January 11, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of	)	
	)	
SHIELDALLOY METALLURGICAL CORPORATION	)	Docket No. 40-8948-MLA
	)	
(Request for Material License Amendment)	)	

NRC STAFF NOTICE OF INTENT TO PARTICIPATE AND NRC STAFF RESPONSE TO REQUEST FOR HEARING FILED BY MICHAEL BRUCE GARDNER

INTRODUCTION

On November 24, 1998, the NRC published in the *Federal Register* a notice of receipt of an application by Shieldalloy Metallurgical Corporation (SMC) to amend Source Material License No. SUA-1507 to allow SMC to relocate slag/soil from one on-site location to another on-site location. The proposed relocation action is more fully described in the July 24, 1998 "Environmental Report for the Proposed Action to Relocate Off-site Slag/Soil at the Shieldalloy Metallurgical Plant in Cambridge, Ohio." That Environmental Report (hereinafter "ER") and the September 14, 1998 Application (hereinafter "Application") to Amend the Source Material license are attached to this filing.

The notice provided that any person whose interest may be affected by this proceeding may file a request for a hearing, in accordance with 10 C.F.R. § 2.1205(d)[1] within thirty days of publication of the notice.

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[1] Paragraph (c) of 10 C.F.R. § 2.1205 pertains to noticing Part 50 license amendments.

By letter dated December 21, 1998, Michael Bruce Gardner, Esq., filed a request for a hearing to remedy on behalf of unidentified "clients" to remedy unidentified harms. That letter was sent to the Commission's Secretary and served by the Secretary upon the Chief Administrative Judge on December 29, 1998.

In accordance with 10 C.F.R. § 2.1213, the Staff provides this notice of its intent to participate in this proceeding. In addition, as detailed below, the Staff opposes the petition to intervene as neither Mr. Gardner nor his unidentified clients have met the requirements for leave to intervene in this proceeding under the Commission's rules and precedent.

BACKGROUND

The petition by Mr. Gardner is a further step in a long history, a precis of which is helpful in understanding the present situation. Property owners and users in the area of Cambridge, Ohio, alleged that their soil was contaminated with radioactive material. Cyrus Foote Mineral Company (CFMC) excavated soil from the area and stored it on site, which is now the Shieldalloy site. Local citizens sued CFMC. Settlement was reached which involved the local residents, the State of Ohio, and the United States District Court for the Southern District of Ohio, CA 2:94-CV-1069. It is that soil which was gathered off site but which now is located on Shieldalloy's site that is the subject of to requested license amendment. Mr. Gardner was formerly associated with counsel for the plaintiffs in the federal suit. Although he represented no members of the class of plaintiffs in the federal action, he filed papers therein. The Magistrate and the District Court Judge addressed Mr. Gardner's role in the soil cleanup and settlement case and found no merit to his role. The Magistrate's Report And Recommendation, dated December 5, 1996, and the District

Judge's Order dated December 31, 1998, in *Strawsburg v. Metallurgic, Inc.*, USDCSD Ohio, Eastern Division, unreported, CA-2:94-CV-1069 are attached hereto for background and clarification. Much of this information is also contained in the ER.

In September 1998, Shieldalloy found itself with a site at Cambridge, Ohio which contained two piles of sludge/soil. On September 14, 1998, they applied to the NRC for an amendment to their materials license to move soil previously collected off site and stored on site to another location on site See Application at 1 and ER at 1 and 4, *inter alia*. The amendment request is very, very narrow and specific. It concerns only moving one pile of soil stored on site to another location on site. That is all the proposed amendment requests. We now turn our attention to the legal requirements applicable to Mr. Gardner's requests for a hearing in this case.

DISCUSSION OF APPLICABLE LAW

I. Legal Requirements for Standing and Participation in an NRC Proceeding

A. Standing

Pursuant to 10 C.F.R. § 2.1205, interested persons may request a hearing on the grant of an amendment to a source or byproduct materials license under the Commission's informal hearing procedures set forth in 10 C.F.R. Part 2, Subpart L. A hearing request is considered timely if filed within 30 days of the notice of opportunity for hearing. 10 C.F.R. § 2.1205(k).

It is fundamental that any person who wishes to request a hearing or to intervene in a Commission proceeding must demonstrate that he or she has standing to do so. Section 189a(l) of the Atomic Energy Act ("AEA"), 42 U.S.C. § 2239(a), provides that:

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

Id. (emphasis added).

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

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

Pursuant to 10 C.F.R. § 2.1205(h), in ruling on any request for hearing filed under 10 C.F.R. § 2.1205(d), the Presiding Officer is to determine "that the specified areas of concern are germane to the subject matter of the proceeding and that the petition is timely." The rule further provides as follows:

> The presiding officer also shall determine that the requestor meets the judicial standards for standing and shall consider, among other factors -
>
> (1) The nature of the requestor's right under the [AEA] to be made a party to the proceeding;
>
> (2) The nature and extent of the requestor's property, financial, or other interest in the proceeding; and
>
> (3) The possible effect of any order that may be entered in the proceeding upon the requestor's interest.

In order to determine whether a petitioner has met these standards and is entitled to a hearing as a matter of right under Section 189a of the Act, the Commission applies contemporaneous judicial concepts of standing. *See, e.g., Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992), *review denied sub nom. Environmental & Resources Conservation Organization v. NRC,* 996 F.2d 1224 (9th Cir. 1993); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983); *Envirocare of Utah, Inc.* (Byproduct Material Waste Disposal License), LBP-92-8, 35 NRC 167, 172 (1992).

The United States Supreme Court has stated that the "irreducible constitutional minimum" requirements for standing are that the litigant suffer an "injury-in-fact" which is "concrete and particularized and . . . actual or imminent, not conjectural or hypothetical," that there is a causal connection between the alleged injury and the action complained of, and that the injury will be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. _____, 117 S. Ct. 1154, 1163 (1997).[2] *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, (1991). In addition to this constitutional aspect of standing, there are "prudential" (*i.e.*, judicially self-imposed) standing requirements, one of which is that the litigant's asserted interests must arguably fall within the "zone of interests" of the governing

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[2] In other words, the petitioner must establish (a) that he personally has suffered or will suffer a "distinct and palpable" harm that constitutes injury in fact; (b) that the injury can fairly be traced to the challenged action; and (c) that the injury is likely to be redressed by a favorable decision in the proceeding. *Dellums v. NRC,* 863 F.2d 968, 971 (D.C. Cir. 1988); *Vogtle, supra,* 38 NRC at 32; *Babcock and Wilcox, supra,* LBP-93-4, 37 NRC at 81; *Envirocare, supra,* 35 NRC at 173. An alleged injury could be redressed in a licensing proceeding since a presiding officer has the power to approve, deny or condition any licensing action that comes under his or her jurisdiction. *See e.g., Sequoyah Fuels Corp.* LBP-96-12, 43 NRC 290, 206 (1996).

law. *See Bennett*, 117 S. Ct. at 1167. *See also Port of Astoria v. Hodel*, 595 F. 2d 467, 474 (9th Cir. 1979).

The Commission applies constitutional and prudential aspects of the standing doctrine. *See, e.g., International Uranium,* CLI-98-23, 48 NRC ___, slip. op. at 3-8 (November 24, 1998) (economic harm unrelated to potential radiological or environmental effects is not sufficient for "injury-in-fact" and "zone-of-interests" tests)[3]; *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993) (to show an interest in the proceeding sufficient to establish standing, a petitioner must show that the proposed action will cause "injury in fact" to its interest and that its interest is arguably within the "zone of interests" protected by the statutes governing the proceeding); *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266 (1991) (*citing Three Mile Island, supra*, 18 NRC at 332).

A generalized grievance concerning enforcement of regulatory requirements is not sufficient for particularizing a harm to support standing. *See Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-81-25, 18 NRC 327,333 (1983), *citing, Transuclear Inc.,* CLI-77-24, 6 NRC 525, 531 (1977) (a "generalized grievance" shared in

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[3] Purely economic interests (*i.e.*, interests not related to harm stemming from adverse environmental impacts of a proposed action) are not within the zone of interest protected by the AEA or the NEPA and are not sufficient to confer standing. *International Uranium (USA) Corp.,* CLI-98-23, *supra* at 3-8; *Quivira Mining Co.,* CLI-98-11, 48 NRC 1, 8-10 (1998). *See also Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992); *Public Service Co. of New Hampshire* (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1447 (1984). *Accord Churchill Truck Lines, Inc. v. United States*, 533 F. 2d 411, 416 (8th Cir. 1976) (NEPA not designed to prevent loss of profits); *Sabine River Authority v. U.S. Department of Interior,* 951 F.2d 669, 674 (5th Cir.), *cert. denied*, 506 U.S. 823, 113 S. Ct. 75, (1992) (geographic nexus to the project required).

substantially equal measure by all or a large class of citizens will not result in distinct and palpable harm to support standing). Such interests would be indistinguishable from those of general concerns about the integrity of NRC actions.

Requirements for standing have been applied to requests for hearing in numerous informal Commission proceedings held under Subpart L. *See, e.g., Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54, 66-67 (1994); *Babcock and Wilcox Co.* (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-94-4, 39 NRC 47, 49 (1994); *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 80-81 (1993); *Umetco Minerals Corp.* (Source Materials License No. SUA-1358), LBP-92-20, 36 NRC 112, 115 *(1992); Sequoyah Fuels Corp.* (Source Material License No. SUB-1010), LBP-91-5, 33 NRC 163, 164-65 (1991); *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 312-13 (1989).

A petitioner must have a "real stake" in the outcome of the proceeding to establish injury-in-fact for standing. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48, *aff'd*, ALAB-549, 9 NRC 644 (1979). While the petitioner's stake need not be a "substantial" one, it must be "actual," "direct" or "genuine." *Id.* at 448. A mere academic interest in the outcome of a proceeding or an interest in the litigation is insufficient to confer standing; the requester must allege some injury that will occur as a result of the action taken. *Puget Sound Power and Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 983 (1982), *citing Allied General Nuclear Services* (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC

420, 422 (1976); *Id.* LBP-82-26, 15 NRC 742, 743 (1982). Similarly, an abstract, hypothetical injury is insufficient to establish standing to intervene. *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 252 (1991), *aff'd in part on other grounds,* CLI-92-11, 36 NRC 47 (1992).

A person may obtain a hearing or intervene as of right on his own behalf but not on behalf of other persons whom he has not been authorized to represent. *See, e.g., Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (individual could not represent plant workers without their express authorization); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977) (mother could not represent son attending university unless he is a minor or under legal disability); *Combustion Engineering, Inc.* (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 145 (1989) (legislator lacks standing to intervene on behalf of his constituents).

