

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of)
)
CONSUMERS POWER COMPANY) Docket Nos. 50-329
) 50-330
Midland Plant, Units 1 and 2)

AFFIDAVIT OF MYRON M. CHERRY

Myron M. Cherry, being duly sworn on oath, deposes
and says:

1. I am the attorney who has been representing the
so-called Saginaw Valley, et al. Intervenors since the inception
of this intervention.

2. At transcript 7089, the Board ordered me to serve
upon the Board on or before June 9, 1972 a sworn statement of
the circumstances "under which he committed what appears to the
Board to be a contempt in this regard of the Board's order and
he can at the same time make whatever showing he deems appro-
priate by way of an explanation as to why the Board should not
hold him in contempt and take whatever action it deems appro-
priate in the circumstances." *

3. This affidavit and submission is made in order to
set forth my view of facts which I believe have been erroneously
characterized, initially by counsel for Dow Chemical Company

*By telephone Chairman Murphy extended the date for filing until
the end of August 1972.

and subsequently by the Board. This affidavit is made without in any way admitting that there are circumstances which require that I make any showing as to why I should not be held in contempt and is further made without admitting that this Board is granted by the Rules of Practice of the Atomic Energy Commission any so-called powers of contempt. However, notwithstanding these exceptions and therefore my legal position, I am submitting the following statement of facts because I believe there has been a misunderstanding created, nurtured and seized upon by Dow Chemical's counsel.

4. As this Board will recall, Saginaw Valley Intervenor.s originally asked several interrogatories of Dow Chemical Company dealing with the synergism or other interaction between chemicals and other releases from Dow Chemical facilities with radionuclides. Although the Board originally characterized the request for information by Saginaw as an attack upon the radiation standards of 10 C.F.R. Part 20, it is clear from the transcript that interest was shown in whatever information Saginaw (or the Board on its own motion) could bring to bear upon the so-called synergism problem. For example, at Tr. 1332-1341, Dr. Goodman indicated that the Midland plant might be the only plant in the world scheduled to be located next to a chemical facility and that Part 20 might be inapplicable in view of the fact that it, that is, Part 20 standards, may have been drafted contemplating a pure atmosphere.

5. Dow Chemical therefore objected to supplying information on the synergism matter and objected initially to supplying any information as to Dow's releases only because Dow Chemical believed the matter was not legally in issue. Dow Chemical never took the position that the information was entitled to any proprietary protection or that it was confidential in any fashion at all.

6. For example, the following exchange took place at Tr. 1332:

"Dr. Goodman: Do you suppose Dow has any objection to giving this information out [that is, information as to releases from Dow's plant]?"

"Mr. Wessel: Not as a matter of proprietary information but simply because it is not an area into which the Board should be inquiring because it isn't going to lead to anything that is pertinent."

7. Thereafter and at Tr. 1342 Dr. Goodman indicated that he could not think of any synergistic reaction that would prevent, all other things being equal, the issuance of a construction permit but that it might turn out to be something which the Regulatory Staff, the Applicant and Dow ought to look at prior to the operating license stage. Dr. Goodman never suggested that the information should not be viewed publicly. In connection with Dr. Goodman's remarks, Mr. Wessel stated:

"Mr. Wessel: I think I can say, speaking for Dow, that if there is any possibility of the kind of synergistic reaction between a release from the Dow plant and from radioactivity or radiation activity of a nuclear plant, Dow would want to know it.

"Dr. Goodman: And know it now.

"Mr. Wessel: And know it now, so that corrective action can be taken.

"Dr. Goodman: Why don't we suggest then that Dow try to come up at the hearing with some further thoughts along this line.

"Mr. Wessel: I assure you we will consider it again, but I also say, Dr. Goodman, we do not know of any such reaction."

Tr. 1342.

Thus Dr. Goodman spoke of analysis of any possible synergistic effect in the open and at the hearing.

8. Thereafter and at Tr. 1394-95 the Board indicated it would consider the nature of an order upon Dow Chemical in connection with the requested information.

9. Thereafter and on June 21, 1971 the Board indicated that it had reconsidered its decision with respect to the so-called synergistic interrogatories and ordered:

" . . . the Dow Chemical Company to answer the interrogatories specifically with respect to the effluents."
Tr. 1502.

I queried the Board as to whether merely answering the interrogatories would be sufficient inasmuch as what we, that is, Saginaw, were interested in was having material placed in the record, including perhaps Dow witnesses testifying as to the underlying information. The Board responded to that query by stating:

"As of now, let's not rule on the question of witnesses, at least until the Board has some clearer notion of what exactly it is that you are after." Tr. 1502.

Accordingly, when the Board originally ordered the information to be produced, it was in terms of a requirement upon Dow Chemical to answer interrogatories, thus overruling Dow's objection to our interrogatories on a legal basis. There was no suggestion by the Board that the information was entitled to any proprietary protection and, more importantly, there was never any suggestion (on the contrary, see supra) that Dow Chemical considered the matter as entitled to proprietary protection. The interrogatories which were ordered to be answered by Dow were interrogatories numbered 239, 241, 243, 245-46, 251, 259, 260, 270 and 286. (See Tr. 1511.)

10. After a recess, Dow Chemical's counsel objected to answering the interrogatories and, in a sense, moved for reconsideration of the Board's order. After a colloquy between counsel, the Board revised its order, stating:

"I suggest you go ahead, Mr. Wessel, and prepare what you propose to prepare and at that time let's all look at it and see what the next step is from there." (Tr. 1518)

Thus even with the Board's modification of its order to Dow Chemical to answer the interrogatories, the emphasis once again by the Board was that the information to be submitted by Dow Chemical was to be for purposes of an analysis at the hearing and even at that late date there was no suggestion by the Board that it was entitled to proprietary protection; and, more important, Dow had not asked for any.

11. The next time this subject came up was at Tr.

1681-85, when Mr. Wessel once again asked for a modification of the Board's order on what Dow was required to produce. The Board acquiesced and once again stated for Mr. Wessel what was to be produced. Again there was no suggestion that the Board intended to treat the matter as proprietary or that Dow wished any confidential treatment. See Tr. 1681-85.

12. In light of this background, the whole question of a form of protective order came up almost inadvertently. Thus, on June 24, 1971, Mr. Wessel again complained to the Board that Dow was having difficulty compiling the list of effluents, that Dow people were out of town and it had been difficult getting final clearance. Mr. Wessel stated:

"But in connection with what we're now discussing, I would like to request that since this report -- since this list is being furnished for the very limited purposes of analysis, that it also be under the Board's June 14 protective order until such time as the necessary foundation has been shown, that is, the order of June 14, which says that the materials to be used for the purposes --

Chairman Murphy: Let's treat it that way and Mr. Cherry can make an objection later on."
Tr. 2125.

