

LEBOEUF, LAMB, GREENE & MACRAE
L.L.P.

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATION S

NEW YORK
WASHINGTON, DC.
ALBANY
BOSTON
DENVER
HARRISBURG
HARTFORD
HOUSTON
JACKSONVILLE
LOS ANGELES
NEWARK
PITTSBURGH
SALT LAKE CITY
SAN FRANCISCO

99 WASHINGTON AVENUE

SUITE 2020

ALBANY, NY 12210-2820

(518) 626-9000

FACSIMILE: (518) 626-9010

E-MAIL ADDRESS: TWEST@LLGM.COM

WRITER'S DIRECT DIAL: 518-626-9307

WRITER'S DIRECT FACSIMILE: 518-431-8234

LONDON
(A LONDON-BASED
MULTINATIONAL PARTNERSHIP)

PARIS

BRUSSELS

JOHANNESBURG
(PTY) LTD.

MOSCOW

RIYADH
(AFFILIATED OFFICE)

TASHKENT

BISHKEK

ALMATY

BEIJING

February 27, 2004

VIA FACSIMILE AND E-MAIL

Margaret Federline
Deputy Director
Office of Nuclear Material Safety and Safeguards
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852-2738

Re: Radiac Research Corporation

Dear Ms. Federline:

We write, on behalf of Radiac Research Corporation ("Radiac"), to address the procedural errors of Arnold & Porter's ("A&P") most recent 10 C.F.R. 2.206 petition, dated November 4, 2003 (the "November 4, 2003 A&P Petition"), to the U.S. Nuclear Regulatory Commission ("NRC") alleging for a second time common defense and security issues at Radiac's low-level radioactive waste storage facility (the "LLRW Facility"). The November 4, 2003 A&P Petition was submitted by A&P on behalf of its client Neighbors Against Garbage ("NAG").

As your counsel, Antonio Fernandez, Esq., requested during the February 20, 2004 NRC public meeting regarding the LLRW Facility, we are addressing procedural issues only and this submittal will not address issues on the merits nor attempt to expand upon the factual background that was provided by both parties at that meeting.¹ We trust NAG's corresponding

¹ See Transcript, pp. 88-89: "Initially what we would expect is not to address the merits portion of the argument in this first submittal. . .the decision that the board needs to initially make is whether you meet the requirements of 2.206[;]. . .the merits portion of the argument. . .should be addressed, if at all, after the board makes the determination that it will accept this under the 2.206 process."

response will also limit itself to this very clear parameter and that any information provided by NAG outside this scope will be disregarded.

It is undisputed that the November 4, 2003 A&P Petition was submitted pursuant to 10 CFR 2.206. In relevant part, 10 CFR 2.206 states that "[a]ny person may file a request to initiate a proceeding pursuant to 2.202 to modify, suspend or revoke a license. . . ." 10 CFR 2.206(a). The pertinent regulation, 10 CFR 2.202, however, limits these types of petitions to enforcement actions and limits petitioners to one such request.²

Specifically, 10 CFR 2.206 (c)(2) prohibits multiple attempts using the same or re-named arguments: "No petition or other request for Commission review of a Director's decision under this section will be entertained by the Commission." 10 CFR 2.206(c)(2). Pursuant to this regulation and NRC policy, therefore, a petition will be rejected, "whether [2.206 is] specifically cited or not," if, in relevant part, it: (1) does not request enforcement action, but instead addresses strictly health and safety or rulemaking issues; (2) fails to provide sufficient supporting information; (3) raises "issues that have already been the subject of NRC staff review and evaluation either [for the subject] facility, other similar facilities, or on a generic basis, for which a resolution has been achieved, the issues have been resolved and the resolution is applicable to the facility in question. This would include requests to reconsider or reopen a previous enforcement action (*including a decision not to initiate an enforcement action*)." absent "significant new information"; or (4) addresses a request to deny a license or amendment.³ NRC Directive 8.11, pp. 13-14 and 10 CFR 2.206(c)(2).

Based on the following, Radiac requests that the NRC summarily dismiss the November 4, 2003 A&P Petition as being in violation of both 10 CFR 2.206(c)(2) and NRC policy.