An organization may meet the injury-in-fact test either (1) by showing an effect upon its organizational interests, or (2) by showing that at least one of its members would suffer injury as a result of the challenged action, sufficient to confer upon it "derivative" or "representational" standing. *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646-47 (1979), *aff'g* LBP-79-10, 9 NRC 439, 447-48 (1979). An organization seeking to intervene in its own right must demonstrate a palpable injury in fact to its organizational interests that is within the zone of interests protected by the AEA or NEPA. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-30 1991). Where the organization relies upon the

interests of its members to confer standing upon it, the organization must show that at least one member (with standing in an individual capacity) has authorized the organization to represent his or her interests in the proceeding. *Id*; Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 393-94, 396 (1979); *Babcock and Wilcox Co., supra,* LBP-94-4, 39 NRC at 50. Finally, an individual who files a request for hearing on behalf of an organization must show that he or she has been expressly authorized by the organization to represent its interests in the proceeding. *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 583 (1978); *see also Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 92 (1990).[4]

The question of whether proximity to a nuclear facility (or a site at which the possession of nuclear materials is authorized) is sufficient to confer standing upon an individual or entity has been addressed in numerous Commission decisions. While residence within 50 miles of a nuclear power reactor often has been sufficient to confer standing in construction permit or operating license proceedings, such distance may not necessarily confer standing in other types of proceedings. In reactor license amendment proceedings and materials license proceedings, a petitioner must demonstrate that the risk of injury resulting from the contemplated action extends sufficiently far from the facility so as to have the potential to affect his interests.[5] In adopting Subpart L, the Commission rejected a 50-mile

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[4] It has also been held that the alleged injury-in-fact to the member must fall within the purposes of the organization. *Curators of the University of Missouri (TRUMP-S* Project), LBP-90-18, 31 NRC 559, 565 (1990).

[5] *See, e.g., Boston Edison Co.* (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC (continued...)

geographic proximity rule for materials licensing and rejected a presumption that persons who reside and work outside a five-mile radius of a site would not have standing. The Commission stated, "[t]he standing of a petitioner in each case should be determined based upon the circumstances of that case as they relate to the factors set forth in [10 C.F.R. § 2.1205(g)]." Statement of Consideration, "Informal Hearing Procedures for Materials Licensing Adjudications," 54 Fed. Reg. 8269 (Feb. 28, 1989); *see also, id.,* Proposed Rule, 52 Fed. Reg. 20089, 20090 (May 29, 1987).

In cases without obvious offsite implications, a petitioner must allege some specific "injury in fact" will result from the action taken. *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2, CLI-89-21, 30 NRC 325, 329-30 (1980). Petitioners need not set forth all of their concerns until they have been given access to a hearing file. *Babcock & Wilcox,* LBP-94-4, 39 NRC 47, 52 (1994).

B. Areas of Concern

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[5](...continued)
97, 99 (1985), *aff'd on other grounds,* ALAB-816, 22 NRC 461 (1985) (risk of injury from proposed spent fuel pool expansion was not demonstrated where petitioner resided 43 miles from the facility); *c.f. Sequoyah Fuels Corp., supra,* LBP-94-5, 39 NRC at 67-91 (residence adjacent to contaminated fuel fabrication facility might not be sufficient to confer standing if the proposed action has no potential to affect the requester's interests); *Babcock and Wikox Co., supra,* LBP-94-4, 39 NRC at 51-52 (standing and injury-in-fact can be inferred in some cases by proximity to the site, but a greater demonstration of injury may be required where the activity has no obvious offsite implications); *Babcock and Wilcox, supra,* LBP-93-4, 37 NRC at 83-84 and n.28 (petitioners' residences within one-eighth of a mile to approximately two miles from a fuel fabrication facility were insufficient to confer standing in a decommissioning proceeding, absent "some evidence of a causal link between the distance they reside from the facility and injury to their legitimate interests"); *see also, Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 44-45 (1990) (person who regularly commutes past the entrance to a nuclear facility once or twice a week possessed the requisite interest for standing).

Pursuant to 10 C.F.R. § 2.1205(h), areas of concern identified by a petitioner must be "germane to the subject matter of the proceeding." States and municipalities seeking to participate under 10 C.F.R. § 2.1211(b) similarly "must state with reasonable specificity [their] areas of concern about the licensing action that is the subject matter of the request. 10 C.F.R. § 2.1211(b).

The threshold showing at the intervention stage of a Subpart L proceeding is low, but must be specific enough to allow the presiding officer to ascertain whether or not the matter sought to be litigated is relevant to the subject matter of the proceeding. *Sequoyah Fuels Corp.*, LBP-94-39, 40 NRC 314, 316 (1994); "Informal Hearing Procedures for Materials Licensing Adjudication, 54 Fed Reg. 8269, 8273 (February 28, 1989) (inequitable to require intervenor to file written presentations setting forth all of its concerns without access to the hearing file).[6] Only those concerns which fall within the scope of the proposed action set forth in the *Federal Register* notice of opportunity for hearing may be admitted for hearing. *See e.g., Commonwealth Edison Co.*(Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980).[7]

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[6] Pursuant to 10 C.F.R. § 2.1233(c), after a hearing is granted and the hearing file is made available in accordance with § 2.1231, written presentations by intervenors must describe in detail any deficiency or omission in the license application, why any particular portion is deficient or why the omission is material, and what relief is sought.

[7] In *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974), it was held that a contention must be rejected where:

(1) it constitutes an attack on applicable statutory requirements;

(2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;

(continued...)

When proffering concerns to be admitted in a proceeding, an intervention petitioner may rely on Staff guidance to allege that an application is deficient, but guidance cannot prescribe requirements. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-95-41, 34 NRC 332, 338-39, 347, 354 (1991); *Curators of University of Missouri*, CLI-95-1, 41 NRC 71, 98, 100 (1995). In addition, because licensing boards and presiding officers have no authority to direct the Staff in the performance of its safety reviews, *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516 (1980); *Recoil International Corp.* (Rocketdyne Division), ALAB-925, 30 NRC 709, 721-11 (1989), *aff'd,* CLI-90-5, 31 NRC 337 (1980), and the applicant/licensee has the burden of proof in this proceeding, the adequacy of the Staff's review is not determinative of whether an action should be approved. *Curators of the University of Missouri,* CLI-95-1, 41 NRC at 121.

SCOPE OF THE PROPOSED LICENSE AMENDMENT ACTION

Shieldalloy requests an amendment to permit it to move approximately 2,540 metric tons of slag/soil (ER at 5), 2294 cubic meters (ER at 8) some 156.25 meters (ER at 4 w/scale) from the East Slag Pile to the West Slag Pile, both of which piles are presently located on site (ER at 4). The contemplated action does not concern soil/slag presently

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[7](...continued)

(3) is nothing more than a generalization regarding the petitioner's view of what applicable policies ought to be;

(4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or

(5) it seeks to raise an issue which is not concrete or litigable.

A merits determination is not required at the pleading stage. *Id.* at 20.

located off site. It does not concern off site disbursement of radioactive material from the operation of the facility. It is a very narrow and specific license amendment request.

THE PETITION TO INTERVENE

The petition totally fails to comply with the Commission's requirements set forth in 10 CFR § 2.1205 (e), *supra* at 4, in that no person is identified as having an interest that could potentially be adversely affected by moving slag/soil from one location on site to another location on site.

The petition alleges that unknown persons participated off-site disbursement of radioactive slag.(Petition at 1, ¶ No. 2). The contemplated licensing action is unrelated to the petition's allegation of interest - *i.e.*, present or past distribution of radio active slag off-site.

The petition asserts that unknown "clients" know of off site radioactive slag. Petition at 1. No person is identified. No location for this "radioactive slag" is identified. What interest is or would be harmed by this slag is not specified. The licensing action requested does not concern off-site slag.

No concern expressed in Mr. Gardner's letter is or could be germane to the amendment request, *supra* at 5. The letter-petition does not addresses the subject matter of the Shieldalloy request for a license amendment.

The petition states that unnamed persons possess off site radioactive slag. These persons are not identified. Their location is not identified. Their "injury in fact" is not identified. Possession of slag off site is unrelated to the license amendment request.

The petition asserts a violation of Ohio law. This is a matter for the State of Ohio and further, there is no specification by counsel as to how the movement of slag from one place on site to another place on site violates Ohio law- or any other law.

The petition asserts on page 3: "Increased costs for proper disposal of off-site radioactive slag unaccounted for in the license amendment." This by its own terms does not relate to the contemplated licensing amendment request, and thus cannot confer standing to intervene. There are other problems with this assertion.

An intervenor, must suffer an "injury in fact" which is "concrete. . . not conjectural. . . ." *Bennett v. Spear, supra at 5.* Here, the petition pleads an unknown person or persons suffering unknown injuries from causes not related to the requested action. This is the antithesis of standing to intervene.

In addition to the foregoing, Mr. Gardner must also demonstrate that he is authorized to bring the petition on behalf of the prospective intervenor, *Turkey Point, supra* at 9 and cases following. There is no such demonstration by Mr. Gardner.

The petitioner must also demonstrate that the risk of injury extends geographically so as to affect his interest, *supra* at 10, footnote 8. Here not only is the risk not identified but the location of the unknown persons who are alleged to be at risk is unknown, and the relation of that unknown person's risk to the proposed license amendment is also unknown.

In summary, no concern protected by the AEA has been identified in Mr. Gardner's letter-petition with respect to the movement of soil from on location on site to another location on site, and no injury in fact which could result to a person by the movement of soil on site

has been identified. Absent such a demonstration of a real concern and a real resulting harm, the petition must be denied.

CONCLUSION

What is before the Presiding Officer is a petition by an attorney representing unknown persons, whose unknown interests may be adversely affected by unknown causes not related to the action requested in the license amendment. The petition fails to identify any single person who has an identifiable interest that may be adversely affected by moving slag from one place on the site to another place on the site. Therefore, the petitioners must be denied intervention status.

Respectfully Submitted

Charles A. Barth
Attorney for the NRC Staff

Dated at Rockville, Maryland
this 11th day of January 1999

SHIELDALLOY METALLURGICAL CORPORATION

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TELEPHONE (609) 692-4200

September 14, 1998

Mr. John W. N. Hickey, Chief
Low-Level Waste and Decommissioning Projects Branch
Division of Waste Management
Office of Nuclear Material Safety and Safeguards
United States Nuclear Regulatory Commission
Washington, D.C. 20555-0001

RE: Application to Amend Source Material License SMB-1507

Dear Mr. Hickey:

Shieldalloy Metallurgical Corporation (SMC) requests an amendment to Source Material License No. SMB-1507 to allow for the receipt and placement of off-site slag/soil from the temporary staging area onsite to the West Slag Pile as described in the enclosed ENVIRONMENTAL REPORT For the Proposed Action to Relocate Off-site Slag/Soil at the Shieldalloy Metallurgical Corporation Plant in Cambridge, Ohio prepared for Cyprus Foote Mineral Company by Auxier & Associates, Inc. This license amendment has been discussed with the NRC and OEPA/ODH during meetings at NRC on March 27, 1998 and at OEPA on April 30, 1998.