Although I cannot indicate what my state of mind was at the time of the above colloquy and the Board's offhandedly applying the June 14 protective order to the Dow effluent list, it is clear that Mr. Wessel made a major change in position in requesting such protection. It is also clear from an analysis of the June 14 protective order (a copy of which is attached hereto as Exhibit A) that there was no basis in the record for

applying the protective order to the Dow effluent list. The Board knows that the protective order was applicable only with respect to Intervenor and Applicant and covered only documents which Applicant asserted were entitled to proprietary (not (confidential) protection pursuant to the rules and regulations of the Atomic Energy Commission. The Board will also recall that the basis for the need of protective order was Babcock & Wilcox's claim that certain information in reports furnished as part of Applicant's case (and hence Applicant furnished them to Intervenor) were entitled to proprietary protection. The Board's protective order was carefully worked out in advance by Mr. Lowenstein and myself in the nature of an agreement and therefore the protective order was entered in the sense of a stipulation between counsel for Applicant and counsel for Intervenor to serve a specific purpose. Perhaps I was negligent in not raising this point at Tr. 2125, but the Board will know from the history traced in this affidavit, together with Tr. 2125, that Mr. Wessel, a skillful trial attorney, succeeded in getting the Board to give him more than he was entitled and more than he ever asked for in earlier descriptions of the documents. Indeed, the manner in which Chairman Murphy acquiesced in Mr. Wessel's request indicates that the Board also may have had some reservations about giving the list protective treatment. Inasmuch as I then did not have any intention of publicizing the Dow effluent list (and maintained that intention to the pre-

sent) and inasmuch as several weeks had gone by since my first request for the information and I desperately needed it for my clients, I recall that I made no mention of any objections at that point. The Board will also note that the colloquy with Mr. Wessel and the Board (Tr. 2124-26) came right in the middle of a complicated discussion between myself and Mr. Engelhardt regarding the existence of documents dealing with certain safety features.

13. The next time this matter came up was at Tr. 2433-35 and the Board queried when I would be in a position to present information on synergism. I explained to the Board that I couldn't make any judgment until I received some of the information which the Board had ordered Dow to produce. I noted that it had been some time since Dow had been ordered to produce the documents but they were still not yet available. Mr. Wessel acknowledged that I might have witnesses testifying about the matter, including Dr. Tamplin. No mention was made by anyone that any sessions would be held in camera or that any information was confidential. I was interested in getting the information as quickly as possible.

14. The Board thereafter took a recess and the hearing was reconvened on July 7, 1972. Prior to that time and on June 29, 1972 I had received by messenger from Mr. O'Connor of Dow the long-awaited list of anticipated Dow effluents.

The information we received by messenger from Dow Chemical is attached hereto as Exhibit B. It is in fact the list of anticipated effluents which Dow prepared. Once again, Dow's skillful lawyer set forth in haec verba the text of the protective order entered by the Board on June 14, 1971 which, as noted earlier, had nothing to do with the Dow Chemical information. I received the information pursuant to the Dow Chemical conditions not because I believed they were applicable but because I was interested in beginning the long-awaited analysis of synergism. In fact, in the interest of expedition, when I needed to make some extra copies, I telephoned Mr. O'Connor that day to get permission, even though legally I thought it an unnecessary extension of industry power with its arrogant agents and attorneys. At Tr. 2556 at the reconvened hearing, I explained on the record the circumstances of my receipt. Once again, I do not recall my state of mind at the time I received the document pursuant to the restrictions incorporated in the list of effluents, but I saw no need then (or now) to take practical issue with respect to the application of the June 14 order to the Dow effluent list except by way of explanation. I do not mean to imply that the June 14 order validly was applied to the list of effluents or that I violated any such order. I just wish to indicate the surrounding circumstances and the fact that as late as July 7, 1971 Mr. Wessel and the Board were aware of the fact that distribution of the effluent list was to be made by me in the context of my preparation of my clients' case. There was no suggestion as of July 7, 1971 or,

to my knowledge, at any time prior thereto, that I was not to give a copy of the Dow effluent list to anyone who could give some assistance to me and my clients in connection with the hearing.

15. It should be pointed out that Mr. Wessel's offhand request for application of a protective order to the list (Tr. 2124-25) was requested " . . . until such time as the necessary foundation has been shown . . ." Thus, in a sense Mr. Wessel was asking for protection until such time as the Board determined that a valid Part 20 attack had been made. It is stretching concepts of legal protection to say that non-proprietary documents of Dow or anyone else are entitled to protection until factual evidence required to be produced later is deemed admissible. There is no basis in law for such an occurrence and, unfortunately, because of my zeal in wishing to have the information as soon as possible, I did not point this out earlier to the Board.

16. As of July 8, 1971, the next time this issue came up, Dow Chemical had admitted, in effect, that the Mapleton Intervenors were entitled to the list of effluents. At Tr. 2620-21, Mr. Wessel himself characterized the contentions which the Mapleton Intervenors had raised. Mr. Wessel said:

"Secondly, yesterday there were six suggestions [raised by Mapleton]. I have them listed. Not seven. And I would like to supply what the six are so that if Mr. Ginster has a seventh we can flush it out. . .

"Four was synergism." Tr. 2620-21. (Emphasis supplied.)

Thus, as of July 8, 1971 Dow Chemical was not disputing the Mapleton Intervenors' right to have the document in question.

and, indeed, on the basis of Mr. Wessel's admission, one might very well have concluded that Mapleton Intervenors were entitled to the document; and they could assist Saginaw in the preparation of Saginaw's case, particularly since Mr. Wessel had admitted that one of the Mapleton contentions was synergism. To my knowledge, that matter was not again raised until some time later.

17. At Tr. 3970 Mr. Wessel indicated that the list, late in coming, was incomplete and offered to clear it up the following Monday.

18. To my knowledge, the next time this matter was discussed was at Tr. 4634, where Mr. Ginster stated that he understood that I had been given (the day before) on July 20, 1971 a list of effluents put out by Dow Chemical Company and that he wanted it. Thereafter followed a colloquy among the Board, Mr. Wessel and Mr. Ginster:

"Chairman Murphy: You're going to request a copy. Will you furnish him a copy?"

"Mr. Wessel: If the Board directs it.

"Chairman Murphy: The Board directs it.

"Mr. Wessel: Subject to the same order as Mr. Cherry, a protective order.

"Chairman Murphy: I didn't remember that."

Tr. 4634.