NRC Already Rejected the June 18, 2003 A&P 2.206 Petition

The November 4, 2003 A&P Petition must be dismissed because the NRC has already dismissed A&P's earlier June 18, 2003 2.206 petition (the "June 18, 2003 A&P Petition") based on the same alleged common defense and security issues. See July 31, 2003 letter from Martin Virgilio, NRC Director of the Office of Nuclear Material Safety and Safeguards to Michael

² This submission will only address very limited procedural issues that were not fully addressed in Radiac's February 18, 2004 submission. This submission is meant to be considered contemporaneously with our February 18, 2004 submission regarding the procedural defects of the November 4, 2003 A&P Petition. Radiac also relies upon its February 18, 2004 response relative to the strong substantive arguments as to why Radiac does not present a threat to the common defense and security. We respectfully urge the NRC to fully consider these other procedural issues and substantive arguments as well in deciding whether to review the November 4, 2003 A&P Petition.

³ "[A]ny hearing which might be accorded petitioner under 10 C.F.R. 2.206 is not automatic or of right but rests in the NRC's sound discretion. . . ." *Save the Valley, Inc. v. United States Nuclear Regulatory Comms'n.*, 714 F.2d 142 (6th Cir. 1983). See also *McDermott v. United States Nuclear Regulatory Commission*, 1985 U.S. Dist. LEXIS 20344, *10 (D.D.C. 1985) ("The NRC was established to regulate the nuclear energy industry for the safety of the country. The Court determines that the Congressional intent in establishing the NRC is in line with the public interest and the Court will not interfere in the discretionary matters of the Commission").

Gerard at Exhibit A. Specifically, the June 18, 2003 A&P Petition urged the NRC "to use its power to protect the common defense and security" by closing down the LLRW Facility. The NRC responded on July 31, 2003 by stating:

[Your petition]. . .has been referred to me pursuant to 10 CFR 2.206 of the Commission's regulations. . . . Our petition review board has reviewed your submittal. The staff concluded that your submittal does not meet the criteria for consideration under 10 CFR 2.206 because your request fails to provide sufficient facts to support NRC consideration under its common defense and security authority. Rather, your request raised potential health and safety concerns[, which] should be addressed by [the New York State Department of Labor ("NYS DOL")].

Id.

After this rejection, NAG now attempts to take another bite out of the procedural apple through the November 4, 2003 A&P Petition in direct violation of 10 CFR 2.206(c)(2). The regulation is clear: the November 4, 2003 A&P Petition should be dismissed because the matter has already be decided by the NRC. Further, although the NRC Directive 8.11 allows for significant new information in these analyses, the November 4, 2003 A&P Petition fails to meet this threshold. Instead, the November 4, 2003 A&P Petition basically pastes or uses old information regarding Radiac's hazardous waste facility (most of which was already included as an EPA letter attachment to the June 18, 2003 A&P Petition) into its *Skull Valley* radioactive material risk analysis (which was also provided in the June 18, 2003 A&P Petition).⁴ We also note that even this further information was a second time rejected by NRC as a basis for interlocutory relief: "We have considered your assertion of the 'need for urgent action' a request for immediate action under our procedures for 2.206 petitions in Management Directive 8.11. Your request for immediate action has been denied because the limits on types and activity of radioactive material that Radiac is authorized to possess are below levels of concern." See December 17, 2003 letter from Martin Virgilio, NRC Director of the Office of Nuclear Material Safety and Safeguards to Michael Gerrard at Exhibit B.

Substantively, as well as procedurally, NRC has already determined that NAG's allegations do not rise to the level of a common defense and security concern. "[NAG's] request raises *potential public health and safety concerns*. Since Radiac Research Corporation is a [NYS DOL] licensee, your concerns should be reviewed by that agency. We note that you have requested such a review. . . . We also note that NYDOL responded to your health and safety concerns [denying them all]." July 31, 2003 letter from Martin Virgilio, NRC Director of the Office of Nuclear Material Safety and Safeguards to Michael Gerrard (emphasis added)⁵; July 16,

⁴ *In Matter of Envirocare of Utah, Inc.*, 1997 NRC LEXIS 4 (NRC, Feb. 4, 1997) (NRC finding that no action is required in 2.206 petition based on alleged health and safety concerns, particularly when opponents provided no information the NRC was not already aware of).

⁵ This statement further supports dismissal: strictly non-enforcement health and safety concerns are not proper for a 2.206 petition and must be dismissed. See NRC Directive 8.11, pp. 1, 6 ("Requests that raise health and safety or other concerns without requiring enforcement-related action will be reviewed by other means than the 10 CFR

2003 letter from Acting Director Anthony Germano of NYSDOL to Michael Gerrard of A&P at Exhibit C; see *Envirocare of Utah*, 1998 NRC LEXIS 85, at *7-8 ("requests for action concerning [state licensees and programs] concern matters that do not fall within the scope of matters ordinarily considered under section 2.206.").

