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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of	)	
Chemetron Corporation	)	Docket No. 040-08724 — MLA
(Bert Avenue and Harvard Avenue Sites Newburgh Heights and Cuyahoga Heights, Ohio)	)	Source Material License No. SUB-1357

LICENSEE CHEMETRON CORPORATION'S ANSWER TO REQUEST FOR HEARING BY EARTH DAY COALITION PURSUANT TO 10 C.F.R. § 2.1205(c)

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INTRODUCTION

On April 11, 1994, the Nuclear Regulatory Commission ("NRC" or "Commission") published in the Federal Register notice of its consideration of an amendment to Source Material License No. SUB-1357 to be issued to Chemetron Corporation ("Chemetron" or "Licensee"), for decommissioning the Bert Avenue site in Newburgh Heights, Ohio and the Harvard Avenue

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1/ The Notice of Opportunity for Hearing published in the Federal Register refers to the decommissioning of Chemetron's facilities "at the Bert Avenue site in Newburgh Heights, Ohio, and at the Harvard Avenue site and McGean-Rohco in Cuyahoga Heights, Ohio." 59 Fed. Reg. 17124 (April 11, 1994). The Designation of the Presiding Officer makes a similar reference. 59 Fed. Reg. 29448 (June 7, 1994). As stated in the Chemetron Site Remediation Plan § 1.1 (copy attached), the Harvard Avenue site consists of the McGean-Rohco complex located at 2910 Harvard Avenue, including associated buildings. The Bert Avenue site, while not a part of that complex, is also owned by McGean-Rohco, Inc. The description of the proceeding provided in the Federal Register may give the misimpression that there are actually three sites under remediation.

site in the McGean-Rohco complex in Cuyahoga Heights, Ohio. See 59 Fed. Reg. 17124 (April 11, 1994) ("the Notice"). The Notice stated that the proposed amendment would authorize the Licensee to decommission both sites in accordance with Chemetron's proposed remediation plan and to dispose of a portion of depleted uranium contaminated waste at each site. Further, the Notice stated that the proceeding on the application for the license amendment falls within the scope of informal materials licensing proceedings under 10 C.F.R. Part 2, Subpart L.

The Notice invited "any person whose interest may be affected by this proceeding" to file a request for a hearing in accordance with 10 C.F.R. § 2.1205(c) within thirty days of the date of publication. Pursuant to the Notice, a request for hearing was filed by Earth Day Coalition (the "Coalition" or "petitioner") on May 12, 1994.[2/] Pursuant to 10 C.F.R. § 2.1205(f), Chemetron hereby answers the Coalition's petition as follows.

[2/] The Coalition's petition is dated May 9, 1994, but postmarked May 12, 1994. Under 10 C.F.R. § 2.1205(b) filing by mail "is complete as of the time of deposit in the mail its counsel . . . ." Chemetron calculated its response to the petition as due on June 9, 1994, which its counsel confirmed in a discussion by telephone with the Presiding Officer on June 1, 1984.

ARGUMENT

I. THE COALITION HAS NOT SATISFIED JUDICIAL CONCEPTS OF STANDING TO REQUEST A HEARING

A. Petitioner Must Show That It Is Likely to Suffer Real or Threatened "Injury in Fact" as a Result of the Proceeding, and That the Injury Falls Within the "Zone Of Interests" Protected by Applicable Statute

The Commission's Rules of Practice provide in 10 C.F.R. § 2.1205(d) that a request for a hearing filed by a person other than an applicant "must describe in detail --

> (1) The interest of the requestor in the proceeding;
>
> (2) How that interest may be affected by the results of the proceeding, including the reasons why the requestor should be permitted a hearing, with particular reference to the factors set out in paragraph (g) of this section;
>
> (3) The requestor's areas of concern about the licensing activity that is the subject matter of the proceeding; . . . ."

Further, the regulations provide in 10 C.F.R. § 2.1205(g) that, in ruling on a request for a hearing, the presiding officer "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 Act 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."

The explanation by the Commission in adopting Subpart L procedures in 1989 demonstrates that the Commission consciously elected to impose standing requirements in conformity with judicial standards. While judicial standards for standing have long been applied in NRC proceedings generally,[3/] the Commission stated in its rulemaking that standing in Subpart L proceedings "should be based upon an analysis of the particular material that was the subject of the licensing action and not the 'fifty-mile radius' rule that had developed with respect to power reactor licensing proceedings." 54 Fed. Reg. 8272 (February 28, 1989). In fact, the Commission rejected any formulation of standing based upon proximity to the licensed activity, observing that "[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 paragraph (g)." Id.