The interesting part of this colloquy is that Mr. Wessel had no objection to furnishing the Mapleton Intervenors

a copy of the effluent list so long as it was subject to the protective order. That is, it would not be disclosed except in the context of the hearing and if a foundation for an attack on Part 20 was made. Since Mr. Wessel was only interested in protecting the information from getting to the media (an advantage that perhaps Mr. Wessel and Dow are not entitled to in any event), it is clear that Mr. Wessel had no objection to placing the list in the hands of Mapleton so long as the so-called protective order was applied. And, as the Board knows and as later will be demonstrated, Mr. Like stated that he was always agreeable to be bound by the terms of the protective order, although he did not believe it applicable.

Of additional importance here is the remark by Chairman Murphy, "I didn't know that," an obvious reference to the most inadvertent and casual manner in which the June 14 protective order was applied to the effluent list in the first place. See Tr. 2124-25. It is interesting, to say the least, that Dow Chemical and Mr. Wessel, who complained of violation of an order and also about the integrity of the judicial process, are subject to a bit of contradiction themselves. This is shown by the following colloquy in the record beginning at Tr. 4634:

"Mr. Wessel: This is the effluent list and and there is no purpose in the world for them [Mapleton] to have it. Everybody who has it, like Mr. Cherry, has given it to a technical

scientist for the purposes of analysis. They [Mapleton] have no such reason for this list at all.

"Mr. Ginster: We do want to present it to experts for analysis with respect to the synergistic effects.

"Mr. Wessel: Under the same protective order, if the Board please.

"Chairman Murphy: Yes.

"I do not recall that Mr. Wessel. [That is, Chairman Murphy once again acknowledging for obvious reasons that the Dow effluent list was not the kind of document that was entitled to any protection at all. As I have pointed out earlier, it was Mr. Wessel's inadvertent reference to the June 14 order and not the Board's direction that started this whole business in the first place.] If it is subject to a protective order to Mr. Cherry, then the same conditions will apply."

"Mr. Wessel: Furthermore, I don't think the Mapleton Interveners --

"Mr. Ginster: It's covered in contentions three and four.

"Mr. Wessel: It is. And they have been excluded. He is correct.

"Mr. Ginster: They have not been excluded.

"Mr. Wessel: The only one on which [sic] the Mapleton Interveners have any right to present evidence is on contention No. 1. And in the other areas they have been told if they wish to make an affirmative showing they may do so.

"Now this list of effluents was given to Mr. Cherry at his request for a specific purpose, to make a specific showing. That is not one of the areas in which the Mapleton Interveners have any concern, not at all, at any point in this hearing until this moment.--or at least until this morning when Mr. Ginster asked for that list. There is no reason in the world for this list to be furnished them, because even if they give it to someone and he analyzes it, that evidence could not be offered under the present ruling of the Board."

Of interest in this colloquy are four points:

1. Chairman Murphy did not remember that a protective order had been issued, thereby calling into question whether in fact a protective order really was issued. Tr. 2125;

2. Chairman Murphy saw no difficulty in giving the list to Mr. Ginster subject to a protective order, if in fact one was entered;

3. Mr. Wessel stated at Tr. 4635 that the Mapleton Intervenors wanting a copy of the list was news to him and that, in Mr. Wessel's own words, "This is not one of the areas in which the Mapleton Intervenors have any concern, not at all, until this moment." Tr. 4635. This statement of Mr. Wessel is to be contrasted with the statement above at Tr. 2820-21 (see paragraph 16 above), where it was Mr. Wessel himself who informed the Board that one of the areas raised by Mapleton was synergism; and

4. Mr. Wessel's argument as to why Mr. Ginster should not receive the list was illogical in its zenith, inasmuch as Mr. Wessel first wanted a protective order, so he said, until such time as someone could analyze it in support of a foundation for an attack on Part 20, and then says at the bottom of Tr. 4635 that Mapleton could not have the list even to give it to someone to analyze since under the present rulings of the Board, they couldn't put the evidence in anyway.

Since the purpose of the analysis was to determine whether a proper attack could be made, I can only state that Mr. Wessel's remarks are illogical because that is the best manner in which he could explain his client's position.

19. Immediately after the inconsistent remarks by Mr. Wessel, the following occurred dealing with Mr. Ginster's right to have the list:

"Chairman Murphy: I will have a look at it. Do you want to respond?"

"Mr. Ginster: Yes, sir. Even to make an offer or proof bearing on radioactive hazards to health we need this information for the benefit of the qualified experts.

"Mr. Wessel: Would the Board ask Mr. Ginster what this list is. Let him say now what he thinks it relates to. Not Mr. Gadler, Mr. Ginster.

"Mr. Ginster: It's a list of effluents.

"Mr. Wessel: What is it going to show?"

"Mr. Ginster: What is being put into the atmosphere which has a bearing on synergism, which further has a bearing on the radioactive retention.

"Chairman Murphy: I'm going to take a look at the contentions again, Mr. Wessel, and look back at the rest.

"Mr. Wessel: Would you like a copy of the list?"

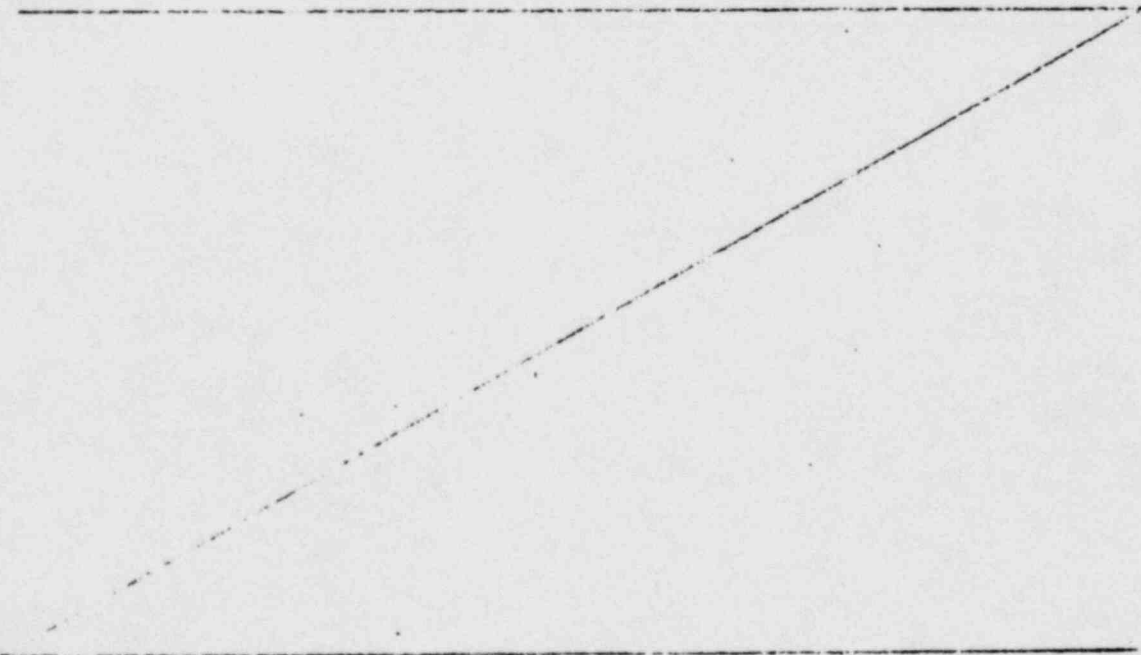
"Chairman Murphy: I have it. And we will decide this on Friday."