We anticipate that NAG will argue that because the June 18, 2003 A&P Petition omitted a citation to 2.206, that the November 4, 2003 A&P Petition should not be dismissed. However, the failure to include a citation to 2.206 is not dispositive. Any attempt by NAG now to "back-pedal" on the issue is resolved by the June 18, 2003 A&P Petition itself, which addressed why its 2.206 citation was missing: "We would be pleased to provide documentation and full citation to any or all of the factual and legal assertions made in this letter. . . ." See June 18, 2003 A&P Petition, p. 4. Moreover, in no place did NAG ask the NRC not to treat its petitions under 2.206 or rebut such treatment after the NRC's July 31, 2003 letter. In any event, NRC policy and case law on the issue is clear: "[i]f there is any uncertainty about whether or not a request is a petition under 10 CFR 2.206, it should be treated as one so that a petition review board can make its recommendations. . . ." See NRC Directive 8.11, p. 3-4. As NRC's July 31, 2003 letter clearly indicates, this is exactly what happened with A&P's June 18, 2003 petition: it was reviewed as a 2.206 petition and dismissed as such. "[Your letter]. . . has been referred to me pursuant to 10 CFR 2.206 of the Commission's regulations. . . . Our petition review board has reviewed your submittal. The staff concluded that your submittal does not meet the criteria for consideration under 10 CFR 2.206." July 31, 2003 NRC letter. This is well-established NRC procedural practice, as documented by a United States Supreme Court case on 2.206 issues: "Her detailed letter urged the Commission to suspend Turkey Point's operating license and specified several reasons for such action. The Commission treated Lorion's letter as a citizen petition for enforcement action pursuant to the authority of § 2.206 of the Commission's rules of practice." *Florida Light & Power Co. v. Lorion*, 470 U.S. 729, 731 (1984).

Accordingly, because NAG's common defense and security claims have already been denied by NRC as a 2.206 petition, the November 4, 2003 A&P Petition must be dismissed in its entirety.⁶

2.206 process."). For example, in *Envirocare of Utah, Inc.*, NRC explained that, under a 2.206 petition, once NRC determines that a violation of its requirements has occurred, it can then issue an order to remove a threat to the public health and safety, common defense and security, or the environment. See *Envirocare of Utah, Inc.*, 1998 NRC LEXIS 85, *12 (NRC, Sep. 14, 1998). NAG's alleged public health and safety concerns alone are not proper under 2.206, but rather should be addressed at the State level—where they were presented and dismissed.

⁶ Radiac also requests that NAG be precluded from raising any issues regarding Radiac's NRC transportation license, an issue that NAG failed to raise in its 2.206 petitions. See *Astoria Federal Savings and Loan Ass'n. v. Solimino*, 501 U.S. 104, 107 (1991) ("We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality. 'When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.' ") (citation omitted); *Matter of Georgia Power Co.*, 1993 NRC LEXIS 28, *28, n. 27 (NRC, Aug. 19, 1993) ("Collateral estoppel principles may be applied by the Commission in administrative proceedings to bar re-litigation of previously resolved factual issues."). It is well-established that this doctrine also applies to bar issues that a party could have raised but failed to do so. See *Matter of Pacific*

The A&P Petition is a Collateral Attack on a License That Requires Rulemaking

In the alternative, the November 4, 2003 A&P Petition should be dismissed as a collateral attack on a permit and related regulations and/or as a request for a rulemaking procedure. The November 4, 2003 A&P Petition asks NRC to use its residual powers to classify the LLRW Facility as a threat to the common defense and security, based on an alleged risk of a catastrophic event, and to "close this facility as a matter of urgency." November 4, 2003 A&P Petition, p. 20. As stated above, NRC has already twice rejected this allegation. See July 31, 2003 and December 17, 2003 NRC letters. As demonstrated below, the LLRW Facility, like other facilities such as schools, hospitals and universities in New York City that store only minor amounts of hazardous and radioactive materials, is not a threat to common defense and security from either an accident or terrorism perspective. The November 4, 2003 A&P Petition thus collaterally attacks both the NRC and NYSDOL regulations that resulted in the licensing of the LLRW Facility. Any collateral attack on a license or amendment is not proper for a 2.206 petition. Likewise, to the extent that NAG's request is actually a request for a rulemaking, it is also improper under 2.206.