In accordance with the Memorandum of Understanding Settlement agreed to by Cyprus Foote and class member residents of Guernsey County, Ohio (USDC 1996) and the Administrative Order issued by the Ohio Department of Health (ODH 1997), slag from a number of residential properties in the Guernsey County area has been removed and temporarily staged at the Shieldalloy Metallurgical Corporation (SMC) facility. As discussed in the Permanent Injunction Consent Order (PICO) between SMC and the State of Ohio in addition to the Draft Environmental Impact Statement (DEIS) Decommissioning of the Shieldalloy Metallurgical Corporation Cambridge, Ohio, Facility (Docket No. 040-8948 License No. SMB-1507, USNRC July 1996), the slag staged onsite is proposed to be added to the West Slag Pile prior to further decommissioning activities. This offsite slag/soil addition will be placed in a manner that ensures a separable and retrievable condition until the Final Environmental Impact Statement and Decommissioning Plan are approved.

This requested action is consistent with the alternatives evaluated in the RI/FS, DEIS and Decision Document prepared for the SMC site. As noted in the draft Major Actions and Decisions Decommissioning of Shieldalloy Cambridge. Ohio Facility list, resulting from the March 27, 1998

meeting with NRC, this license amendment is not on the critical path for decommissioning, and does not influence major decisions, but has been required for completeness in the process. Rather than delay the license amendment until submission of the decommissioning license amendment, the transfer is requested now to make progress toward decommissioning and prepare for other remediation activities at the site.

Please contact me at 609-692-4200 extension 230 if you have any questions.

Sincerely,

James P. Valenti

James P. Valenti

Radiation Safety Officer

cc: Anthony R. Zecca
Thomas A. Matthews
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James Webb-ODH
John House-USNRC-Region III
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ENVIRONMENTAL REPORT

For the Proposed Action to Relocate Off-Site Slag/Soil at the Shieldalloy Metallurgical Corporation Plant in Cambridge, Ohio

Prepared for
Cyprus Foote Mineral Company
Kings Mountain, North Carolina

July 24, 1998

Prepared by
Auxier & Associates, Inc.
10317 Technology Drive, Suite 1
Knoxville, Tennessee 37932

TABLE OF CONTENTS

LIST OF TABLES

LIST OF FIGURES

1.0 INTRODUCTION

This environmental report has been prepared to support a proposed action to relocate slag/soil from off-site locations from the staging area to the west slag pile at the Shieldalloy Metallurgical Corporation (SMC) plant in Cambridge, Ohio. This report addresses the requirements stipulated in Title 10 Code of Federal Regulations Part 51 (10 CFR 51), at §51.45, to describe the proposed action, the environment affected by the action, and the purpose of the action.

The SMC plant is an operating ferroalloy production facility that opened in 1953 (Figure 1). The plant was owned and operated by Foote Mineral Company (FMC) until its sale to SMC in 1987. Cyprus Minerals Company purchased FMC from FMC's parent company, Newmont Mining Corporation, in 1988, one year after Newmont had sold the Cambridge plant to SMC. Following the sale of FMC to Cyprus Minerals Company, FMC's name was changed to Cyprus Foote Mineral Company ("Cyprus Foote").

All of the alloy production processes conducted at the Cambridge plant resulted in the production of slag. The U.S. Nuclear Regulatory Commission (NRC) issued a license (Number SMB-1507) to the operators of the Cambridge plant to possess source material contained in some of the raw materials from which vanadium was extracted. Based on production process information, some of the slag produced at the Cambridge plant contained low levels of naturally occurring radioactivity from the alloy feed materials. Some of the slag from the plant apparently was sold or given away for off-site use as fill material, primarily in the 1980s.

A 1994 study by the NRC concluded that the slag from the Cambridge plant does not pose an immediate health and safety risk to residents because of its physical nature and the low levels of radiation involved (NRC 1994). In December 1996, the United States District Court (USDC) for the Southern District of Ohio issued its approval of the Memorandum of Understanding of Settlement agreed to by Cyprus Foote and class member residents of Guernsey County, Ohio (USDC 1996). The settlement resolved a class action lawsuit that had been filed on behalf of residents who owned or lived on property alleged to contain slag produced at the Cambridge plant.

Pursuant to the settlement agreement, Cyprus Foote excavated and removed slag from a number of residential properties in the Guernsey County, Ohio area during the summer of 1997. This was conducted in accordance with an Administrative Order, issued by the Ohio Department of Health (ODH) in July 1997 (ODH 1997). The excavated material includes slag and a significant

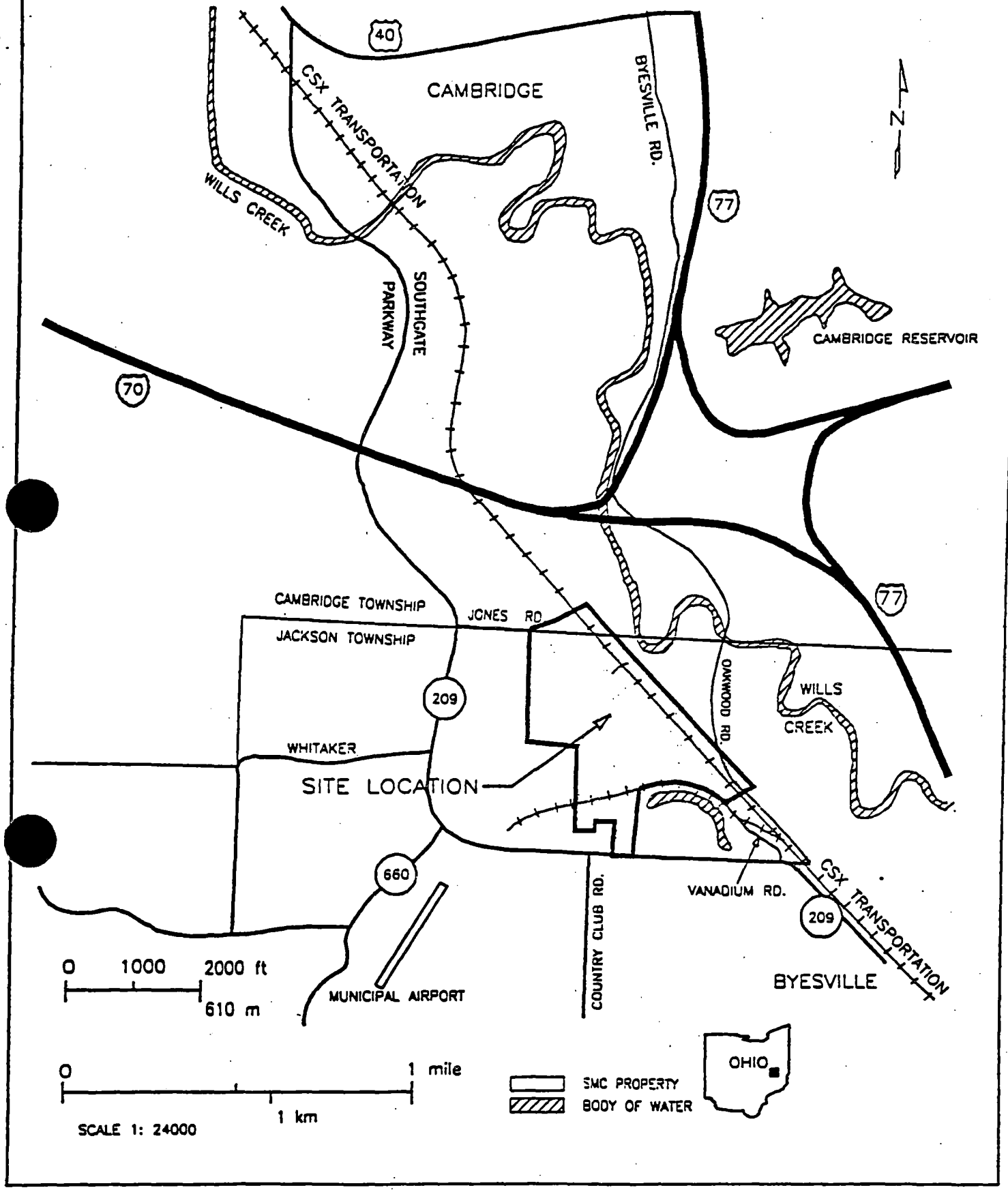

FIGURE 1. Shieldalloy Metallurgical Corporation Plant in Cambridge, Ohio.

amount of native soil, in which the slag had become mixed over time. The excavated slag/soil mixture was placed in containers (roll-off boxes) at a temporary staging area at the SMC Cambridge facility. The locations of the west slag pile and the staging area are shown in Figure 2. The physical and radiological characteristics of the slag/soil material are described in Section 3.0.

Because the current status of the slag/soil material in roll-off boxes is temporary, Cyprus Foote seeks to transfer possession of the slag/soil to SMC for its removal from the roll-off boxes and relocation to the west slag pile. The action to return off-site slag to the Cambridge plant, with subsequent stabilization and disposal of the material on the west slag pile, has been addressed in detail in the "Draft Environmental Impact Statement [DEIS] Decommissioning of the Shieldalloy Metallurgical Corporation Cambridge, Ohio Facility" (NRC 1996). The slag/soil mixture temporarily stored in the roll-off boxes represents one-half of one percent (0.5%), by mass, of the material already stored in the west slag pile. As discussed in Section 3.0, concentrations of radioactive material in the slag/soil mixture in the roll-off boxes are comparable to the concentrations of the radioactive material in the west slag pile. The amount of slag/soil material involved in this requested action is limited and the duration of implementation of the action is very short. It has been determined that there will be no adverse effects on workers and the public during implementation of the proposed action. Potential impacts on the public following the requested action will also be negligible prior to the final remedy selected for the site, including the west slag pile.

The slag/soil from off-site locations will be relocated to the west slag pile in a manner that the slag/soil will be separable and retrievable from the west slag pile. The ongoing monitoring activities for the west slag pile will address the relatively small amounts of slag/soil relocated from the roll-off boxes during the period prior to a final decision on the disposal of the off-site slag.