Tr. 4535-36.

20. I wish to state that I have no present recollection of ever tendering the Dow list of effluents to Mr. Like

Mr. Ginster or anyone connected with the Mapleton Intervenors. On the other hand, I have the greatest respect for Mr. Like as an attorney, and if Mr. Like indicates that I gave him the list, and despite my present recollection that I did not do so, it is entirely possible that Mr. Like and I had communications about the list during the time that Mr. Wessel admitted that synergism was one of Mapleton's contentions and during the time that Mr. Ginster asked for the list at Tr. 4634. I wish to state emphatically that this interpretation is being made by me based on the circumstances as I can recall them through the transcript. I can only state that a tremendous amount of confusion surrounded the list and what my present recollection is.

21. Here follow true and correct copies of pages 4685 through 4694 of the transcript:



1 Mr. Ginsten, and we will specify a time by which the affirma-
 2 tive testimony on the Part 26 violations should be submitted
 3 to the Board.

4 In that connection, Mr. Vassel, --

5 MR. CHAMBERLAIN: Incidentally, Mr. Chairman, we did
 6 not get that 1944 list for General Gregory which we need
 7 for our report.

8 MR. WASSER: May I speak to that, Mr. Chairman?

9 CHAMBERLAIN: Yes, you may.

10 MR. WASSER: Mr. Ginsten made his application
 11 at about five o'clock after six on Wednesday, predicating
 12 it on the statement, "I understood yesterday that Mr. Vassel
 13 gave Mr. Gregory a list."

14 Now that list was given to Mr. Gregory on June
 15 25th as a result of discussions which had started in April
 16 and which are in this record and as to which there has been
 17 much discussion, questions by the press, questions by
 18 Dr. Ginzman. And the fact that Mr. Ginsten may have learned
 19 something the day before I think is suggestive of why he
 20 is making his list.

21 There is no issue -- there is absolutely no issue
 22 in this case in which Mr. Ginsten has presented any contro-
 23 versial evidence which is in any way in conflict with the
 24 evidence which is in the record. And the fact that he
 25 made his list the day before I think is suggestive of why he

1 First of all, because the list is obviously on its
 2 face a highly confidential matter which should only be
 3 produced if there is a really good reason for it to be pro-
 4 duced;

5 And second of all, because there is no reason in
 6 this world why Mr. Ginstler should be in a position and now
 7 seek to reopen another issue which is at the point of being
 8 closed, another issue with none of this kind of presentation
 9 and none of this kind of argument.

10 We have in our -- I believe it is the July 1968
 11 memorandum, submitted an eleven-page document to this Board
 12 indicating the many, many different instances in which the
 13 Nigerian Government have failed and refused to comply with
 14 orders of this Board. I would like to give you just one that
 15 happened on Wednesday in this same connection.

16 At page 5855 of the transcript the Chairman stated
 17 in response to a question I had asked -- that I had stated,
 18 on a comment as to Mr. Ginstler's not being present:

19 "Chairman, Lady: Both Mr. Mike and
 20 Mr. Ginstler talked to me, and they do not intend
 21 to participate to any additional extent so far as
 22 I understand on quality assurance matters. And on
 23 that understanding they requested permission not to
 24 participate in the hearing. I have not heard
 25 granted that permission."

Nevertheless, I persisted in noting that Mr. Ginstone was not here. He comes in and out when he likes, as did Mr. Lake, and shakes us all up. We've got to look back over the record, spend nights finding out where the Board ruled this and the Board ruled that, and then on Wednesday, after we are all done with reading committee, at page 4688:

"Mr. Ginstone: I have just a few questions, Mr. Chairman."

Page 4688, again Mr. Ginstone:

"I would know by request to exercise--"

There was opposition. Five minutes past six, and the Chair ruled at page 4688:

"But the Board will permit you to address written questions, if you choose,--"

Now I think respectfully the time has come that Mr. Ginstone should obey a rule. There is not one reason in this proceeding for him to have this highly confidential list and I would respectfully request the Board not to let him have it. There isn't any showing of any kind.

Now let me suggest another thing:

When this originally came up in April upon the basis of Mr. Cheney's interrogation, the Board ruled that Mr. Ginstone should have the privilege of such a list until Mr. Cheney had said a word, or. There was some argument

1 about that, I believe in early May. In June, the Board
2 reversed itself and said, "We adhere to the prior ruling.
3 We will not at this point consider this other than
4 an attack on Part 20. But, Mr. Wessel, we're going to shift
5 the burden to you. Let Mr. Cherry have the list and then
6 he can study it, and if he can make a showing, then we will
7 see where we go."

8 Now why should Mr. Ginstor at this point,
9 Wednesday, at five minutes past six, come in and not only
10 take advantage of what happened in April, May and June, but
11 all of his violations all the way through. It seems to me
12 that just once this Board should say to him, "Mr. Ginstor,
13 come on in with your showing, with your offer of proof, and
14 then you can have the list."

15 And I respectfully request the Board to adhere to
16 this ruling and not permit him to have it.

17 MR. GINSTEIN: Mr. Chairman, in response to this
18 attack, first of all it has been the contention, the sub-
19 stance of contention of the Hopleton Interveners all the
20 way through from the original filing of the petition for
21 leave to intervene that these people are subject to radio-
22 logical hazard from the establishment -- and God prevent it
23 and the law prevent it -- of this monstrous plant which
24 we believe and we will prove will emit radioactivity,
25 including radioactive gases that are lethal to man to a

1 ... ble medical and scientific certainty into the
 2 atmosphere. Now that has been their contention all the way
 3 through.