As explained in greater detail in our February 18, 2004 response to the November 4, 2003 A&P Petition, the State of New York has entered into an agreement with the NRC for discontinuance of certain NRC regulatory authority under 42 U.S.C. 2021. See October 15, 1962 Agreement, p. 5. Pursuant to the Agreement and Section 2021, NRC retains the authority to issue orders to protect the common defense and security. See October 15, 1962 Agreement, p. 6. In essence, NRC has delegated to NYSDOL licensing authority for minor operators (not facilities such as spent fuel rod storage or nuclear power plants). See 42 U.S.C. 2021(c). As NRC has stated, "requests for action concerning [state licensees and programs] concern matters that do not fall within the scope of matters ordinarily addressed under section 2.206."⁷

NRC's historical approach as to state licensees is consistent with the minimal accidental or terrorism threat such storage facilities, like the LLRW Facility, pose to public health and safety. Nonetheless, NAG claims that a terrorist or vandal with a hand grenade or Molotov cocktail could "cause a conflagration that would release a plume of radioactive toxic waste into the

Gas and Electric Co., 1993 NRC LEXIS 3, *58-*59, 7.50 (NRC, Jan. 21, 1993) ("The Board concludes that litigation of issues related to simultaneous earthquake and plant accident at Diablo Canyon is prohibited by the doctrine of collateral estoppel and res judicata. . . Petitioner attempted to save its contention at the prehearing conference by denying that it was interested in relitigating the issue of simultaneous earthquake and plant accident. It claimed instead that it was concerned about diminished resistance of the plant to earthquake stresses caused by aging components. . . This claim, however, is contrary to the wording of the contention as it was filed with the Board and parties, and it came too late and with too little basis (i.e., no scientific data) to permit admission of a revised contention.")

⁷ *Envirocare of Utah.*, 1998 NRC LEXIS 85, at *8 ("Accordingly, this Director's Decision will only address the NRDC requests for action that relate to the license . . . issued to Envirocare by NRC."); July 31, 2003 NRC letter (recommending NAG seek review under NYSDOL, not NRC). Even when NRC grants review of a state license or program, such requests are typically denied. See *In Matter of State of Utah*, 1995 NRC LEXIS 4, *1 (NRC, Jan. 26, 1995); see also *In Matter of Petition of Sunflower Coalition*, 1981 NRC LEXIS 108, *1 (NRC, Jun. 24, 1981).

air". This language is ridiculously exaggerated, inflammatory and shows a lack of understanding of the types and quantities of radioactive materials at Radiac; safety features such as the use of steel drums and the existence of fire suppression systems, all of which are simply ignored by NAG. Further, equally exaggerated is NAG's claim that the LLRW Facility poses a "particularly attractive target" because of the presence of radioactive waste in an urban area. Actually, any hospital, medical center, or nuclear pharmacy would be a much more attractive target from a radioactivity standpoint because these facilities routinely have hundreds or thousands of times more radioactivity on hand than does Radiac, and many of these facilities are located in Manhattan, a known target area.

Most notably, the low-level nature of Radiac's operations do not even prompt the need for an emergency action plan, required for some state licensees. Instead, minor facilities like Radiac are regulated via Table 7 of NYSDOL's Code Rule 38. Table 7 is taken from NRC's NUREG 1140: thus, NRC has directly assessed risk for storage facilities like the LLRW Facility and created recommended thresholds, which were adopted by NYSDOL and currently apply to the LLRW Facility. See NUREG 1140, pp. 75-77 and 10 CFR Part 30. NAG's petition is a collateral attack on this rulemaking standard and/or a request that the rulemaking standard be lowered to accommodate this particular facility.

First, NAG rejects the accidental threshold analyses (and their associated risk and incident calculations) of 10 CFR 30.72 and NUREG 1140. Specifically, NAG attempts to apply inapplicable risks analyses from the *Skull Valley* case. Any NAG challenge to Radiac through a challenge or requested revision (e.g., the addition of a terrorist analysis) to the applicable federal standard and guidance must be done through a federal rulemaking procedure, not via a 2.206 petition.

Second, NAG cannot use the 2.206 process to challenge the analogous accidental threshold analysis of Code Rule 38 or to attack Radiac's recently renewed license. Any NAG challenge to Radiac through a challenge to Code Rule 38 must be done through a State rulemaking procedure, not a 2.206 petition. Likewise, NAG must use the appropriate state venue to challenge a NYSDOL-issued permit. NYSDOL has twice *emphatically* dismissed NAG's allegations. See July 16, 2003 letter from Acting Director Anthony Gemano of NYSDOL to Michael Gerrard of A&P at Exhibit C; see also December 24, 2003 letter from Senior Attorney Kevin Jones of NYSDOL to Michael Gerrard of A&P at Exhibit D.⁸

Third, despite NAG's claim to the contrary, the LLRW Facility does not constitute a unique, low-level radioactive storage situation. Specifically, NAG has stated that "[i]t is a combination of being contiguous to the hazardous waste facility and being in a residential community having no buffer areas. I think the combination of those factors is unique, to our knowledge." Transcript, p. 33. NAG's knowledge is simply wrong. As you have said, NAG's

⁸ We hereby incorporate by reference this December 24, 2003 NYSDOL letter into our February 18, 2004 response to the November 4, 2003 A&P Petition. See Exhibit D. Due to A&P's failure to address Radiac on its June 18, 2003 A&P Petition to both NYSDOL and NRC, this NYSDOL letter was not provided to Radiac until this week. We note that the NYSDOL's analysis in this letter further buttresses Radiac's substantive arguments for dismissal.

