products has not shown any reason not to follow this assessment. Accordingly, these exceptions are denied.

### Other Exceptions Raised by Neutron Products

During the Exceptions Hearing, Neutron Products objected because MDE failed to provide "any adequate justification" for its license conditions. (Exceptions Hearing transcript at p.14.) Neutron Products carries the burden to show MDE was arbitrary and capricious. MDE has broad discretion to assess license conditions and when doing so, the onus is not on MDE to provide detailed justification for its actions. Furthermore, Neutron Products produced no legal authority to the contrary. This exception is denied.

Neutron Products also questioned the basis for the Administrative Law Judge's findings of fact. Neutron Products argued that they were "woefully inadequate" in that there was "no nexus between the testimony and license conditions." (Exceptions Hearing transcript at p.16.) Despite this contention, Neutron Products produced no authority in support of its argument indicating that an Administrative Law Judge is required to provide a detailed analysis of the

thought process involved in reaching a decision. This, in essence, is what Neutron Products is requesting. An Administrative Law Judge has discretion in reaching a decision and, in doing so, can consider the testimony provided, exhibits admitted, credibility, cross-examinations and other evidence. In this case, the Administrative Law Judge also discussed some of the reasoning for supporting her determinations. (Proposed Decision at pp. 52-54, 56.) Therefore, this Exception, raised at the Exceptions Hearing, is also denied.

At the Exceptions Hearing, Neutron Products objected that it was not allowed to introduce the "Statement of Principals and Policies for the Agreement States" prepared by the NRC. (Exceptions Hearing transcript at p.20.) The record shows that the document was published after MDE issued its license conditions. The Administrative Law Judge ruled appropriately holding, that the document was irrelevant. MDE cannot be required to consider a document that it has neither adopted nor was published prior to issuing the license conditions. Neutron Products' argument that it still should have been considered by MDE is without merit and this Exception is denied.

Last, at the Exceptions Hearing, Neutron Products requested that MDE's final decision maker reconsider the decision to grant MDE's Motion to Dismiss Neutron Products' Errata to Neutron Products' Exceptions to the Proposed Decision. A Motion to Dismiss those Errata was granted because the proposed substitute exceptions were not filed in a timely manner. As the ruling on the Motion discusses, each party must be afforded due process. In this matter, due process was afforded to the parties by providing an opportunity to file Exceptions to the Proposed Decision. In this case, the time period for filing those Exceptions had been extended at Neutron Products' request. The Errata were filed after the deadline. For these reasons, the final decision-maker's ruling to grant MDE's Motion to dismiss Neutron Products' Errata to

Neutron Products' Exceptions is not changed.

**Challenged License Conditions: 7A, 8A, 9A, 12B-G, 13, 14,  
15A, 15C, 16, 18, 20, 21, 22B, 24, 26, 27C.2 and 37**

For those conditions which Neutron Products has asserted that MDE either: (1) exceeded its authority or (2) was arbitrary and capricious in imposing the condition, the issue is the same and the exceptions can be addressed together. Neutron Products, as the moving party, carries the burden of proof to show that MDE did not have the authority to issue the license conditions. The Exceptions to these license conditions are denied because Neutron Products failed to produce any evidence at the hearing or in its Exceptions demonstrating that MDE exceeded its authority or acted arbitrarily or capriciously.

Neutron Products also did not produce any authority supporting its contention that incorporating internal procedures was not within the discretion of MDE. The Administrative Law Judge properly found that there is no showing that MDE did not have the authority to impose these license conditions under its broad mandate to minimize radiation hazards per Md. Code Ann., Envir., section 8-101 et. seq. (1996 repl. vol.) and the specific regulatory authority of COMAR 26.12.01.01 et seq. (Proposed Decision pp.47 – 48 and 52-54). As the Administrative Law Judge pointed out in the Proposed Decision “MDE has broad discretion to include in a license “such conditions and limitations as it deems appropriate or necessary.” (Proposed Decision at pp. 48.)

As an example, Condition 24 requires that the licensee establish a central location for maintaining records. The statutory and regulatory scheme provides MDE broad latitude in imposing requirements that will help protect public health. COMAR 26.12.01.01.30 affords the regulatory agency broad discretion in imposing such requirements. No evidence showing that

MDE has exceeded its authority to protect the public health from hazards posed by radiation in imposing any of the license conditions has been produced.

As another example, Neutron Products excepted to License Condition 27C.2 which, in part requires Neutron to maintain its pool conductivity below 10 microsiemens-cm because it will require Neutron to change the pool resin more frequently which, among other things, will create additional radioactive waste. At the same time, Neutron Products has not objected to Proposed Finding of Fact no. 91 which finds that Condition 27C.2 is consistent with the federal standard for irradiator waters and with Neutron Products' internal standards.