4 Now those contentions have been made more specific
 5 and had I been permitted to question the gentlemen,
 6 Mr. Giese, and the other gentleman orally, Mr. Gower, the
 7 questions would have been along the lines of -- about this
 8 practice of not examining a pressure vessel until it is near
 9 completion because, as I understand it, the integrity of
 10 welds in a pressure vessel is a matter of criticality --
 11 criticality relating to preventing leakage of radioactive
 12 gas from water coolers.

13 But in any event, the line of questioning would
 14 have been related to: Is there any possible way to determine
 15 the integrity of welds unless, for one thing, you have
 16 practical training or experience in welding and, number two,
 17 if you understand radiographic --

18 MR. KAWALSKI: Wasn't this what he was supposed
 19 to do in writing, Mr. Chairman?

20 MR. GEMMEL: This is just answering Mr. Wessel's
 21 unjustified attack.

22 But, your Honor -- or Mr. Chairman, these people
 23 had a right to raise whatever they wanted to. Now I have
 24 been learning here right from the beginning, and I might
 25 have started with a question --

1 I think, especially with further experience, that I will be
2 an old pro in these proceedings.

3 I'm glad you wrote the book, Mr. Chairman, because
4 this type proceeding is the most unusual thing that I have
5 ever been involved in.

6 CHAIRMAN NUTTIN: It is unusual, I think.

7 MR. CHISHAM: -- In sixteen years of practice
8 in law, including before administrative agencies, sir.

9 I understand that if we get the list of effluents
10 put out by the Dow Chemical Company, whether particulate
11 or chemical, that it is confidential, that it can only be
12 shown to an expert, and that he must keep that confidential,
13 and I understand that wholly. So I want to say this:

14 I have done my level best for these Napleton
15 Interventions. I will fight for them to the death. It has
16 been a privilege for me to represent them, and I want to
17 tell Mr. Nuttin that I have just started to fight Dow
18 Chemical Company and Consumers Power Company, but it may
19 appear to be a battle between David and Goliath.

20 CHAIRMAN NUTTIN: Would you care to identify the
21 parties?

22 (Laughter.)

1 We have, Mr. Glander, taken the matter of the
2 effluent matter under consideration, and it seems to us that
3 it is not within the area which was specified in the conten-
4 tions.

5 In view of the fact -- especially in view of the
6 fact that Mr. Cherry is in the process of consulting with
7 people as to whether or not these two effluents in fact have
8 anything to do with whether the problem of synergism is a
9 real problem, we are going to deny the request at this late
10 stage to turn over the list to the Hopleton Interveners.

11 MR. GASSNER: Mr. Chairman, I would ask that you
12 reserve your ruling, or the Board's ruling, until such time
13 as we have an opportunity to make a written offer of proof
14 of what we would prove by our experts; in no way, however,
15 waiving the position that we would have the right to present
16 oral testimony.

17 But I have to get the record clear in this regard.

18 CHAIRMAN MURPHY: You can make a written offer
19 of proof on the question, on the issues in 3 and 4, and we
20 will look at that. But all we are suggesting at the moment,
21 or saying at the moment, is that we will not make the two
22 effluent lists available to you as it has been to Mr. Cherry.

23 MR. CHERRY: You also understand, sir, just so the
24 record is clear, that we contend not only a hazard from this
25 point of view, but also a hazard from the other side.

1 2

1 hazard & the synergistic effects, radioactive effluent
2 combining with effluents from the Dow stacks, claimedly
3 adversely affecting the health or being a danger to the
4 health of the Hopedon Interveners -- just so that the record
5 is clear in this regard.

6 CHAIRMAN HORTON: I think the record is clear in
7 that regard.

8 Mr. Chavvy, do you want a minute or two, or shall
9 we start?

10 MR. CHAVVY: Why don't we say three minutes?

11 CHAIRMAN HORTON: Five.

12 MR. CHAVVY: Dr. Goodman was going to say something,
13 I thought, on quality assurance. I did not want him to
14 forget about it. Maybe I'm wrong.

15 DR. GOODMAN: No, I was going to ask you a
16 different question.

17 MR. CHAVVY: Do you want to ask it?

18 DR. GOODMAN: It was during that period of sweating
19 and right about I was going to ask it, and it's a little hard
20 to bring it back.

21 (Laughter.)

22 I was going to ask you if you don't probably feel
23 that there were four places where... this is... an
24 affirmative statement

DR. GOODMAN: On any issue.

MR. CHERRY: Adequate time --

DR. GOODMAN: For you to make an affirmative showing.

You told us, off and on, during the last 7 or 8

months, that you were going to have an affirmative showing.

Now I'm here waiting and waiting for your affirmative showing.

MR. CHERRY: On what, sir?

DR. GOODMAN: On any of the issues that you brought up. You've cross-examined, you've done this; but you have not put any witnesses on.

MR. CHERRY: I'm about to put one on.

Dr. Goodman, let me respond to it in this way:

I have taken exception from the beginning to the Board's rulings on interrogatories and discovery, and I still take exception. I don't see how we can make an affirmative showing with respect to BCS until the case has been put in; and that has not been put in. I don't see how we can make an affirmative showing in the Fedine matters until the matter is resolved, and that has not been resolved.

I don't see how we can make an affirmative showing -- and I do think fairly we should be required to make an affirmative showing -- on the synoptic matters until a reasonable time before the hearing has been concluded or adjourned.

of the new list had been resolved sometime in the spring, one way or the other, then we would have had some period of time before the hearing started.

As I say, I don't mean to be critical. I don't think the question, sir, is as simple as my saying has the Board made a decision or not. I just don't think it is that simple.

I think it's a combination of factors, and if you ask me the simple question, my simple answer is going to be no. But I don't think the question is that simple, nor is the answer that simple.

DR. COOPERMAN: Okay.

MR. GLENN: Mr. Chairman, one point. I understand that Dr. Trepkin has this list of effluents. If we can produce names of other experts in this area, which as I understand it would be hazardous or injurious effects on health, human health from radioactivity, or radioactive effluents, if those names are furnished would Dr. Trepkin be permitted to communicate those effluents -- that list -- to them?

MR. CHAIRMAN: Before the Board answers, could I make a suggestion which may resolve this problem?

May I suggest to Mr. Glenn that if he has -- and I am not taking issue on the Board's ruling or not ruling on giving him the list -- but just to get the matter over, if

1 Mr. Ginter would provide me with the names of the people
2 that he would talk to had he had the list, if they have
3 sympathetic qualifications I will consider talking to them on
4 a discreet basis, and then we can end this thing right now.

5 MR. WATSON: OFF the record?

6 MR. GINTER: Can we do it that way?

7 CHAIRMAN WATSON: I don't see why not.

8 (Rings.)