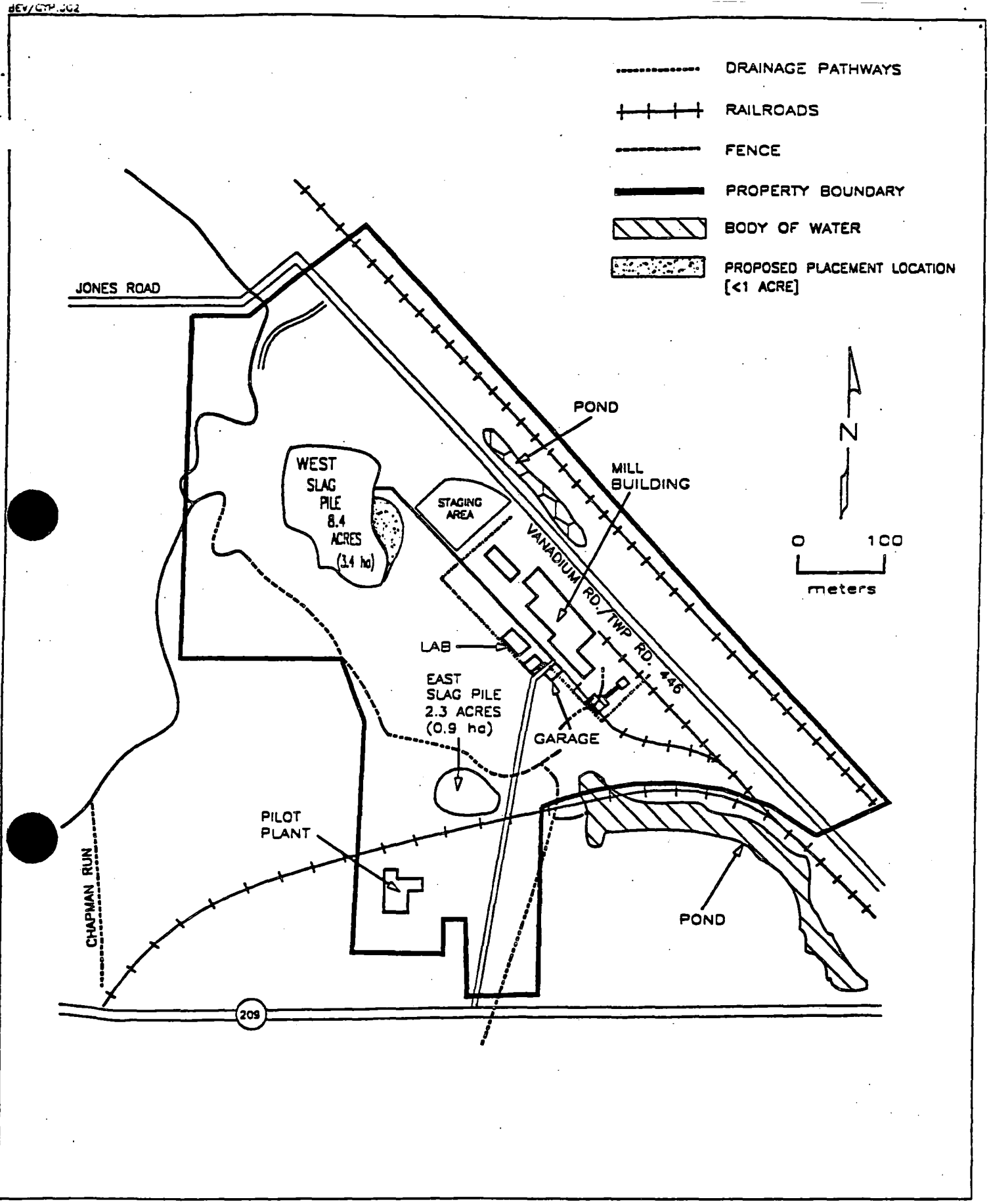

FIGURE 2. Shieldalloy Metallurgical Corporation Facility in Cambridge, Ohio. Location of the West Slag Pile and the Proposed Location for the Off-Site Material.

2.0 PROPOSED ACTION

The proposed action is to amend SMC's NRC license to allow relocation of approximately 2,800 tons of off-site slag/soil from the staging area to the west slag pile at the Cambridge plant. As noted in Section 1.0, the action to return off-site slag to the Cambridge has been addressed in detail in the DEIS (NRC 1996). The slag/soil will be placed in a manner that ensures that it will be separable and retrievable from the west slag pile pending a final decision on the disposal of the off-site slag/soil. The area to be covered with the slag/soil from off-site locations will be less than 1.7 acres (0.7 ha), consistent with the DEIS (NRC 1996). Further details of the proposed action will be presented in an implementation work plan to be prepared after approval of the proposed action.

The final disposition of off-site slag/soil will be addressed as part of the FEIS for decommissioning of the SMC plant. The proposed action is an interim action to transfer the slag/soil material from the roll-off boxes, pending the issuance of the FEIS. The action also entails transfer of possession of the material to SMC.

SMC holds an NRC license (Number SMB-1507) for the possession of source material at its Cambridge plant. The source material is a contaminant in slag from previous alloy furnace operations and has been stored in the east slag pile. Approximately 600,000 tons of slag from other operations at the SMC plant are stored in the west slag pile. The alternatives for long-term disposition of the material in the west and east slag piles are currently under NRC review. This proposed action addresses only the short-term management of approximately 2,800 tons of slag/soil that were removed from off-site residential properties in the Cambridge, Ohio area, and returned to the SMC facility in the summer of 1997.

Slag/soil from off-site areas is currently stored in 200 metal containers (roll-off boxes) in a staging area less than 100 meters from the west slag pile. The boxes are covered with tarpaulins that are held in place with elastic cords. The current status of this slag/soil material staging is suitable only for the very short-term.

Implementation of this action will serve several purposes, including:

1. Consolidate the slag into a common area, thereby reducing the extent and costs of inspection and monitoring of stored slag/soil.

2. Return the area currently leased for staging of the roll-off boxes to SMC in preparation for site decommissioning.

3. Eliminate the current costs associated with leasing and maintaining the roll-off boxes and their covers.

Under the proposed action, the slag/soil would be removed from the roll-off boxes and relocated to the existing west slag pile until a final decision on the disposition of this material. The proposed location for placement of the slag/soil is shown in Figure 2. The estimated surface area that will be covered with the slag/soil is less than 1,000 square meters with a maximum height of approximately six (6) meters. The existing monitoring activities for the west slag pile will be sufficient to monitor the small amount of additional material (slag/soil from off-site properties).

Radiation doses have been calculated for a hypothetical maximum exposed individual following relocation of the slag/soil material to the west slag pile and prior to final remediation of the Cambridge plant. The hypothetical receptor is a maintenance worker who is on top of the slag/soil for one (1) hour each week for 50 weeks each year. Assumed exposure pathways are incidental ingestion of slag/soil, inhalation of resuspended particulates, and external exposure. The radiation dose for this scenario is less than one (1) millirem (mrem) per year. Other potential receptors on-site and off-site would be much less than this annual dose.

Radiation exposures of workers who remediated the off-site properties and transported the slag/soil to the staging area were monitored as part of the off-site remediation project. The radiation doses received by these workers during the several weeks of the off-site remediation project were immeasurably small. The estimated duration of the project to relocate the slag/soil from the roll-off boxes in the staging area to the west slag pile is much less than the duration of the off-site remediation project. Therefore, the potential doses that workers may receive during the proposed relocation of the slag/soil to the west slag pile will be negligible.

SMC has been preparing to decommission the Cambridge plant and terminate its NRC license. To complete the decommissioning of the site, SMC has requested that NRC approve its plan for on-site stabilization and disposal of radioactive waste in the slag piles. In the June 1996 DEIS, the NRC has proposed to stabilize, cap, and grade the slag piles, on site (NRC 1996). The multi-layer cap would be designed to provide long-term protection against wind and water erosion, to minimize the potential for groundwater contamination, and to reduce the radiation dose to an individual who gains access to the pile. As an alternative, the NRC has proposed to add the off-site slag/soil to the west slag pile before it is capped. Other alternatives for the ultimate disposition of slag, including disposal at off-site locations, have been addressed in the DEIS.

Relocation of the slag/soil from the roll-off boxes to the west slag pile will eliminate unnecessary expenditures of funds that could be applied toward site remediation. Assembly of materials to be addressed during final site remediation into a common location will also consolidate monitoring and maintenance efforts.

The NRC evaluated proposed remediation actions for the Cambridge facility and reported their results in the DEIS (NRC 1996). In the DEIS, the NRC described in detail the environment potentially affected by the proposed action and the potential impacts, if any, that would be produced by implementation of the proposed action. The NRC found that the cumulative impacts of the remediation alternatives, including the return and disposal of off-site slag/soil, prior to final remediation are "so small that they could not reasonably contribute to any important effects on human health in a cumulative sense" (NRC 1996).

3.0 MATERIAL DESCRIPTION

3.1 PHYSICAL DESCRIPTION

Material excavated from off-site areas in 1997 consists of a combination of slag interspersed with considerable amounts of native soil. The slag component occurs in a variety of sizes much larger than respirable particles and as large as gravel- or rock-sized stones. Slag is known to be extremely hard, frequently exhibiting distinctive coloration; it can be most easily identified by a porous texture evident on gravel- and rock-sized pieces. Leach testing of slag performed as part of the RI/FS for the Shieldalloy facility has shown that the slag is relatively insoluble.

During remediation of off-site properties, slag was found to be embedded within the soil. As a consequence, native soil comprised a significant part of the material excavated from off-site properties. The native soil is typical for surface soil from the Cambridge area, with small amounts of organic matter and concrete and other aggregates that were present at the off-site remediation areas. This slag/soil material is currently located at the Cambridge plant in containers in the staging area leased by Cyprus Foote for this purpose. The location of the staging area is shown on Figure 2.

The mass of slag/soil material was determined from measurements made during excavation activities. Each container was weighed before and after slag/soil was placed inside, and the net mass of slag/soil was calculated. Table 1 presents the mass inventory of excavated slag/soil in the staging area separately for each off-site area. The number of roll-off boxes that contain slag/soil from each off-site area is also included in Table 1. The total net mass of the material is approximately 2,800 tons.

In addition, the total volume of the material was estimated by two different methods. First, the total volume was calculated from the net mass of material using an assumed material density and an estimated property-specific bulking factor to account for the increase in volume introduced by the excavation process. Alternatively, the total volume was estimated using the total number of roll-off boxes, the capacity of each box, and an estimated fill level per box. Table 2 presents the volume of material estimated by both methods. The total volume of the material is estimated to be approximately 3,000 cubic yards (yd^3).

3.2 RADIOLOGICAL DESCRIPTION

Prior to excavation activities at each off-site location, samples were collected and analyzed for their radionuclide content. Table 3 presents the list of radiological parameters analyzed for each sample. The samples were analyzed by alpha particle spectrometry for thorium isotopes (thorium-228, thorium-230, and thorium-232) and by gamma-ray spectrometry.

The radionuclide activities in picocuries (pCi) of slag/soil from each off-site area, the total activity (curies [Ci]) of each radionuclide, and the average concentration of radionuclides (pCi/g) in the slag/soil are presented in Table 4. These values were calculated from the results of analyses of samples from the individual off-site areas and the mass of material excavated from each off-site area. The individual sample analytical results for each off-site area are tabulated in Attachment 1. The data presented in Attachment 1 illustrates the wide variations of radionuclide concentrations in the biased samples from the remediated areas. Radionuclide concentrations for some of the properties were not significantly above natural background concentrations and were below the concentration limits ordinarily required for site remediation.