The judicial test for standing has been stated and analyzed in a number of operating license amendment cases. These decisions reflect contemporaneous standards of standing requirements defined by the Supreme Court. For example, in Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47 (1992), the Commission held that, to satisfy judicial standing, "a prospective petitioner must demonstrate that it could suffer an actual 'injury in fact' as a consequence of the proceeding and that this interest is within the 'zone of interests' to be protected by the statute under which the petitioner seeks to intervene." 35 NRC at 56. Whether a petitioner has met each of these standing requirements -- showing an "injury in fact" arguably within the "zone of interests" protected by

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3/ E.g., Westinghouse Electric Corp. (Export to South Korea), CLI-80-30, 12 NRC 253, 258 (1980).

the statute governing the proceeding -- has been the subject of numerous decisions by the Commission and its adjudicatory boards.

As a result, it has been uniformly accepted that a petitioner's standing in proceedings under Subpart L will likewise be judged according to "contemporaneous judicial concepts." Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 80 (1993). To prove its standing, a petitioner in a Subpart L proceeding "must show (1) that it could suffer an actual 'injury in fact' because of the licensing proceeding, and (2) that its interest arguably is within the 'zone of interests' to be protected by the pertinent statutes under which the petitioner seeks to challenge the licensing action." Id. Accord, Sequoyah Fuels Corp. (Renewal of 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).

1. **The elements of "injury in fact."** As regards the requirement for injury in fact, it "has been established in Commission practice that a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens will not result in a distinct and palpable harm sufficient to support standing." Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327, 332-33 (1983). Rather, to qualify for standing, "the asserted injury must be 'distinct and palpable' and 'particular [and] concrete,'" as opposed to being conjectural, hypothetical, or abstract. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 121 (1992).

Additionally, asserted injury in fact does not provide standing unless there is "a causal nexus between the asserted injury and the challenged action." Perry, LBP-92-4, 35 NRC at 121. This causal connection must be established by a showing that the alleged injury "can be traced

fairly to the challenged action," and a further showing that the injury is "likely to be redressed by a favorable decision in the proceeding." Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 267 (1991). As summarized in a recent Subpart L decision, the three components of the injury in fact requirement are (1) injury, which as previously described must be "distinct and palpable," "particular [and] concrete," or "real and immediate"; (2) cause, which requires that the alleged injury can be traced fairly to the challenged action; and (3) remedial benefit, which requires that the injury is like to be redressed by a favorable decision in the proceeding. Apollo, LBP-93-4, 37 NRC at 81.

2. The "zone of interests" requirement. The zone of interests prong of the standing test requires that a petitioner's interest falls within those protected by the statute governing the proceeding. Apollo, LBP-93-4, 37 NRC at 80; Sequoyah, LBP-91-5, 33 NRC at 165; Pathfinder, LBP-89-30, 30 NRC at 313. For that reason, assertions of broad public interest in regulatory matters, the administrative process, or the development of economical energy resources do not fall within the Commission's mandate to protect public health and safety under the Atomic Energy Act and to consider and weigh environmental impacts under the National Environmental Policy Act ("NEPA") in licensing and regulatory actions. Three Mile Island, CLI-83-25, 18 NRC at 332. The economic interest of a ratepayer similarly fails to confer standing, as that interest also lies outside those protected by the Atomic Energy Act. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976). Economic injury gives standing under the National Environmental Policy Act only if it is environmentally related. Pathfinder, LBP-89-30, 30 NRC at 313.

3. **Organizational standing.** There are also rules regarding the availability of organizational standing that apply to petitioners like the Coalition. Of course, the same showing of injury in fact is required of both an individual or organizational petitioner. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 529 (1991). Thus, if an organization seeks to intervene in its own right, and not as the representative of members who possess individual standing, the organization must establish real and immediate injury to some organizational interest of its own within the zone of interests protected by the Atomic Energy Act (or NEPA). 33 NRC at 529-30. This standard is not met "if the asserted harm is only a generalized grievance shared by all or a large class of citizens that does not result in palpable injury [to the organization itself]." Id. at 529.[4/]

Alternatively, to establish standing as the representative of members of the organization who themselves possess standing, the organization must identify at least one member, by name and address, having such an interest, and must provide concrete evidence (for example, by affidavit) that the member has authorized the organization to represent his or her interest in the proceeding. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LPB-78-37, 8 NRC 575, 583 (1978). As summarized by the Presiding Officer in a Subpart L proceeding, an organization seeking to establish its standing "must show injury-in-fact

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[4/] Likewise, mere academic interest in the matter of the proceeding is insufficient to establish standing. Edlow International Co. (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 572 (1976).

to its organizational interests or the relevant interest of members who authorize it to act for them." Sequoyah, LBP-91-5, 33 NRC at 165.