The fact that Neutron Products did not object to findings of fact by the Administrative Law Judge discussing the pool including Proposed Findings of Fact nos. 84, 86, 88, 89, 90 and 91 should be considered. Consequently, the objection raised by Neutron Products regarding this license condition is inconsistent with the record and, without more conclusive authority, Neutron Products has failed to show the condition should not be allowed. There is also no showing the MDE exceeded its authority in imposing such a license condition. Therefore, each of these Exceptions is denied.

### FINDINGS OF FACT

#### Administrative Law Judge's Proposed Findings of Fact

The Administrative Law Judge's Proposed Decision includes 102 findings of fact. The following Exceptions taken by Neutron Products are granted because there is a basis in the record for the Exception. The following finding of facts will amend those in the Office of Administrative Hearing's Proposed Decision except as described.

**Neutron Products Exception no. 1**

The procedural background section of the Proposed Decision is amended to reflect that Neutron Products' correct address is "22301 Mt. Ephraim Road, Dickerson, MD 20842."  
(Proposed Decision at p. 3.)

**Neutron Products Exception no. 2**

Proposed finding of fact no. 18 of the Proposed Decision is amended as follows:  
*"Neutron Products sent a letter to the Secretary of MDE filing a request for a hearing to contest certain license conditions on February 15, 1996. The Office of Administrative Hearings received that appeal from MDE on March 12, 1996."*

**Neutron Products Exception no. 5**

The "Evidence in the Record" section of the Proposed Decision is amended by adding the following statement: *"Neutron Products intended to call Mr. Roland Fletcher as a hostile witness."* (Proposed Decision at p. 11.)

**Neutron Products Exception no. 7**

Proposed finding of fact no. 5 of the Proposed Decision is amended as follows: *"Neutron Products' use of radioactive materials was initially regulated through licensing by the Atomic Energy Commission which subsequently became the Nuclear Regulatory Commission."*  
(Proposed Decision at p. 16.)

**Neutron Products Exception no. 8:**

The reference to NRC (proposed finding of fact no. 6 of the Proposed Decision) is amended to the *"Atomic Energy Commission."* (Proposed Decision at p. 17.)

Neutron Products takes exception to a number of the remaining proposed findings of fact, which are addressed below. Except for the five proposed findings of fact discussed in the

preceding paragraph, the remaining findings of fact proposed by the Administrative Law Judge are hereby adopted because there is a fair and justified basis in the record for each finding.

**Neutron Products Exception nos. 6, 9, 11, 14, 21, 22, 23, and 34**

As part of its exceptions, Neutron Products contends that there are a variety of errors in the Administrative Law Judge's proposed findings of fact. These exceptions do not raise issues that would have any significant bearing on the outcome of the Proposed Decision or this Final Decision. Generally, many of these exceptions fail to address the merits of the case, or are irrelevant to the issues before the Secretary. Moreover, there is a basis for each of those findings of fact by the Administrative Law Judge. These Exceptions are, therefore, denied.

**Neutron Products Exception nos. 10, 15, 16, 17, 18, 19 and 20**

Neutron Products took exception to these proposed findings citing two categories of assertions. In some cases, Neutron Products prefers that additional information be added to the factual finding to posit the finding in a more positive light for Neutron Products. In other cases, Neutron Products appears to miss the import of the proposed finding. Often, Neutron Products accords import to the proposed finding beyond the fact itself. Consequently, these Exceptions are denied because, in each case, the Administrative Law Judge correctly found there is a basis in the record for each proposed finding of fact.

**Neutron Products Exception no. 32**

Neutron Products disputes the application of the ALARA standard. Neutron Products asserts that MDE has misinterpreted this standard and also disputes the Federal interpretation of ALARA. The Administrative Law Judge correctly determined that MDE has no authority to change this federal standard (Proposed Decision at pp. 57 - 59.). MDE is required to implement the NRC standards. These standards are predicated upon the principle that there is no safe

threshold for exposure to radiation. The license MDE issued must contain provisions that are, at least, as stringent as the federal requirements. MDE has implemented the Federal ALARA standard in its regulatory scheme as it is required to do. The Administrative Law Judge examined each of the applicable laws and regulations and correctly determined that MDE was required to implement this standard as part of its regulatory program. For these reasons, Exception no. 32 is denied.

#### **Neutron Products Exception no. 24**

The Administrative Law Judge found that "the cleanup of the pool and canals is a hazardous activity which exposes employees to potentially dangerous levels of radiation." (Proposed Decision at p. 39.) Neutron Products took exception, stating there has never been an exposure to an employee. The Exception doesn't address the merits of the proposed finding of fact. The Administrative Law Judge had a basis for the finding. (Hearing transcript vol. 17, at p. 2296-2299)

#### **Neutron Products Proposed Findings of Fact**

In its Exceptions, Neutron Products includes twenty-seven new proposed findings of fact. Each of these proposed findings has been considered.