9 CHAIRMAN WATSON: The hearing will please come to
10 order.

11 Resumption,

12 DONALD M. HOLMES

13 was called as a witness on behalf of Signal Valley
14 Enterprises, and having been first duly sworn, was examined
15 and testified as follows:

16 DIRECT-EXAMINATION

17 BY MR. GINTER:

18 Q Will you state your name, please?

19 A Donald Matthew Holmes.

20 Q Where do you live, Mr. Holmes?

21 A Oakes, Michigan.

22 Q Mr. Holmes, during the course of your testimony both
23 on direct and on cross-examination I have suggested that from
24 time to time the Board might wish a candidate. And when they

These pages show the confusion in connection with the Dow effluent list, the underlying circumstances surrounding it and the fact that even if the order of June 14, 1971 had application to the list, it was not violated, but rather it was contemplated that Mapleton and Saginaw people would work together. Thus, as these pages demonstrate, the following is correct:

(a) Mr. Wessel argued that Mr. Ginster was making a late application.

(b) Mr. Wessel also argued that Mr. Ginster was attempting to reopen matters and show that Mr. Ginster had failed to follow other rules not applicable to this discussion.

(c) Mr. Ginster indicated that he had information concerning synergism he thought useful.

(d) Mr. Wessel was concerned only with the confidential nature of the list.

(e) I suggested that Mr. Ginster could have access to the list by virtue of working with me. I asked Chairman Murphy if that was agreeable and Mr. Murphy said:

"Chairman Murphy: I don't see why not." Tr. 4695. Accordingly, if there is any legislative history dealing with the practical availability of the effluent list to the Mapleton Intervenor, it clearly shows that so long as I was willing to vouchsafe for the confidentiality of the use of the list by Mapleton, the two of us could work together. It is clear

that Mr. Wessel was only concerned with protecting the confidentiality of the order, which never was breached until Mr. Wessel published the list himself. It is clear that the parties at Tr. 4695, including Mr. Wessel and Chairman Murphy, acknowledged the fact that the Mapleton Intervenors and their witnesses could have access to the list through me so long as it was kept confidential. Once again, I reiterate that I have no present recollection of giving the list to Mr. Like or to Mr. Ginster. However, I state emphatically on the basis of my review of the transcript that if I had given the list to Mr. Ginster or Mr. Like, it was not a violation or flouting of the Board's order but clearly in contemplation of the informal and practical method which all of the parties were aware of and agreed to at Tr. 4695. Indeed, as the above transcript references demonstrate, Mr. Ginster made a promise to keep the list confidential and a commitment on the record. See Tr. 4690.

22. To my knowledge, the next time this matter came up was on November 23, 1971. The pertinent pages are Tr. 5048-5050. In these pages Mr. Like formally asked once again for the list of Dow effluents, stating that he understood a copy had been made available to Saginaw. Mr. Wessel objected. Mr. Like countered that Dr. Hoover and others have contributed or are contributing testimony which is relevant to effluents and that he, that is, Mr. Like, would like to have them

have an opportunity to examine the list of effluents in conjunction with the testimony that they will give in the proceeding. Mr. Wessel objected again. The following colloquy then took place:

"Chairman Murphy: In view of the history of this, this is something that clearly should be made by way of written application.

"Mr. Cherry: May I say, I think the whole procedure is kind of moot. I just said to Irving [Like], I am glad of all the help I can get and I would be delighted to have him look at them [that is, the Dow effluent list] on my behalf."

Mr. Wessel inquired whether the list had been shown to Dr. Tamplin and I admitted that this had been done. Mr. Wessel then said with respect to Mr. Like assisting me:

"Mr. Wessel: So that course is one that has been accepted all along, provided everybody says [sic] it is a party to the same restrictive agreement."
Tr. 5048-5050.

Again, I reiterate that I have no present recollection of having turned over the list to Mr. Like. However, it is clear from the proceedings here that the Board and Mr. Wessel acknowledged the fact that Mr. Like could assist me in the synergism case and it was contemplated by Mr. Wessel himself that Mr. Like's witnesses could see the list in connection with their testimony. All Mr. Wessel was concerned about was that the confidentiality be maintained. The confidentiality was maintained, inasmuch as noted above, it was Mr. Wessel himself who finally admitted that the list was not entitled to protection

and released it to the media.

23. In light of this history and Mr. Wessel's agreement on the record on several different occasions, it is inconceivable to me that Mr. Wessel made a fuss about this whole matter in the summer of 1972. It appears that Mr. Wessel, in accusing lawyers of violating agreements, just hadn't done his homework. With respect to the transcript in the summer of 1972 and particularly pages 5506-5510, 5550-5555, 5558-5559, 5560-5575, 5578-5579, etc., no one during those discussions was cognizant of how the order came into effect. As has been shown above, it was clearly contemplated that the Mapleton Intervenors could assist me and thereby have access to the list, so long as they kept it confidential. Mr. Ginster made that promise on the record. Mr. Like acknowledged that he had done so and it was only Mr. Wessel's overzealousness in looking narrowly at the June 14, 1971 protective order (which, as I have indicated, has no real application) and the list of effluents furnished on June 29, 1971 that appeared to get everyone discombobulated.

24. In summing up, I wish to state very clearly the following:

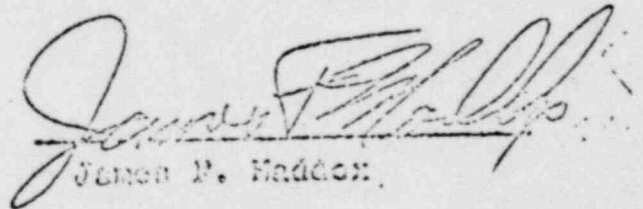
(a) I have no present recollection of giving the list to Mr. Ginster or Mr. Like.

(b) I have the greatest respect for Mr. Like and if he states that I gave him the list, I am obliged to review the transcript in light of that statement.

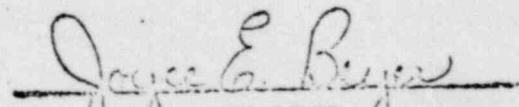
STATE OF MICHIGAN)
COUNTY OF MIDLAND)

ss.

James P. Maddox, being duly sworn, deposes and says that he is Project Manager for The Dow Chemical Company in connection with the proposed nuclear energy project and that he has read the foregoing list of anticipated Dow gaseous/liquid effluents which he believes to be true.


James P. Maddox

Subscribed and sworn to before me this 29th day of June,
1972.