B. The Coalition Has Failed to Assert an "Injury in Fact" Arising From Any Interest Within the "Zone of Interests" Protected by the Atomic Energy Act or NEPA

The Coalition does not assert representative standing on the basis of any of its members. The petition is written on Coalition stationery and is signed by Chris Trepal, noted on the letterhead as a Director of the organization. The name of the organization is repeated through the petition without reference to any individual member. No member of the Coalition is identified in the petition, nor does the petition even assert that the Coalition purports to represent the interests of such members. Instead, the petition simply maintains that the "Coalition has a substantial interest in the [Bert Avenue and Harvard Avenue] site(s)." Petition at 1.

Therefore, the Coalition has not sought, and does not have, representative standing. Moreover, the Coalition does not possess standing in its own right. In its petition, the Coalition has identified five interests as a possible basis for its standing. But none of those claimed interests asserts any injury in fact to the Coalition, and the petition fails to assert any interest protected by the Atomic Energy Act or NEPA. Thus, none of the five interests asserted by the Coalition qualifies it for organizational standing.

1. Tax-exempt status. The Coalition asserts that it is a tax-exempt organization under Section 501(c)(3) of the IRS Code as a non-profit environmental education organization. Accepting this representation as so, it is unavailing for standing. Issuance of an amendment for the Chemetron materials license will not affect the Coalition's tax-exempt status, nor are tax

exemptions within the zone of interests protected by the Atomic Energy Act or NEPA. At most, the Coalition's status as an environmental education organization bespeaks the kind of academic interest in licensing matters which the Commission and its adjudicatory boards have categorically rejected as a basis for standing. Edlow International Co., CLI-76-6, 3 NRC at 572.

2. **Information dissemination.** The Coalition asserts that information obtained from a hearing will be disseminated to the public. The Commission has twice rejected attempts to establish standing on the basis of an organization's "informational" activities. Rancho Seco, CLI-92-2, 35 NRC at 57-61; Edlow International, CLI-76-6, 3 NRC at 572. As the Commission observed in Rancho Seco, the United States Court of Appeals for the District of Columbia Circuit rejected "informational standing" in Foundation on Economic Trends v. Lyng, 943 F.2d 79, 84-85 (D.C. Cir. 1991).

3. **Community activities.** The Coalition also asserts that it has "participated substantially" in public activities involving Newburgh Heights residents, such as creating a document depository, participating in public meetings, briefing elected officials, and requesting a health study by the Agency for Toxic Substances and Disease Registry ("ATSDR"). Here again, even accepting the assertion as true, these activities merely show that the Coalition has an academic interest in the outcome of the Chemetron licensing amendment proceeding. Its assertions show no harm, real or immediate, to the organization itself, much less how any putative harm "can be traced fairly to the challenged action," or is "likely to be redressed by a favorable decision in the proceeding." Seabrook, CLI-91-14, 34 NRC at 267. Without a showing of palpable injury, one cannot even determine whether any Coalition interest affected

by such an injury would fall within the zone of interests protected by the Atomic Energy Act or NEPA.

4. Participation in agency meetings. The Coalition's attendance at NRC and Ohio agency meetings is quintessentially the kind of academic interest or shared public interest consistently held insufficient for standing. Attendance at the public meetings of various agencies reflects, at most, a "'generalized grievance' shared in substantially equal measure by all or a large class of citizens" -- the kind of grievance which "will not result in a distinct and palpable harm sufficient to support standing." Three Mile Island, CLI-83-25, 18 NRC at 333.

5. Lawsuit settlement. The Coalition asserts that the settlement of a lawsuit by Newburgh Heights residents may affect the rights of residents to raise safety concerns. Putting to one side the basis for this unsupported allegation, it clearly does not allege any injury to the Coalition. The Coalition concedes that the alleged harm, if any, affects local residents, not the Coalition. This violates the well-established precept that a party may not establish its standing on the basis of injury to a third party. Fermi, LBP-78-37, 8 NRC at 585. See also Warth v. Seldin, 422 U.S. 490, 499 (1975) (as a general rule, a litigant may assert only his own constitutional rights).