#### **Neutron Products Proposed Findings of Fact nos. 41, 45, 48 and 61**

These Proposed Findings of Fact are adopted because there is a basis in the record for the finding.

#### **Neutron Products Proposed Findings of Fact no. 47**

This Proposed Finding of Fact is adopted in part. The Proposed Finding of Fact is modified to "*Neutron specifically requested that it be allowed to conduct some of the operations*

*in areas outside the hot cell. The State refused to allow such a license condition.”* The remainder of this proposed finding of fact is not adopted.

**Neutron Products Proposed Findings of Fact no. 62**

This proposed finding of fact is adopted in part. The proposed finding of fact is modified to *“The NRC issued NUREG 1530 (NPI-30) in December, 1995.”* The remainder of this proposed finding is not adopted because the record did not substantiate interpretation of this document.

**Neutron Products Proposed Findings of Fact nos. 38, 42, 43, 46, 51, 52 and 56**

These proposed findings of fact are not adopted because there is either no basis in the record for such a finding or there is conflicting evidence and testimony and absent a strong showing as to why the Administrative Law Judge’s assessment of the evidence should not be followed, deference will be given to the Administrative Law Judge’s finding.

**Neutron Products Proposed Findings of Fact nos. 55 and 63**

These proposed findings of fact are not adopted because they consist of legal argument rather than a finding of fact.

**Neutron Products Proposed Findings of Fact nos. 60 and 65**

These proposed findings of fact are not relevant to this Decision which is limited to the merits of the license conditions that have been challenged by Neutron Products.

**Neutron Products Proposed Findings of Fact nos. 39, 40, 49, 53, 58 and 59**

These proposed findings of fact are not adopted because they are unclear and do not provide sufficient information to make a determination as to constitute a statement of fact that has bearing on the outcome of this matter. For example, proposed Findings of Fact nos. 39, 58 and 59 deal with the term “quantitative analysis.” The issue of whether MDE performed a

quantitative analysis was raised numerous times. (Hearing transcript, vol. 10 at pp.1464-1466 and vol. 11 at pp.1544-1549.) However, without reaching the issue of whether these proposed facts are relevant, there is no basis in the record for a definition of quantitative analysis.

**Neutron Products Proposed Findings of Fact nos. 44, 54, 57, 64**

These proposed findings of fact are not adopted because the statements, as they are drafted, are too broad and do not have a basis in the record for such a general finding.

**Neutron Products Proposed Findings of Fact no. 50**

This proposed finding of fact is not adopted because the Administrative Law Judge addressed this same fact in Proposed Finding of Fact no. 78. (Proposed Decision at p. 37).

**INTERVENORS**

The Administrative Law Judge dismissed the claims of the Intervenors because the issues at the Hearing were limited to Amendment 43 of the radioactive materials license. The relief sought by the Intervenors was beyond the scope of the hearing and pertained to matters related to MDE's enforcement activities at the Neutron Products facility.

Intervenors Carol and Michael Oberfordfer responded to the Exceptions filed by Neutron Products and participated in the hearing on the exceptions. The other Intervenors did not. The Oberdorfers' response to Neutron Product's Exceptions focused specifically on the Exceptions filed and the need for an expeditious final decision in this matter. However, because the initial relief sought by the Intervenors related to enforcement and other matters not directly related to MDE's authority to issue Amendment 43, the decision of the Administrative Law Judge to dismiss the claims of the Intevenors is affirmed.

### CONCLUSION

After review of the Proposed Decision by the Administrative Law Judge, the administrative record, Exceptions filed by Neutron Products and the responses filed thereto by MDE and the Intervenors, and consideration of the applicable law and regulations, it is determined that the Administrative Law Judge's Proposed Decision fully considers the record regarding the objections filed by Neutron Products to Amendment 43 of the Radioactive Materials License. For the reasons discussed above, the Administrative Law Judge's Proposed Decision is adopted with the changes to the five proposed findings of fact and five new proposed findings of fact as outlined herein.

### ORDER

It is hereby ordered, this 24th day of August, 1999, by Shari Wilson, the delegated Final Decision Maker in this matter, that the Proposed Decision of the Administrative Law Judge regarding Amendment 43 to the Neutron Products radioactive materials license is affirmed as the final decision, with the changes to the five proposed findings of fact and six new proposed findings of fact as outlined herein.

### NOTICE

The parties are hereby notified that it may seek judicial review of this Order in the Circuit Court pursuant to Md. Code Ann. State Gov't Article, Section 10-221(b) (1995 repl. vol.) Any petition for judicial review must be filed within thirty (30) days after receipt of this Order.

151  
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Shari T. Wilson  
Delegated Final Decision Maker  
Maryland Department of the Environment

8/24/99  
\_\_\_\_\_  
Date