JOYCE E. BEYER
Notary Public, Bay County, Michigan
Acting in and for the County Midland
My Commission Expires July 31, 1972

<u>Compounds</u>	<u>Concentration</u> <u>mg./m³</u>
D. <u>Agricultural Chemicals</u>	
Sodium Dichloropropionate	0.02
Dimethyl Dichloro Pyridinol	0.01
Butyl Chlorophenyl Methyl, Methyl Phosphoramidate	0.001
Dimethyl Trichlorophenyl Phosphorothioate	0.001
Phenoxy Herbicides	0.0004

III. Acid Gases

Sulfur Dioxide	0.8
Hydrochloric Acid	1.1
Chlorosulfonic Acid	0.009
Sulfur Trioxide	0.007
Nitrogen Oxides (NO-NO ₂)	7.9
Acetic Acid and Anhydride	0.07
Chloroacetic Acids (mono, di, tri)	0.008
Carbonyl Chloride	0.005
Chloropicrin	0.004
Sulfur Bromides	0.006
Carbon Dioxide	2400

IV. Miscellaneous Chemicals

Acrylonitrile	0.5
Amines	0.001
Ammonia	0.02
Hydrogen	21.0
Argon	6.3
Freon	0.6
Halogen and Ozone (Cl ₂ , Br ₂ and O ₃)	0.02
Carbon Monoxide	4.6
Ethylene Oxide	0.4
Propylene Oxide	0.2

<u>Compounds</u>	<u>Concentration</u> <u>mg/m³</u>
G. <u>Acrylate</u> Methyl Methacrylate	0.001
H. <u>Amino Hydrocarbons</u> Aniline	0.001
I. <u>Aromatic Hydrocarbons</u>	
Benzene	1.2
Ethyl Benzene, Diethyl Benzene, Divinyl Benzene, Isopropyl Benzene, t-Butylethyl Benzene, Methyl Toluene, Styrene & Dimers	0.45
Vinyl Toluene-Toluene	0.2
Xylene	0.4
o-Methyl Styrene	0.1
Naphthalene	0.06
Chlorinated Benzenes (mono, di, tri, tetra)	0.004
Ethyl Chlorobenzene	0.02
Chlorinated Phenols	0.06
Phenol	0.08
p-Phenyl Phenol	0.24
Diphenyl Oxide, Diphenyl, o-Phenyl Phenol	0.14
Butyl Phenols	0.07
	0.05
J. <u>Undefined Aliphatic and Aromatic Hydrocarbons</u>	0.5
II. <u>Dust Mists</u>	
A. <u>Inorganic Dust</u>	
Combustion Particulate	6.3
Calcium Oxide	0.2
Magnesium Sulfate	0.06
Calcium Chloride	0.3
Sodium Chloride	0.7
Bromide Salts	0.02
Diatomaceous Earth	0.004
Sodium Carbonate	0.02
B. <u>Organic Dust</u>	
Bisphenol	0.02
Parabispheol	0.1
Salicyelic Acid	0.07
C. <u>Polymer Dust</u>	
Vinylidene Chloride/Vinyl Chloride	0.3
Methylcellulose	0.09
Alkali Cellulose Pulp	0.04
Ion Exchange Resin	0.07
Polycrylamide	0.05

ANTICIPATED 1975 DOW GASEOUS EFFLUENTS
TO EXTERNAL ENVIRONMENT

<u>Compounds</u>	<u>Concentration mg/m³</u>
I. <u>Hydrocarbons</u>	
A. <u>Saturated Aliphatic Hydrocarbons</u>	
Ethane	15.6
Pentane	0.04
Methane	5.7
Iso-Butane	0.2
Heptane	0.1
Butane	0.1
B. <u>Unsaturated Aliphatic Hydrocarbons</u>	
Butene-1	0.5
Butadiene	0.2
Iso-Butylene	0.3
Acetylene	0.07
C. <u>Alkyl Halides</u>	
Methyl Chloride	3.9
Vinyl Chloride	1.0
Methyl Bromide	0.3
Ethylene Dichloride	0.1
Methylene Chloride	2.9
Vinyl Bromide	0.2
Carbon Tetrachloride	0.1
Chloroform	0.1
Vinylidene Chloride	1.1
Propylene Dichloride	0.7
Perchloroethylene	0.08
Organic Bromides	0.03
D. <u>Alcohols</u>	
Methanol	0.3
Ethanol	0.02
E. <u>Ethers</u>	
Dimethyl Ether	0.7
Glycol Ethers	0.06
F. <u>Aldehydes, Ketones, Acetates</u>	
Aldehydes	0.02
Acetone	0.09
Acetates	0.02

This quantity does not include methane vented from brine wells located up to a distance of 20 miles outside the plant boundary.

ANTICIPATED 1975 DOW LIG. D EFFLUENTS
TO RECEIVING STREAMS

	<u>Effluent Concentration mg/liter</u>
Inorganic Salts	
Chlorides (as Chloride ion)	1133
Bromides (as Bromide ion)	1.1
Sulfate (as Sulfate ion)	192
Bicarbonate (as Bicarbonate ion)	321
Sodium (as Sodium ion)	792
Calcium (as Calcium ion)	113
Strontium (as Strontium ion)	2.0
Iron (as Ferric ion)	1.0
Aluminum (total metal, all forms)	1.0
Boron (as Borate ion, B ₂ O ₃)	0.9
Nickel (total metal, all forms)	0.02
Copper (total metal, all forms)	0.02
Zinc (total metal, all forms)	0.2
Other heavy metals	#
Suspended Solids	35
Organic Components**	
Organic Acids (such as acetic, glycolic)	1.4
Aliphatic Ethers (such as polyglycol ether, methylal)	4.0
Phenol	0.04
Aldehydes - Ketones (such methyl ethyl ketone, acetaldehyde)	4.3
Esters (such as methyl acetate, octyl phthalate)	5.5
Polymer (such as methyl cellulose, polyacrylamide)	4.3
Aromatics (such as styrene, ethyl benzene)	1.2
Alkyl Halides (such as methylene chloride)	4.3
Aryl Halides (such as monochlorobenzene)	4.3

Other heavy metals are in trace quantities and not above the background of the river water used as service water.

** No further current breakdown is available, although with respect to this category, research studies have been conducted to determine components.

might result with respect to any of the effluents listed and the levels of radioactivity which may be released by the Midland Nuclear Plant, then detailed specifications as to quantities, concentrations, water flow and meteorology and other appropriate conditions would be needed in order to make more precise calculations for that specific effluent. Moreover, of course, at that point the Hearing Board's inquiry should be focused on the nature of the total effluent concentration at the relevant point - not Dow's alone. Dow believes that the reason its effluents alone have been demanded by Saginaw, is only because Dow is an Intervenor, which is not a proper consideration for creating an issue.