Analytical results are presented in units of pCi/g, as reported by the analytical laboratory. The tabulation also includes the mass of material excavated from each off-site area and the average concentration of each radionuclide calculated from the samples from each property. The data presented in Attachment 1 were obtained during from the sampling and analysis programs of Phases I, II, and III of the off-site property characterization program (WC 1995a; WC 1995b; A&A 1997) and from the sampling performed during the ORISE scoping survey (ORISE 1994). Average concentrations presented in Table 4 incorporate the total mass of the off-site material and estimated area-specific dilution factors. The area-specific dilution factors are estimates based on field observations during excavation activities at each off-site area, and account for incidental dilution by soil, containing natural radionuclide concentrations, that was excavated along with the slag.

Natural background radionuclide concentrations are presented in Table 4 and may be subtracted from the gross radionuclide concentrations to yield the net radionuclide concentrations in the collective off-site material (see Table 4). Natural background concentrations listed in Table 4 are based on analyses of radium-226 (Ra-226), thorium-232 (Th-232), Th-228, and uranium-238 (U-238) in samples from six (6) locations in Guernsey County, Ohio (ORISE 1994) and assumptions regarding natural series radioactive decay and the natural abundances of uranium isotopes.

The radionuclide concentrations for the soil/slag material that are presented in Table 4 are more likely than not an overestimation of the actual concentrations, for the following reasons:

- Collection of samples at off-site areas was biased toward locations that exhibited above-background levels of external gamma radiation, if such locations were identified during the pre-excavation survey. The results, therefore, were not representative of radionuclide concentrations over the entire excavation volume.

- Based on field observation of the excavation activities, the area-specific dilution factors are likely to underestimate the actual dilution caused by excavation of soil with the slag.

The DEIS presents quantities, activities, and concentrations of radionuclides within each type of slag present in the west slag pile (see Table A-2 of the DEIS) (NRC 1996). Radionuclide concentrations presented in the DEIS are overall averages calculated from:

- analytical data for samples collected during March 1995 in accordance with the draft RI/FS work plan (PTI 1995a);

- data generated from numerous facility records describing the volume and disposition of slag at the Cambridge plant (PTI, 1995b); and

- other sampling and analysis data used to verify the calculations.

A comparison of radionuclide concentrations in the slag/soil from off-site areas (Attachment 1) with the radionuclide concentrations reported for the west slag pile (NRC 1996) is presented in Table 5. The slag/soil from off-site areas and the slag in the west slag pile exhibit elevated concentrations of Th-230. The concentrations of all radionuclides in slag/soil from off-site areas are in agreement with the radionuclide concentrations in the west slag pile (NRC 1996). The data support the basic assumption of the DEIS remedy for inclusion of off-site slag with the west slag pile, i.e., the radiological characteristics of the off-site slag are approximately the same as the characteristics of the west slag pile.

Table 1. Inventory of Excavated Material in the Staging Area at the Shieldalloy Plant

Off-site Area	Number of Roll-Off Containers	Net Weight of Material (pounds)	Net Mass of Material (tons)
1	6	157,280	79
2	12	438,805	219
3	14	344,625	172
4	35	956,435	478
5	23	691,220	346
6	36	1,006,095	503
7	4	92,460	46
8	33	888,710	444
9	31	783,740	392
10	4	104,360	52
11	2	70,333	35
Totals	**200**	**5,534,063**	**2767**

Table 2. Estimated Volume of Soil/Slag from Off-Site Locations

Assumptions	Estimated Volume (yd^3)
Volume Estimation Method One	
Assuming density of 1.26 ton/yd^3 (i.e. 1.5 g/cm^3)	2196
Assuming a bulking factor of 1.5 from excavation	3294
Volume Estimation Method Two	
Capacity per container	20
Assuming 67% fill level per container	2668
Final Estimated Total Volume = 3000 yd^3	2981

Table 3. Radionuclide Analytical Parameters

Radionuclide Decay Series	Radionuclides
Uranium (Uranium-238)	U-238, Th-230, Ra-226
Thorium (Thorium-232)	Th-232 and Th-228
Actinium (Uranium-235)	U-235, Pa-231, Th-227, and Ra-223

Table 4. Radionuclides and Concentrations

Offsite Area	Dilution Factor	Radionuclide Activity: Ra-226 (pCi)	Th-232 (pCi)	Th-228 (pCi)	U-238 (pCi)	Th-230 (pCi)	Pa-231 (pCi)	U-235 (pCi)	Th-227 (pCi)	Ra-223 (pCi)
1	4	9.97E+08	5.10E+08	4.79E+08	9.26E+08	9.15E+10	2.99E+08	9.71E+07	1.42E+08	1.25E+08
2	2	1.08E+09	5.31E+08	4.90E+08	2.10E+09	1.03E+11	1.95E+09	2.90E+08	6.80E+08	7.29E+08
3	3	1.18E+09	1.09E+09	1.04E+09	1.68E+09	4.31E+10	9.41E+08	2.13E+08	3.99E+08	3.10E+08
4	2	4.21E+08	3.16E+08	1.68E+08	2.50E+08	5.25E+10	6.45E+08	4.35E+07	1.37E+08	1.03E+08
5	2	2.09E+08	1.00E+08	1.07E+08	2.38E+08	1.45E+10	2.85E+08	3.16E+07	5.98E+07	8.00E+07
6	3	8.10E+08	4.72E+08	4.83E+08	7.11E+08	1.16E+10	2.29E+08	6.16E+07	9.96E+07	9.58E+07
7	2	5.03E+08	5.81E+07	5.81E+07	6.78E+07	5.21E+08	8.38E+08	1.86E+07	5.91E+08	6.76E+08
8	3	2.86E+08	3.33E+08	3.40E+08	5.87E+08	1.80E+09	1.17E+08	3.97E+07	3.97E+07	5.43E+07
9	2	2.44E+08	2.19E+08	2.29E+08	3.88E+08	1.73E+09	1.33E+08	8.96E+06	5.37E+07	5.37E+07
10	2	1.49E+08	1.41E+08	1.56E+08	2.58E+08	1.87E+09	7.03E+06	7.03E+06	7.03E+06	7.03E+06
11	3	7.88E+07	1.02E+08	1.10E+08	1.13E+08	2.21E+08	2.52E+06	2.52E+06	2.52E+06	2.52E+06
Total Gross Activity* (Ci)=		5.95E-03	3.87E-03	3.66E-03	7.32E-03	3.22E-01	5.45E-03	8.14E-04	2.21E-03	2.24E-03
Gross Concentration* (pCi/g)=		2.4	1.5	1.5	2.9	128.3	2.2	0.3	0.9	0.9
Net Concentration* (pCi/g)=		1.5	0.1	0.1	1.0	126.4	2.1	0.2	0.8	0.8

* Mass weighted concentrations

Total Mass (g) 2.51E+09	Background Radionuclide Levels: Ra-226	Th-232	Th-228	U-238	Th-230	Pa-231	U-235	Th-227	Ra-223
Background (pCi/g)	0.9	1.4	1.4	1.9	1.9	0.09	0.09	0.09	0.09
Activity (Ci)	2.26E-03	3.51E-03	3.51E-03	4.77E-03	4.77E-03	2.26E-04	2.26E-04	2.26E-04	2.26E-04

Table 5. Comparison of Radiological Characteristics

Radionuclide	Mass-Weighted Average Concentration of All Off-Site Material (pCi/g)	Property-Specific Average Concentrations for Off-Site Areas (Attachment 1) (pCi/g)	DEIS Overall West Pile Radionuclide Average (NRC 1996) (pCi/g)
U-238	3.0	0.88 – 13.77 (5.19)*	4.04
Th-230	128.4	12.0 – 3291 (525)	285.0
Ra-226	2.4	0.94 – 25.48 (7.01)	6.39
Th-232	1.5	0.23 – 18.39 (3.29)	3.74
Th-228	1.5	0.22 – 9.12 (2.49)	2.02
U-235	0.3	0.20 – 2.63 (1.04)	0.920
Pa-231	2.2	0.94 – 40.37 (11.05)	10.3
Th-227	0.9	0.20 – 16.47 (3.99)	5.48
Ra-223	0.9	0.34 – 18.87 (4.07)	12.4

* Range of average concentrations for each property. (Average for all properties.)

4.0 SUMMARY

Pursuant to a settlement agreement approved by the U.S. District Court for the Southern District of Ohio (December 1996) (USDC 1996), and in accordance with the July 1997 Administrative Order issued by the Ohio Department of Health (ODH 1997), Cyprus Foote has excavated approximately 2,800 tons of slag/soil from several residential properties in Guernsey County, Ohio. This material is managed temporarily in roll-off boxes at a staging area at the Cambridge plant. Radionuclide concentrations in the slag/soil from off-site areas are in agreement with the radionuclides in the west slag pile. The slag/soil temporarily stored in the roll-off boxes represents approximately one-half of one percent (0.5%) of the mass (and a much smaller fraction of the total activity) of material already stored in the west slag pile.

The U.S. Nuclear Regulatory Commission is currently evaluating final disposal options for the west slag pile and the off-site slag/soil under its DEIS for the facility (NRC 1996). In the interim, Cyprus Foote seeks to transfer possession of the slag/soil to SMC and to relocate the slag/soil from the roll-off boxes to a pile several meters away, adjacent to the existing west slag pile at the Cambridge plant. The NRC has determined that relocation of the slag from off-site areas to the west slag pile should have no significant impacts on human health or the environment (NRC 1996). The environmental monitoring program for the west slag pile will also encompass monitoring for the relatively small amount of additional material introduced by addition of the slag/soil from off-site areas. Final disposition of the west slag pile and the slag/soil from off-site areas will be addressed in the FEIS to be issued by the NRC.