Margaret Federline
February 27, 2004
Page 7

issues are "common across the entire United States with a whole variety of businesses and transportation activities." Transcript, p. 40. We agree. As detailed in our February 18, 2004 response to the November 4, 2003 A&P Petition, Radiac is no different from the many other state-licensed facilities in metropolitan areas—many of which store *more* hazardous and radioactive materials in close proximity (with less security measures) and are located in heavily populated areas (*e.g.*, nuclear pharmacies, hospitals, universities). Nor is Radiac the only LLRW Facility with a RCRA permit.

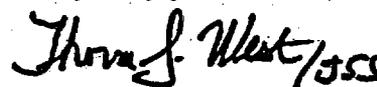
To the extent that the NRC perceives a need to address common defense and security issues at these low-level facilities, such a review must be done generically, through rulemaking, rather than on a case-by-case basis.⁹ In other words, any general application of safety requirements to these types of facilities, while not required, must be applied via a rulemaking process, not by singling out Radiac in response to NIMBY concerns.¹⁰

Conclusion and Requested Relief

Based on the foregoing, Radiac respectfully requests that the NRC summarily dismiss the November 4, 2003 A&P Petition in its entirety, with all available prejudice.

Please feel free to contact me if you have any questions.

Very truly yours,



Thomas S. West

TSW/JSS/cd (85178)
Attachments

cc: Walter Mugdan, Esq., EPA Region 2
Stephen Hammond, NYSDEC
Michelle Moore, NYSDEC
Radiac Research Corporation
Charles Cox, NRC
Martin J. Virgilio, NRC
Executive Director of Operations, NRC

⁹ Given other such facilities, a Radiac-only order is improper. The NRC should "rely on its rulemaking authority to determine issues that do not require case-by-case consideration. . . '[A] contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding.'" *Nuclear Information Resources Service v. NRC*, 969 F. 2d 1169, 1176 (D.C. Cir. 1991), *citing to Mobil Oil Exploration & Producing Southeast, Inc., v. FERC*, 498 U.S. 211, 228 (1990). Furthermore, "even if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority." *Id.* An NRC-delegated permit process should bring finality to licensee issues.

¹⁰ Reference is to "Not in my Backyard."

EXHIBIT A



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

July 31, 2003

RECEIVED
DEPARTMENT OF LABOR
DIVISION OF SAFETY
ALBANY, NY

NOV 2003

Mr. Michael B. Gerrard
Arnold & Porter
399 Park Avenue
New York, NY 10022-4690

Dear Mr. Gerrard:

I am responding to your letter dated June 18, 2003, addressed to Chairman Diaz. It has been referred to me pursuant to 10 CFR 2.206 of the Commission's regulations. You requested that the Nuclear Regulatory Commission (NRC) use its authority to protect the common defense and security under the Atomic Energy Act of 1954 to close the Radiac facility. As the basis for your request, you stated that the radioactive waste storage operation adjoining a hazardous waste transfer and storage operation at the Radiac Research Corporation in Brooklyn, New York represented a significant risk.

Our petition review board has reviewed your submittal. The staff has concluded that your submittal does not meet the criteria for consideration under 10 CFR 2.206 because your request fails to provide sufficient facts to support NRC consideration under its common defense and security authority. Rather, your request raises potential public health and safety concerns. Since Radiac Research Corporation is a New York Department of Labor (NYDOL) licensee, your concerns should be reviewed by that agency. We note that you have requested such a review in a letter dated June 18, 2003 to the Honorable Linda Angello, Commissioner, NYDOL. We also note that NYDOL responded to your health and safety concerns in a letter to you from Anthony J. Germano, Acting Director, NYDOL, dated July 16, 2003.

Based on our review, the NRC plans no further action. I would like to express my appreciation for your effort in bringing these matters to the attention of the NRC.