It reflects maximum anticipated concentrations, based upon the assumptions that the proposed Midland Nuclear Plant will be operational so that Dow may discontinue operation of its fossil fuel fired boilers, and that projects underway, or authorized or clearly needed to meet anticipated legal requirements, will be completed in accordance with schedules.

This list is based upon Dow's current information as of June 29, 1971. Effluents from any chemical plant necessarily change as products and methods change. Dow of course is hopeful and believes that improved technology will permit it to reduce the specified releases in order to minimize environmental impact.

The list furnishes relative concentrations as initially directed. Liquid effluent concentrations are given as released, and are, of course, subject to further dilution by the stream. Atmospheric concentrations at the nuclear site are estimated using extreme atmospheric conditions, Pasquill Type F stability, a specific wind direction toward the site and 1 meter/second windspeed and these concentrations would exist only as long as these extreme conditions prevail. The monthly mean concentrations would be orders of magnitude lower. However, as pointed out at the Hearing, downwind concentrations are exceedingly difficult to calculate because sources are distributed over 1,200 acres of production operations and because discharges are not necessarily at a continuous rate. In addition, instrument analyses for measurement of individual compounds other than at the vent, are for the most part impractical because of their extremely low concentrations. Accordingly, the list reflects averages and estimates, not projections, with a substantial probability of error on the conservative side. Should evidence be introduced by Saginaw sufficient to satisfy the Hearing Board that synergism

of this proceeding, and shall be used solely in connection with his preparation for or trying of this proceeding or any continuation thereof.

3. Neither counsel for intervenors nor any persons assisting him will make any copies of any such documents.

4. At the conclusion of this proceeding and all appeals therefrom, counsel for intervenors will return all such documents to applicant or its counsel.

5. Counsel for intervenors shall not make these documents available to any persons assisting him in preparing for this proceeding or the trial or any continuation thereof unless they first undertake in writing to be bound by the provisions of this order.

It is and has been Dow's contention from the inception of this area of inquiry by the Saginaw Intervenors, that there is no evidence of any synergism with respect to biological systems exposed to any chemical compound in combination with exposure to radioactivity at the applicable levels given in Code of Federal Regulations, Title 10, Part 20. Saginaw has not adduced any such evidence, despite its claim to the contrary. Dow understands that the Hearing Board's request that it furnish a list of its anticipated 1975 effluents is not based upon any determination that such synergism may in fact occur, but solely to permit Saginaw to conduct research to determine if it can produce evidence of possible synergism with respect to the specific identified Dow effluents.

The list includes all effluents discharged in such a manner as to permit the conceptual possibility of physical juxtaposition to radioactivity. It does not include solid waste disposal by land-fill nor deep well disposal, as to neither of which is there any anticipated external environmental concentration.



UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of
CONSUMERS POWER COMPANY
(Midland Plant)

Docket Nos. 50-329
50-330

PROTECTIVE ORDER

For good cause appearing, it is hereby ordered that all documents or copies thereof furnished by applicant to counsel for intervenors which both counsel for applicant and counsel for intervenors agree are to be governed by this order, shall be furnished to counsel for the intervenors subject to the following terms.

Unless and until otherwise ordered by the Board,

1. Counsel for intervenors will not disclose, or permit to be disclosed any such document, its content, or any portion thereof, except to persons assisting him in preparing for or the trying of this proceeding or any continuation thereof.

2. Information obtained from any such document will be treated as confidential by counsel for intervenors and any persons assisting him in preparing for or the trying of this proceeding, and shall be used solely in connection with his preparation for or trying of this proceeding or any continuation thereof.

(c) I have reviewed the transcript and have quoted and attached pertinent parts thereof. These transcript references plainly show that everyone, including Mr. Wessel, was aware of the fact that there was to be communication between the Saginaw and Mapleton people in pursuing the synergism matter and that Mr. Wessel on two occasions agreed to that procedure. The Board acknowledged its acquiescence. Finally, if one looks at the June 14 order itself, and assuming its applicability and assuming that I gave the list to Mr. Like or Mr. Ginster, there was no violation thereof, inasmuch as the order does not restrict me from making the list available to anyone who would assist me in the preparation of the synergism case, so long as the confidentiality of the list was maintained. It is clear that the confidentiality of the list was maintained and therefore no violation of the order took place.

25. I do not believe that I or Mr. Like has violated any order of the Board; I simply believe there was a great deal of confusion surrounding the entire matter, confusion going to whether in fact the Board ruled that the list was ever subject to the June 14, 1971 order. I had no intention of violating, and I do not believe that I violated, any order and, as the facts demonstrate, whether I am right or whether Mr. Like is right, each of our assertions is plainly contemplated by the so-called legislative history surrounding the

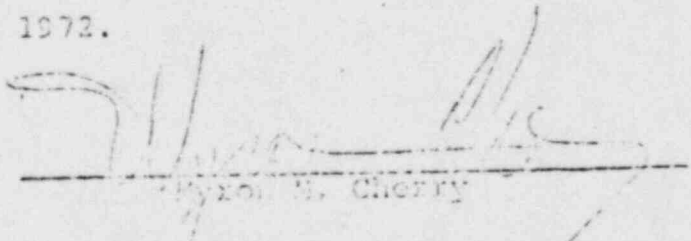
disclosure of the effluent list.

26. I respectfully suggest that the Board issue a ruling stating that it is clear that I did not violate any order. If the Board wishes any further explanation from me in the event it wishes to take any action inconsistent with the position I have not forth herein, I should appreciate some advance notice.

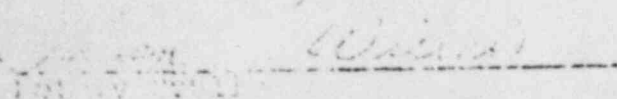
27. It is clear, if there ever was any doubt, that the colloquy among Mr. Wessel, Chairman Murphy and myself at the bottom of Tr. 4694 and the top of 4695 cannot be regarded as other than permission for Kapleton and its experts to view the list through me, so long as I vouchsafed its confidentiality. In my judgment, contempt is precluded since permission was granted.

28. I believe the entire confusion about the list stems from Mr. Wessel's not having reviewed the transcript before he made his accusations. I assume that Mr. Wessel's accusations are inadvertent and in the heat of adversary conduct. However, now that the transcript has been reviewed, I contemplate that Mr. Wessel submit appropriate apologies to me and Mr. Liko.

DATED: August 30, 1972.


Byron H. Cherry

Subscribed and sworn to
before me this 30th day
of August, 1972.


Notary Public