ATTACHMENT 1
SAMPLE ANALYTICAL RESULTS FOR OFF-SITE AREAS

	Gross Results in pCi/g								
Off-Site Area	Ra-226	Th-232	Th-228	U-238	Th-230	Pa-231	U-235	Th-227	Ra-223
CYP3-22S001	4.94	0.71	0.49	6.85	718.90	3.31	1.11	0.77	1.34
CYP3-22S002	7.29	0.69	0.41	7.88	1347.00	4.01	1.23	1.50	1.53
CYP3-22S003	8.48	0.84	0.60	13.79	830.50	9.44	1.91	3.04	2.17
CYP3-22S004	0.33	0.75	0.41	10.36	4.74	3.93	1.15	0.99	1.69
CYP3-22S005	6.51	2.01	2.25	8.52	637.10	41.02	2.04	15.58	15.67
CYP3-22S006	0.96	1.54	1.26	4.06	5.91	1.88	0.69	0.31	0.79
CYP3-22S007	2.53	2.09	1.81	8.35	5.48	3.40	1.32	0.80	1.50
Average @ CYP3-22	4.43	1.23	1.03	8.54	507.09	9.57	1.35	3.28	3.53
CYP3-24S001	9.11	0.87	0.62	8.77	1632.00	11.60	1.42	2.27	4.25
CYP3-24S002	1.58	1.11	1.07	6.11	504.60	2.98	0.92	1.27	1.12
CYP3-24S003	0.83	1.07	0.79	6.39	2.88	2.79	0.91	0.47	1.23
CYP3-24S004	0.50	0.54	0.60	5.07	2.43	1.88	0.63	0.56	0.81
CYP3-24S005	0.61	1.43	1.52	7.38	2.01	2.44	0.75	0.44	1.00
CYP3-24S006	38.35	13.53	16.35	14.86	1630.00	52.51	2.75	8.75	11.09
Average @ CYP3-24	7.92	2.83	3.14	8.16	611.57	11.97	1.25	2.43	3.29
CYPO-18S001	25.22	18.25	9.95	18.71	1382.00	25.69	3.40	4.66	6.69
CYPO-18S002	0.76	1.87	1.51	6.99	3.61	2.64	0.87	2.74	1.11
CYPO-18S003	0.94	1.33	1.32	7.91	2.26	2.46	0.75	0.44	1.04
CYPO-18S004	20.14	11.89	18.57	16.74	868.10	14.40	3.08	3.31	3.35
CYPO-18S005	2.43	1.32	1.18	9.77	25.74	3.75	1.21	2.64	1.47
CYPO-18S006	15.24	18.68	16.89	9.98	1233.00	13.92	1.78	4.48	4.49
CYPO-18S007	0.64	1.17	0.58	4.69	26.75	1.87	0.60	0.31	0.84
CYPO-18S008	0.33	0.99	0.69	5.40	3.65	2.20	0.69	0.83	0.87
CYPO-18S009	0.35	0.65	0.56	5.61	3.72	2.21	0.70	0.34	0.93
CYPO-18S010	15.28	7.70	8.29	17.67	46.68	8.52	3.09	12.09	3.56
Average @ CYPO-18	8.13	6.38	5.95	10.35	359.55	7.76	1.62	3.18	2.43
O-05-1	1.20	0.60	0.90	2.10	14.90	NA	NA	NA	NA
O-05-2	0.80	1.00	0.60	1.10	13.00	NA	NA	NA	NA
O-05-3	2.30	0.90	1.20	4.90	74.00	NA	NA	NA	NA
0-05-1	0.30	0.10	0.20	0.40	0.10	0.60	0.10	0.10	0.20
0-05-2	0.60	0.20	0.20	0.80	0.80	0.70	0.20	0.10	0.30
0-05-2 Dup	0.90	0.10	0.20	2.50	0.10	1.30	0.30	0.40	0.50
0-05-3	0.40	0.10	0.20	0.40	0.20	0.70	0.10	0.10	0.20
0-05-4	1.00	0.10	0.10	2.30	4.50	1.40	0.30	0.30	0.50
Average @ O-05	0.94	0.39	0.45	1.81	13.45	0.94	0.20	0.20	0.34
O-17-1	1.00	0.40	0.60	1.40	22.00	NA	NA	NA	NA
Average @ O-17	1.00	0.40	0.60	1.40	22.00	NA	NA	NA	NA
O-19-1	9.10	1.20	0.60	4.00	1796.00	1.70	NA	1.30	1.10
O-19-2	6.90	0.60	0.30	1.30	1312.00	2.00	NA	1.20	0.80
O-19-3	30.20	1.10	0.60	3.20	4864.00	3.40	NA	3.00	3.10
O-19-1 Sl	3.90	0.30	0.10	NA	48.00	1.50	0.50	0.40	0.60
O-19-2 Sl	0.80	0.10	0.10	NA	0.10	1.30	0.30	0.30	0.20
O-19-3 Sl	9.20	1.00	0.10	NA	240.00	2.80	0.70	1.40	1.00
O-19-3 Sb6	1.20	0.10	0.10	NA	0.50	5.30	0.90	1.20	0.90
O-19-3 Sb6Dup	1.40	NA	NA	NA	NA	5.60	1.00	1.50	0.90
O-19-4 Sl	2.60	0.20	0.10	NA	47.00	1.00	0.40	0.30	0.30
O-19-5 Sl	1.30	0.10	0.10	NA	9.40	1.00	0.70	0.20	0.20

Off-Site Area	Gross Results in pCi/g								
	Ra-226	Th-232	Th-228	U-238	Th-230	Pa-231	U-235	Th-227	Ra-223
O-19-6 Sl	4.80	0.30	0.10	NA	67.00	1.80	0.50	0.60	0.60
Average @ O-19	6.49	0.50	0.22	2.83	838.40	2.49	0.63	1.04	0.88
O-29-1	1.70	0.90	1.20	2.30	18.00	1.80	NA	0.50	0.60
O-29-2	1.40	0.70	0.60	1.70	13.00	0.70	NA	0.40	0.30
Average @ O-29	1.55	0.80	0.90	2.00	15.50	1.25	NA	0.45	0.45
O-47-1	13.20	0.40	0.60	5.30	75.00	48.20	NA	33.80	57.90
O-47-2	7.40	0.60	0.60	2.00	38.00	24.70	NA	18.30	30.80
O-47-3	0.90	0.60	0.30	2.10	10.00	0.60	NA	0.40	0.30
O-47-1 Sl	0.90	0.10	0.10	NA	1.80	1.00	0.20	0.20	0.20
O-47-2 Sl	100.00	0.10	0.20	NA	1.30	68.00	1.30	51.00	49.00
O-47-2 Sb6	2.10	0.10	0.10	NA	0.20	3.30	0.20	2.60	2.60
O-47-2 Sb12	0.90	NA	NA	NA	NA	0.90	0.14	0.20	0.50
O-47-2 Sb24	0.90	NA	NA	NA	NA	1.10	0.14	0.30	0.50
O-47-3 Sl	30.00	0.10	0.10	NA	0.30	130.00	1.30	90.00	84.00
O-47-4 Ss	0.80	0.10	0.10	NA	0.10	1.40	0.30	0.40	0.30
O-47-5 Ss	0.40	0.10	0.10	NA	0.10	0.60	0.10	0.20	0.10
O-47-6 Ss	1.00	0.10	0.10	NA	0.20	1.00	0.20	0.20	0.20
Average @ O-47	13.21	0.23	0.23	NA	12.70	23.40	0.43	16.47	18.87
P2-21-1	5.80	0.10	0.20	0.80	0.10	0.80	0.10	0.10	0.30
P2-21-2	0.60	0.10	0.10	0.40	0.10	0.60	0.10	0.20	0.20
P2-21-3	7.20	0.90	1.10	1.60	290.00	3.30	0.60	1.50	1.10
P2-21-4	0.50	0.10	0.10	0.70	0.10	0.60	0.10	0.10	0.20
Average @ P2-21	3.53	0.30	0.38	0.88	72.58	1.33	0.23	0.48	0.45
P3-13-01	37.15	17.93	16.38	15.33	6282.00	26.40	3.06	10.96	7.26
P3-13-02	71.17	38.82	11.51	24.33	6571.00	152.80	5.32	20.07	15.84
P3-13-03	26.65	28.57	9.12	19.83	3695.00	47.07	3.83	13.45	7.93
P3-13-04	1.67	1.34	0.54	6.27	218.70	2.46	0.75	0.56	0.95
P3-13-05	15.45	22.88	16.74	10.64	2944.00	10.81	1.99	5.55	5.31
P3-13-06	0.76	0.80	0.42	6.21	37.50	2.69	0.86	0.48	1.09
Average @ P3-13	25.48	18.39	9.12	13.77	3291.37	40.37	2.63	8.51	6.40
891	4.60	5.90	8.70	8.70	NA	NA	NA	NA	NA
891A	8.10	5.60	5.70	4.60	13.00	NA	NA	NA	NA
891B	5.00	6.20	6.20	3.90	12.70	NA	NA	NA	NA
900	2.50	4.10	4.40	4.40	NA	NA	NA	NA	NA
900A	0.40	0.60	0.80	0.80	NA	NA	NA	NA	NA
900B	2.40	4.70	4.60	3.10	10.30	NA	NA	NA	NA
Average @ Straw	3.83	4.52	5.07	4.25	12.00	NA	NA	NA	NA
Average for All Properties	8.00	3.31	2.53	6.12	566.24	11.87	1.03	5.04	5.27

NA= Not applicable.

REFERENCES

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Integrated Environmental Management, Inc. (IEM), "Source Term Development – East and West Slag Piles, Shieldalloy Metallurgical Corporation, Cambridge, Ohio Site", June 1995.

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PTI Environmental Services, Inc. (PTI), "Work Plan, Remedial Investigation and Feasibility Study at Shieldalloy Metallurgical Corporation Site, Cambridge, Ohio", May 1995.

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U.S. District Court (USDC), Memorandum of Understanding, In the Matter of: *Strawsburg, et al. v. Metallurg, et al.* (Case No. C2-94-1069), and *Malernee, et al. v. Cabot Corporation, et al.* (Case No. C2-95-248), April 1996.

U.S. Nuclear Regulatory Commission (NRC), "NRC Inspection Report No. 999-9003/04038 (DRSS)", May 1994.

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Woodward-Clyde (WC), "Phase II Data Report, Cambridge, Ohio", August 1995.

Woodward-Clyde (WC), "Data from the Phase I Survey and Phase II Investigation, Cambridge, Ohio", September 1995.

12/6/96

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALLAN STRAWSBURG, et al.,
Plaintiffs,

vs.

Civil Action 2:94-CV-1069
Judge Smith
Magistrate Judge King

METALLURG, INC., et al.,
Defendants.

and

SUE ANN MALERNEE, et al.,
Plaintiffs,

vs.

Civil Action 2:95-CV-248
Judge Smith
Magistrate Judge King

CABOT CORPORATION, et al.,
Defendants.

REPORT AND RECOMMENDATION

These consolidated actions seek relief arising from the presence of allegedly radioactive slag material on residential properties located in Guernsey County, Ohio. Plaintiffs allege that Cyprus Foote Minerals Company, the only remaining defendant in this case, is responsible for the alleged radioactive contamination. On September 24, 1996, this Court granted

provisional certification of a class of plaintiffs for settlement purposes, pursuant to Fed. R. Civ. P. 23(b)(1) and 23(b)(2), and granted preliminary approval of the proposed settlement. This Court also approved the proposed notice of settlement to the class. This matter is now before the Court for final approval of this class action settlement. The matter was referred to the undersigned, 28 U.S.C. §636(b)(1)(B), Order (December 3, 1996), and a formal fairness hearing was held, pursuant to Fed. R. Civ. P. 23(e), on December 4, 1996.