Sincerely,

Martin J. Virgilio, Director
Office of Nuclear Material Safety
and Safeguards

cc: Mr. Joseph Spektor, Radiac Research Corporation
Hon. Linda Angello, Commissioner, NY State Department of Labor ✓

RECEIVED
Office of the Commissioner of Labor
Albany NY

AUG 19 2003

EXHIBIT B



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

December 17, 2003

Mr. Michael B. Gerrard
Arnold & Porter
399 Park Avenue
New York, NY 10022-4690

Dear Mr. Gerrard:

Your petition dated November 4, 2003, and addressed to the Executive Director for Operations, U. S. Nuclear Regulatory Commission (NRC), has been referred to me pursuant to 10 CFR 2.206 of the Commission's regulations. You requested that the NRC use its authority to protect the common defense and security under the Atomic Energy Act of 1954 to close the Radiac facility. As the basis for your request, you stated that the radioactive waste storage operation adjoining a hazardous waste transfer and storage operation at the Radiac Research Corporation in Brooklyn, New York represented a significant risk. I would like to express my sincere appreciation for your effort in bringing these matters to the attention of the NRC.

We have considered your assertion of the "need for urgent action" a request for immediate action under our procedures for 2.206 petitions in Management Directive 8.11. Your request for immediate action has been denied because the limits on types and activity of radioactive material that Radiac is authorized to possess are below the levels of concern.

As provided by Section 2.206, we will take action on your request within a reasonable time. I have assigned Charles Cox to be the petition manager for your petition. Mr. Cox can be reached at 301-415-6755. He has contacted you to arrange a meeting for you with our Petition Review Board and he will continue to keep you informed of the staff's review of your request. Your petition is being reviewed by the Division of Industrial and Medical Nuclear Safety within the Office of Nuclear Material Safety and Safeguards. I have enclosed for your information a copy of the notice that is being filed with the Office of the Federal Register for publication. I have also enclosed for your information a copy of Management Directive 8.11 "Review Process for 10 CFR 2.206 Petitions," and the associated brochure NUREG/BR-0200, "Public Petition Process," prepared by the NRC Office of Public Affairs.

Sincerely,

Martin J. Virgilio, Director
Office of Nuclear Material Safety
and Safeguards

Enclosures:

1. Federal Register Notice
2. Management Directive 8.11 (ML0113807270)
3. NUREG/BR-0200

cc: Mr. Joseph Spektor, Radiac Research
Corporation
Hon. Linda Angello, Commissioner
NY State Department of Labor

7590-01-P

U.S. NUCLEAR REGULATORY COMMISSION**RADIAC RESEARCH CORPORATION****BROOKLYN, NEW YORK****RECEIPT OF REQUEST FOR ACTION UNDER 10 CFR 2.206**

Notice is hereby given that by petition dated November 3, 2003, Mr. Michael B. Gerrard, representing Neighbors Against Garbage, et al. (petitioners), have requested that the Nuclear Regulatory Commission (NRC) take action with regard to Radiac Research Corporation Brooklyn, New York, a licensee with the New York State Department of Labor.

The petitioners requested that the NRC use its authority to protect the common defense and security under the Atomic Energy Act of 1954 to close the Radiac facility. As the basis for the request, the petitioner stated that the radioactive waste storage operation adjoining a hazardous waste transfer and storage operation at the Radiac Research Corporation in Brooklyn, New York represented a significant risk.

The request is being addressed pursuant to 10 CFR 2.206 of the Commission's regulations. The request has been referred to the Director of the Office of Nuclear Material Safety and Safeguards. As provided by Section 2.206, appropriate action will be taken on this petition within a reasonable time. A copy of the petition is available for inspection in the Agencywide Documents Access and Management System (ADAMS), which provides text and

Image files of NRC's public documents. These documents may be accessed through the NRC's Public Electronic Reading Room on the Internet at <http://www.nrc.gov/reading-rm/adams.html>. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1-800-397-4209, 301-415-4737 or by email to pdrc@nrc.gov.

FOR THE U.S. NUCLEAR REGULATORY COMMISSION



Martin J. Virgilio, Director
Office of Nuclear Material Safety
and Safeguards

Dated at Rockville, Maryland

this 17th day of December, 2003.

U.S. NUCLEAR REGULATORY COMMISSION**DIRECTIVE TRANSMITTAL**

TN: DT-00-20

To: NRC Management Directives Custodians

Subject: Transmittal of Directive 8.11, "Review Process for 10 CFR 2.206 Petitions"

Purpose: Directive and Handbook 8.11 are being revised to address stakeholder feedback and to improve clarity and make the handbook easier to use. There are three major changes to the handbook: (1) the addition of an opportunity for petitioners to address the Petition Review Board after it discusses the petition; (2) the deletion of criteria for technical meetings with the petitioners; and (3) the addition of a requirement to request comments from the petitioner(s) and affected licensee(s) on the proposed director's decision, with associated steps to resolve, and document the resolution of, those comments.