I

The proposed settlement is contained in the Memorandum of Understanding ("MOU") filed by the parties on June 14, 1996. Exhibit 1, attached to Motion for Preliminary Approval of Class Action Settlement and for Class Certification for Settlement Purposes.

A

The mandatory non-opt out class defined in the proposed settlement relates to more than one hundred (100) residential properties and is composed of four mutually exclusive subclasses of persons who own or reside in residential property containing the slag, whether or not subsequently removed, generated from production operations of Foote Mineral Company and its predecessors prior to May 13, 1987 at the Byesville, Ohio plant. The presence at some point of the slag on the class properties presents issues of both fact and law common to the class. Moreover, it is

undisputed that each of the representative plaintiffs is a member of one of the subclasses described in the MOU. Finally, the record in this action bears witness to the fact that both the representative plaintiffs and their counsel have vigorously represented the interests of the class. The prerequisites to class certification, F.R.Civ.P. 23(a)(1) - (4), have therefore been satisfied. See Senter v. General Motors Corp., 532 F.2d 511, 523 (6th Cir. 1977), cert. denied 429 U.S. 870 (1978).

The proposed settlement also contemplates certification of the class of plaintiffs under the provisions of F.R.Civ.P. 23(b)(1)(A) and 23(b)(2). As will be more thoroughly addressed infra, the primary feature of the proposed settlement agreement is injunctive relief in the form of evaluation and remediation or purchase of the affected properties. Although the proposed settlement agreement also contemplates monetary relief to the members of the plaintiff class, that relief may properly be characterized as incidental to the primary injunctive relief. Because the common claim of the plaintiff class is subject to a single injunctive remedy, then, certification of the plaintiff class under F.R.Civ.P. 23(b)(2) is appropriate. See Senter v. General Motors Corp., supra, 532 F.2d at 525. Moreover, because the prosecution of separate actions would impose on defendant an unreasonable risk of inconsistent results and conflicting standards of conduct, certification of the plaintiff class under F.R.Civ.P. 23 (b)(1)(A) is likewise appropriate. See Bendectin Prods. Liab. Litig., 749 F.2d 300, 305 (6th Cir. 1984).

A total of $850,000.00 has been set aside by defendant to fund the settlement. The settlement agreement sets forth the injunctive relief to which the members of the subclasses are entitled and to which the defendant has agreed to be bound. Subclass 1 is entitled to receive one lump sum payment of $40,000 from the fund, and the defendant "shall purchase and/or remediate the identified properties in Subclass 1." (MOU at ¶12). Similar terms apply to Subclass 2, except that the members of this subclass are to receive a lump sum payment of $20,000. The agreement provides that the purchase option shall be at the defendant's sole discretion, after consultation with the individual property owner. Remediation is to consist of the excavation and removal of slag. There are explicit provisions regarding the time period for purchase or remediation of the property, as well as appeal, in the event of disagreement, to an implementation master or trustee appointed by the Court consistent with Paragraph 9 of the MOU. (Id. at ¶12-13).

The properties of members of Subclass 3 are to undergo radon testing. If the results of a radon test exceeds 4 pCi/l, the property owner will be entitled to radon mitigation at the defendant's expense. (Id. at ¶14). Owners of properties in Subclass 3 are to receive a payment of $15,000 from the fund or 10% of the appraised value of the property. (Id.).

Members of Subclass 4 are to have their properties evaluated pursuant to explicit terms contained in ¶17, and are entitled to a

payment of $5,000 from the fund. (Id. at ¶15). Defendant also agrees to pay a lump sum amount to the Court-appointed class representatives from the established fund (Id. at ¶20).[1]

The MOU contemplates the release of all claims of members of the plaintiff class against the defendant, except unknown future individual claims for latent physical injuries "that have not manifested themselves up to the effective date of the Settlement." (Id. at ¶6).

Finally, the defendant has agreed to pay the reasonable attorney and expert fees and expenses of lead class counsel that have been approved as fair and reasonable by the Court. (Id. at ¶21).[2] In this regard, lead class counsel and defense counsel stipulated, at the fairness hearing, that lead class counsel's request for attorney and expert fees and expenses in the amount of $750,000.00 is fair and reasonable, subject only to further itemization by lead class counsel, and subject further to the $200,000.00 limitation on expert fees contained in Paragraph 21 of the MOU.

On December 4, 1996, associate class counsel filed a motion to approve payment of attorney fees and litigation costs in the amount of $485,990.25. While defense counsel conceded at the fairness

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[1]By separate order and without objection, the Court has granted the motion of Sue Ann and Edward Malernee to be designated as additional class representatives. Defendant Cypress Foote has agreed to increase this portion of the fund to reflect the addition of two class representatives and so as not to dilute the portion of the fund to which the other class representatives are entitled.

[2]It is agreed that no portion of the $850,000.00 settlement fund will be used for payment of these expenses.

hearing that associate class counsel is entitled to some payment, no agreement has been reached regarding the reasonableness of the amounts sought by associate class counsel. IT IS HEREBY ORDERED that defendant may have until December 13, 1996 to file a memorandum contra the motion to approve payment of attorney fees and litigation costs filed by associate class counsel, and IT IS FURTHER ORDERED that associate class counsel may have until December 17, 1996 to reply in support of the motion.

II

Notice of this proposed class action settlement was properly made. That notice explicitly required that objections were to be filed with the Court no later than November 24, 1996. No objection was filed by that date and, indeed, no member of the class has raised any objection whatsoever to the proposed settlement. [3]

On November 25, 1996, a document captioned Notice of Intent to Appear at Fairness Hearing on December 2, 1996 [sic] was filed by one Michael Bruce Gardner "on behalf of the public, in the public interest and in the interest of promoting public confidence in the integrity of the legal system . . . ." Mr. Gardner, who is an attorney and who was present at the fairness hearing on December 4, 1996, acknowledged that he does not represent any named plaintiff

[3]On October 9, 1996, a number of persons, including Sue Ann and Edward Malernee, filed Objections to Class Notice and Class Notice Procedure. At the fairness hearing held on December 4, 1996, their counsel, Steven D. Bell, expressly withdrew any objection previously raised by him on behalf of these persons and indicated that he was aware of no objection to the terms of the proposed settlement by any member of the plaintiff class.

or member of the plaintiff class; [4] he nevertheless expressed his intention to object to certain portions of the proposed settlement. Because Mr. Gardner is not a member of the class of plaintiffs and does not represent any named party or class member, Mr. Gardner cannot be heard in this matter. Moreover, Mr. Gardner has never actually filed an objection to any portion of the proposed settlement. In any event, his notice of intent to appear at the fairness hearing -- even if construed as an objection -- was untimely.

III

This Court must now determine whether the agreement is fair, adequate and reasonable. See Bailv v. Great Lakes Canning, Inc., 908 F.2d 38, 42 (6th Cir. 1990); United States v. Jones & Laughlin Steel Corp., 804 F.2d 348, 351 (6th Cir. 1986). The agreement may not be the result of fraud or collusion between the parties. See Ohio Public Interest Campaign v. Fisher Foods, 546 F.Supp. 1 (N.D. Ohio 1982). Approval of a proposed class action settlement falls within the discretion of the Court. Id.

Various factors should be considered by the Court in evaluating a proposed class action settlement, including balancing the likelihood of plaintiffs' ultimate success against the amount and form of relief offered in the settlement; the expense, complexity and duration of the litigation; the judgment of

[4]Apparently, Mr. Gardner was formerly associated with Steven D. Bell, who continues to represent certain members of the plaintiff class, including Sue Ann and Edward Malernee.

experienced trial counsel; any objections by class members; and the public interest in the settlement. Bronson v. Bd. of Educ. of City School Dist. of City of Cincinnati, 604 F.Supp. 68, 73 (S.D. Ohio 1984); Williams v. Vukovich, 720 F.2d 909, 922 (6th Cir. 1985).

Applying these factors to the proposed settlement presently before it, this Court concludes that the proposed settlement is reasonable, fair and adequate. The terms of the proposed settlement results from extensive community and scientific investigation into the alleged radioactive contamination, and reflects careful consideration by all sides. The comprehensive nature of the relief offered is extremely favorable to plaintiffs and the members of the plaintiff class. Moreover, the relief available under the proposed settlement in relation to radon remediation in all likelihood would not have been a remedy to which plaintiffs would have been entitled had this action proceeded to trial.[5] Finally, although the proposed settlement contemplates a release of most claims by the members of the plaintiff class against defendant, the proposed settlement does not contemplate the release of "any currently unknown future individual claims for compensatory damages for latent physical injuries proximately caused by the slag . . . that have not manifested themselves up to the effective date of the Settlement." (MOU, at ¶6).

Consideration of the possible expense, duration, and

[5]Lead class counsel conceded at the fairness hearing that establishing at trial a legally significant correlation between the radioactive slag and the presence of radon in certain properties would have been difficult if not impossible.

complexity of this litigation also weighs in favor of the proposed settlement. Defendant remains firm in its position that the slag presents no unreasonable risk of immediate medical damage or other harm; the proposed settlement relieves that plaintiff class of the not insubstantial burden of proving otherwise. The judgment in favor of the proposed settlement on the part of the experienced trial counsel on both sides of this action also leads this Court to conclude that settlement is appropriate. Likewise important is the fact that no objections to the proposed settlement have been filed by any named plaintiff or class member. Finally, the proposed settlement, which will avoid protracted litigation while at the same time provide a comprehensive remedy to the plaintiff class, serves well the interests of the citizens of Guernsey County and the residents of eastern Ohio.

This Court therefore concludes that the proposed settlement agreement is reasonable, fair and adequate and that this action should be compromised pursuant to the terms of said agreement.

It is therefore RECOMMENDED that final approval of the class action settlement, as reflected in the parties' Memorandum of Understanding of Settlement, be GRANTED. It is SPECIFICALLY RECOMMENDED that a mandatory, non-opt out class of plaintiffs consisting of all persons who own or reside in residential property containing slag (whether or not subsequently removed) generated from production operations of Foote Mineral Company and its predecessors prior to May 13, 1987, at the plant currently owned by

ShieldAlloy Metallurgical Corporation located in Byesville, Ohio, be certified under F.R.Civ.P. 23(b)(1)(A) and 23 (b)(2). It is also SPECIFICALLY RECOMMENDED that, in the event that the Court adopts this Report and Recommendation, the Court appoint in the order approving the proposed settlement an implementation master as contemplated by Paragraph 9 of the parties' Memorandum of Understanding.

If any party seeks review by the District Judge of this Report and Recommendation, that party may, within ten (10) days, file and serve on all parties objections to the Report and Recommendation, specifically designating this Report and Recommendation, and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. §636(b)(1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to de novo review by the District Judge and of the right to appeal the decision of the District Court adopting the Report and Recommendation. See Thomas v. Arn, 474 U.S. 140 (1985); Smith v. Detroit Federation of Teachers, Local 231, etc., 829 F.2d 1370 (6th Cir. 1987); Harris v. City of Akron, 20 F.3d 1396 (6th Cir. 1994).

Norah McCann King
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALLEN STRAWSBURG, et al.,

Plaintiffs,

vs.

Civil Action 2:94-CV-1069
Judge Smith
Magistrate Judge King

METALLURGIC, INC., et al.,

Defendants,

and

SUE ANN MALERNEE, et al.,

Plaintiffs,

vs.

Civil Action 2:95-CV-24[illegible]
Judge Smith
Magistrate Judge King

CABOT CORPORATION, et al.,

Defendants.

ORDER

On December 5, 1996, the United States Magistrate Judge issued a Report and Recommendation recommending that the Court grant final approval of the proposed class action settlement as reflected in the parties' Memorandum of Understanding of Settlement (Exhibit 1, attached to Motion for Preliminary Approval of Class Action Settlement and for Class Certification for Settlement Purposes) (hereinafter "MOU"). It was specifically recommended that the Court certify under F.R. Civ. P. 23(b)(1)(A) and 23(b)(2) a mandatory, non-opt out class of plaintiffs consisting of all

95

persons who own or reside in residential property containing slag (whether or not subsequently removed) generated from production operations of Foote Mineral Company and its predecessors prior to May 13, 1987, at the plant currently owned by ShieldAlloy Metallurgical Corporation located in Byesville, Ohio. Finally, it was specifically recommended that the Court appoint an implementation master as contemplated by Paragraph 9 of the parties' MOU.

I

On November 25, 1996, one Michael Bruce Gardner filed a document captioned Notice of Intent to Appear at Fairness Hearing on December 2, 1996 [sic]. Although Mr. Gardner was apparently present at the fairness hearing and expressed an intention to address the terms of the proposed settlement, he was not permitted to do so:

> Because Mr. Gardner is not a member of the class of plaintiffs and does not represent any named party or class member, Mr. Gardner cannot be heard in this matter. Moreover, Mr. Gardner has never actually filed an objection to any portion of the proposed settlement. In any event, his notice of intent to appear at the fairness hearing -- even if construed as an objection -- was untimely.

Report and Recommendation, at 7. However, although he made no mention of it at the fairness hearing, Mr. Gardner had also filed with the Office of the Clerk immediately prior to the fairness hearing a written argument "on behalf of absent and unidentified members of the provisionally-certified settlement class, tendered

at the fairness hearing on December 4, 1996." In that document, Mr. Gardner acknowledges that he represents no named plaintiff or "any specific class member." Argument on Behalf of Absent and Unidentified Members of the Provisionally-Certified Settlement Class ..., at 1 (December 4, 1996). Instead, Mr. Gardner contends that he represents "those who, ... will be bound by the Court's judgment in this matter but, who will not have received any consideration." Id. at 2.

Finally, Mr. Gardener filed objections to the Report and Recommendation. Objection to Report and Recommendation filed December 5, 1996 (December 16, 1996). Although he acknowledges that he does not represent any named plaintiff or member of plaintiff class, Mr. Gardner argues that, because of his former association with Ulmer & Berne, counsel for the named plaintiffs in Sue Ann Malernee v. Cabot Corp., C-2-95-248, he continues to have professional obligations to those named clients and to a class of persons represented by those clients.[1] Mr. Gardner appears to take the position that, despite the fact that he is no longer associated with Ulmer & Berne, he may continue to represent the named plaintiffs in Malernee v. Cabot Corp. and certain absent class members:

> Those clients did not terminate the attorney-client relationship with the undersigned -- the undersigned's former employer terminated its relationship with the undersigned ... . No one has been finally adjudicated to represent the absent class members. No one

[1] No class has ever been certified in Malernee v. Cabot Corp.

> has been finally adjudicated not to represent the absent class members. This is not a well-settled area of the law. Moreover, whether the undersigned actually represents anyone, is largely academic and irrelevant to the fairness of the proposed class action settlement.

Objection to Report and Recommendation filed December 5, 1996, at 13-14. Although the Court concludes that Mr. Gardner has no standing to register objections to either the proposed settlement or the Report and Recommendation, the Court will nevertheless consider his arguments.

Mr. Gardner contends, first, that the injunctive relief contemplated by the proposed settlement fails for lack of adequate consideration because it contemplates only such identification, evaluation and remediation of properties that Cypress Foote would in any event be required to perform under its existing legal obligations. Even if Mr. Gardner's objection in this regard is credited, the argument wholly fails to consider the MOU as it relates to the presence of radon in certain class properties. As the Report and Recommendation states,

> The relief available under the proposed settlement in relation to radon remediation in all likelihood would not have been a remedy to which plaintiffs would have been entitled had this action proceeded to trial.

Report and Recommendation at 8. The Report and Recommendation also reflected lead class counsel's concession at the fairness hearing that "establishing at trial a legally significant correlation between the radioactive slag and the presence of radon in certain properties would have been difficult if not impossible." Id. at

8nS. The injunctive relief contemplated by the MOU is, in the Court's estimation, both substantial and supported by legal consideration.

Mr. Gardner also objects to that portion of the MOU that provides that, if the number of class properties increases by 10 percent or more above the number of properties identified in the MOU, then the defendant, in its sole discretion, may terminate the settlement. See MOU, ¶3A. Because there is no indication that this provision of the MOU has been invoked, the Court will not decline to grant final approval of the settlement on this basis.

Mr. Gardner also argues that persons who either own or reside on contaminated property, but who have not been identified prior to final approval of the settlement agreement, will be prejudiced by the proposed settlement because the MOU contemplates a release of claims by all members of the class, even those not presently identified. Significantly, Mr. Gardener has presented nothing more than a theoretical possibility that any such person exists. The parties and counsel in this litigation have persuaded the Court that actual notice has been given directly to all members of the class actually identified, and that publicity to the general populace in and around Guernsey County, Ohio, regarding the litigation and the proposed settlement has been intense. Rather than present to the Court any reason to conclude that any such person or persons exist, Mr. Gardener merely asks:

> What would be so onerous to the subsidiary of a billion-dollar company to provide for the same amount, degree and type of compensation, to the unidentified class members, whose

> claims surface over the next thirty years or whatever period determined by the court. The funds used for those potential claimants, could be controlled by the same trustee as now provided for, and would revert to Cypress Foote to the extent they are not used to pay claims of the new unidentified class members.

Argument, on Behalf of Absent and Unidentified Members of the Provisionally-Certified Settlement Class ..., at 5. To require Cypress Foote to subject itself to indeterminate liability over the course of "the next 30 years or whatever period determined by the court" is unreasonable, particularly in light of the fact that it does not appear, either from the information provided by counsel in these cases or by Mr. Gardner himself, that there exists any such person who could actually benefit from such a provision.

Mr. Gardner also refers to the fact that not all sites that may fall within the class definition have yet been surveyed or evaluated. Argument, on Behalf of Absent and Unidentified Members of the Provisionally-Certified Settlement Class ..., at 3. The fact that certain sites identified as being potentially contaminated had not, as of March 1996, been evaluated is irrelevant to whether or not vigorous attempts to identify all members of the class have been made and actual notice given to all such persons. Indeed ¶17 of the MOU anticipates further evaluation. In short, the Court concludes that Mr. Gardner's actual objections to the proposed settlement and to the Report and Recommendation are without merit.

The Court has carefully considered Mr. Gardner's remaining objections to the Report and Recommendation and find them

to be without merit.[2]

II

The Court has also received a letter dated December 9, 1996, from Joseph R. and Martha A. Seresun. Apparently, Mr. Seresun was a contractor in past years who hauled the radioactive slag. The Seresun letter expresses some concern because the proposed settlement does not relieve Mr. Seresun of all potential liability. The fact that the proposed settlement does not resolve every potential claim against every potential defendant in connection with radioactive slag does not militate against final approval of the proposed settlement. The Seresuns also appear to claim membership in the plaintiff class. Although the record is not clear in this regard, all counsel agree that, if the Seresuns can establish either ownership of or residency in qualifying property, they will be afforded the remedies contemplated by the MOU.

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[2]The other objections made by Mr. Gardner merit little discussion. The Report and Recommendation did consider the numerosity requirement for class action certification under F.R. Civ. P. 23(a)(1). The Report and Recommendation noted, on pages 2 and 3, that the proposed class consists of owners or residents of more than 100 residential properties. Certainly, as the Report and Recommendation noted, this satisfies the numerosity requirement of F.R. Civ. P. 23(b)(1). Mr. Gardner also appears to argue that there should be certified a separate subclass of plaintiffs consisting of unidentified persons; because there is no representative plaintiff for this subclass, Mr. Gardner contends, the Court should reject the Report and Recommendation. This argument is specious.

III

Finally, the Court has carefully considered the Report and Recommendation, but notes one error. The Report and Recommendation erred in referring to the request for attorney's fees and expenses submitted by lead class counsel. The parties actually stipulated at the fairness hearing that lead counsel's request for attorney's fees in the amount of $750,000.00 is fair and reasonable and that defendant has agreed to pay an additional $200,000.00 in expert fees and costs, with the latter figure subject to defendant's review to ensure that such fees and costs are reasonable.

With that modification, the Court ADOPTS and AFFIRMS the Report and Recommendation. The parties' Memorandum of Understanding of Settlement is approved. Moreover, the Court hereby CERTIFIES under F.R. Civ. P. 23(b)(1)(A), 23(b)(2) a class of plaintiffs consisting of all persons who own or reside in residential property containing slag (whether or not subsequently removed) generated from production operations of Foote Mineral Company and its predecessors prior to May 13, 1987, at the plant currently owned by ShieldAlloy Metallurgical Corporation located in Byesville, Ohio. Moreover, the Court hereby APPOINTS Keith W. Schneider, Esq., of Maguire & Schneider, 580 South High Street, Suite 330, Columbus, Ohio 43215, as the implementation master contemplated by Paragraph 9 of the parties' Memorandum of Understanding of Settlement.

The Clerk shall enter FINAL JUDGMENT in these actions.

George C. Smith

George C. Smith, Judge
United States District Court

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of	)	
	)	Docket No. 40-8948-MLA
SHIELDALLOY METALLURGICAL CORP.	)	
	)	
(Cambridge, Ohio Facility)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF NOTICE OF INTENT TO PARTICIPATE AND NRC STAFF RESPONSE TO REQUEST FOR HEARING FILED BY MICHAEL BRUCE GARDNER" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class; or as indicated by a single asterisk through deposit in the Nuclear Regulatory Commission's internal mail system; or as indicated by double asterisk via facsimile transmission this 11th day of January 1999:

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