Office and Division of Origin: Office of Nuclear Reactor Regulation

Contact: Andrew J. Kugler, (301) 415-2828 or
Donna Skay, (301) 415-1322

Date Approved: July 1, 1999 (Revised: October 25, 2000)

Volume: 8 Licensee Oversight Programs

Directive: 8.11 Review Process for 10 CFR 2.206 Petitions

Availability: Rules and Directives Branch
Office of Administration
David L. Meyer, (301) 415-7162 or
Doris Mendiola, (301) 415-6297

Enclosure 2

EXHIBIT C



**STATE OF NEW YORK
DEPARTMENT OF LABOR
DIVISION OF SAFETY AND HEALTH**
Building 12, Room 522
Governor W. Averell Harriman State Office Building Campus
Albany, New York 12240

July 16, 2003

Mr. Michael B. Gerrard
Arnold & Porter
399 Park Avenue
New York, New York 10022-4690

Re: Radiac Research Corporation (License No. 1944 -1879)

Dear Mr. Gerrard:

Commissioner Angello has asked me to respond to your letter of June 18, 2003, regarding the recent renewal of Radiac Research Corporation's (Radiac) radioactive materials license. In it, you request that the Department of Labor (Department) reconsider its decision to renew Radiac's license, and express your belief that significant risks to the public health and safety were not considered by the Department during the renewal process. At the heart of your concerns appears to lie the assumption that the release of radioactive material from Radiac's facility would cause serious harm to members of the public who live, work, and attend school in the surrounding neighborhood. Fortunately, this is not the case.

Under Industrial Code Rule 38 (12 NYCRR Part 38, Section 38.6), the Department requires licensees possessing more than specified quantities of radioactive materials to develop plans and procedures for responding to, and mitigating, off-site releases. This requirement is based on an analysis conducted by the United States Nuclear Regulatory Commission (NRC) in 1988, and published as a final report in NUREG-1140 "A Regulatory Analysis on Emergency Preparedness for Fuel Cycle and Other Radioactive Material Licensees." Using conservative assumptions, the NRC's analysis determined, for each nuclide of interest, what quantity of material on-site could result in a maximum off-site Dose Equivalent to a member of the public of 1 rem, i.e. the lower limit of EPA's protective action guides for responding to radiological emergencies. These quantities, which are used as screening levels to determine the need for an emergency response plan, are listed in Table 7 of Industrial Code Rule 38 (Section 38.41, Table 7).

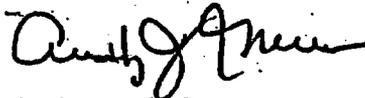
For packaged mixed radioactive waste, such as the bulk of Radiac's inventory, the screening level is 10,000 curies. The corresponding possession limit on Radiac's license is only 50 curies. Radiac has a separate possession limit for tritium (hydrogen-3) of 100 curies. The screening level for tritium is 20,000 curies. As can be readily seen, the maximum amount of these materials which Radiac could possess under its license is at least two orders of magnitude below the level at which an off-site release would begin to be considered as posing a risk to members of the public. As an additional precaution against Radiac obtaining a potentially hazardous quantity of a particular nuclide, Condition 16 of the license further restricts possession of any single material to the limits of Table 7.

With regard to special nuclear material stored at Radiac, the license limits possession to 350 grams of uranium-235, 200 grams of uranium-233, or 200 grams of plutonium (see §38.3 (a) (101)). These quantities are not "just below" the critical mass, as your letter states, but are actually well below the quantities required to form a critical mass. There is absolutely no possibility of a criticality occurring at Radiac's facility.

From these considerations it is clear that should a catastrophic event occur at Radiac's facility, any resulting radiological release would have no appreciable health and safety consequences. The Department's decision to renew Radiac's license was made in conformance with all requirements of the applicable regulations, and is fully protective of public health and safety with respect to radiation hazards. Consequently, no further review of the Department's actions in this matter is warranted.

I trust that this answer is responsive to your inquiry. If you have any questions, please contact Kevin E. Jones in our Counsel's Office at (518) 457-4380.

Sincerely,



Anthony J. Germano
Acting Director

cc: Ms. Carolyn W. Merritt, Chairman, U.S. Chemical Safety and Hazard
Abatement Board, 2175 K Street NW, Suite 400, Washington D.C. 20037-1809
Mr. Arthur Green, Radiac Research Corporation
Mr. George Meyer, Chief, RCRA Compliance Division, U.S. EPA
290 Broadway, New York, New York 10007
Mr. Paul Counterman, Chief, Enforcement and Compliance Division, DEC
625 Broadway, Albany, New York 12233
Mr. Frank Frodyma, Deputy Director, OSHA
Mr. Nils J. Diaz, Chairman, NRC, Washington D.C.

EXHIBIT D



**STATE OF NEW YORK
DEPARTMENT OF LABOR
Counsel's Office
Room 509, Building 12
Harriman State Office Building Campus
Albany, New York 12240**

December 24, 2003

**Michael B. Gerrard
Arnold & Porter
399 Park Avenue
New York, New York 10022-4690**

**Re: Radiac Research Corporation (License No.
1944 -1879)**

Dear Mr. Gerrard:

This is in response to your letter of July 30, 2003, which responds to the Commissioner's letter of July 16, 2003.

Your initial observation, that the Department does not dispute your claims regarding the likelihood of an accident at the Radiac Research Corporation (Radiac) facility, misconstrues the Commissioner's July 16, 2003 letter. The likelihood of a radio-nuclide release at this facility was not discussed because the health consequences of such a release, at least as they relate to radiation hazards, would be minor, irrespective of the likelihood of such an accident.

The Department does not concur in your view that a catastrophic event at this facility is likely to occur. In the forty plus years that this Department has been licensing such facilities, no such incident has ever occurred in this State, nor in any other state, so far as we know. In our view, the likelihood of an accident at this facility is low, and the potential for individuals to suffer significant off-site radiation doses is virtually nonexistent. The reference to NUREG-1140 methodology in the previous letter was only intended to illustrate this latter point. The trigger levels in Table 7 provide a standard for requiring an applicant to develop an off-site emergency response plan. They are not relevant to the question of whether or not a license will be issued. The criteria for granting a license are clearly spelled out in Industrial Code Rule 38 (12 NYCRR 38).

In your letter, you delve deeply into the potential effects of a release of a number of radio-nuclides, all of which are technically permissible under the license but which are in reality an insignificant portion (microcurie to millicurie quantities only) of the waste stream which passes through this facility, including: iodine -125 and iodine -131 (both of which have short half-lives and so will normally be held for decay by the generator), lead - 210, curium - 245, neptunium - 237, actinium - 227, uranium - 233, uranium - 235, and plutonium. The entire

inventory of radioactive material currently on hand at the facility amounts to less than 30 curies, the bulk of which (more than 95% by activity) is comprised of tritium and carbon-14. Thus, your concerns in this area appear to be misplaced.

You also raise the issue of alpha emitters getting lodged in the lungs of an exposure victim, especially a child, and suggest that we did not adequately take into account the danger of such exposure. In fact, this exposure pathway (inhalation) is assumed to account for the largest off-site doses under NUREG-1140 methodology, and is therefore already built-in to the Table 7 values. Furthermore, you mention the possibility of a structure fire at the adjoining toxic waste facility, which is not subject to regulation by the Department of Labor. Under such a scenario, a fire would have to start and reach such an intensity as to breach the barrier between the two facilities, then reach the radio-nuclides' storage containers, and then affect the containers so as to allow a partial release of their contents. While certainly a possibility, the probability of such an occurrence again appears to be relatively insignificant.

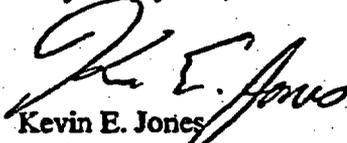
In order to intake an alpha emitter via the inhalation pathway, an individual would of necessity be simultaneously exposed to the smoke plume from the fire. The smoke itself constitutes an immediate hazard to life and health. As compared to the hazard of the smoke itself, any additional hazard attributable to radionuclides from Radiac's inventory, that later become embodied in the plume, would most likely be inconsequential.

The off-site doses calculated in the NUREG scenario assume that the receptor remains directly in the smoke plume for 30 minutes, making no effort to move out of the smoke. Due to the conservative nature of this underlying assumption, we are confident that any radiation doses received in an actual radionuclide release, either by children or adults, would be far lower than those projected by the table. I also must stress that such analysis is only relevant to the issue of whether an off-site emergency response plan is required, not whether to grant a license, or to renew an existing one.

In summary, Radiac has met all the requirements for the issuance of Department of Labor Radioactive Materials License. It has a good compliance history, and remains in compliance with the applicable provisions of the code and the conditions of its license. You have raised no facts that controvert this. Consequently, the Department lacks any basis upon which to take action against this facility's license.

Accordingly, your request to close this facility is denied, and this matter closed.

Very truly yours,


Kevin E. Jones
Senior Attorney

cc: Nils J. Diaz, Chairman, NRC