In any event, the allegation is plainly extraneous to this license amendment proceeding. The Settlement Agreement approved by the District Judge is not subject to review here. As such, there is absolutely no causal connection between the asserted inability of residents to raise safety concerns and the license amendment requested by Chemetron. Perry, LBP-92-4, 35 NRC at 121. There is no way that the asserted inability of residents to raise safety concerns "can be traced fairly" to the proposed license amendment, nor is the supposed inability of residents to

raise safety concerns "likely to be redressed by a favorable decision in the proceeding." Seabrook, CLI-91-14, 34 NRC at 267.[5/]

6. Summary. Overall, the Coalition's petition is remarkable for its utter failure to connect, in any meaningful way, any organizational interest supportive of standing and Chemetron's prospective remediation of the Harvard Avenue and Bert Avenue sites. The lack of any such connection is fatal to the Coalition's attempt to prove standing. As the Board observed in Apollo, "when, as here, a petitioner is challenging the legality of government regulation of someone else, injury in fact as it relates to factors of causation and redressability" ordinarily is substantially more difficult to establish. Apollo, LBP-93-4, 37 NRC at 81 n.20, quoting Lujan v. Defenders of Wildlife, 119 L. Ed. 2d 351, 365 (1992).

II. THE COALITION HAS NOT STATED AN AREA OF CONCERN GERMANE TO THIS PROCEEDING

A. The Presiding Officer's Jurisdiction Is Strictly Limited to Matters "Germane" to This License Amendment Proceeding

It is axiomatic that presiding officers, like adjudicatory boards, are delegates of the Commission and exercise authority only over those matters which the Commission has

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[5/] In this regard, Chemetron notes that a United States District Judge presided over the lawsuit and its settlement. Cheryl Kalnasy, et al. v. McGean-Rohco, Inc., et al., Case No. 1:91 CV 1078 (N.D. Ohio) (Hon. John M. Manos). Attached is a copy of the Order and Final Judgment signed by Judge Manos on May 25, 1994. In ¶ 7 of the Order, the Court recites its approval of the Settlement Agreement "as a good faith, ethical, fair, adequate and reasonable settlement of the claims" of the plaintiffs against the defendants in the action. The Presiding Officer has no jurisdiction over this Settlement Agreement. Hence, the Coalition has not shown how this proceeding could possibly result in any change in the terms of the Settlement Agreement approved by the District Court.

committed to them by hearing notices. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985); Commonwealth Edison Co. (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980). As the Appeal Board reminded in Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983), in "a license amendment proceeding, a licensing board has only limited jurisdiction." Hence, safety or environmental issues which may have been germane to the original licensing proceeding or earlier license amendments are not within the jurisdiction of a licensing board considering a new amendment.

In adopting Subpart L, the Commission explicitly recognized that such proceedings would not be free-wheeling explorations of a broad range of safety or environmental concerns sometimes allowed as contentions in formal reactor proceedings. Instead, the Commission affirmed that it is the obligation of the presiding officer to decide "whether the matters a petitioner desires to litigate" are "germane to the proceeding." 10 C.F.R. § 2.1205(g). Thus, a petitioner's statement of concerns "need not be extensive, but it must be sufficient to establish that the issues the requesters wants to raise regarding the licensing action fall generally within the range of matters that properly or subject to challenge in such a proceeding." 54 Fed. Reg. 8272.

Moreover, by stating that the petitioner's statement "must be sufficient to establish" the issues are germane, the Commission made it clear that the petitioner bears the burden of affirmatively showing that its issues are germane. See generally 10 C.F.R. § 2.1205(g); Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 716 (1989)

(presiding officer "shall determine that the specified areas of concern are germane to the subject matter of the proceeding"); Sequoyah, LBP-91-5, 33 NRC at 166.

B. The Coalition Has Failed to State Any Concern "Germane" to This Proceeding

As stated in the published Notice, the sole subject matter of this proceeding is the requested amendment to Chemetron's materials license authorizing implementation of its proposed remediation plan for the Harvard Avenue and Bert Avenue sites. Yet, the issues which the Coalition would develop in the proceeding are not germane to the proposed remediation plan and, in some instances, constitute an impermissible challenge to NRC regulations. Accordingly, the Coalition's petition should not be granted because none of the issues it has proffered fall within this Board's jurisdiction if a hearing were otherwise allowed.

1. **Compatibility of NRC and Ohio regulations/standards.** The Coalition's first stated concern is that "regulations/standards" of the NRC and Ohio agencies may not be compatible. Whatever the merits of this concern, it is clearly beyond the jurisdiction of this Board to resolve. In determining the acceptability of Chemetron's proposed remediation plan, this Board must apply the NRC's regulatory standards applicable to Chemetron's materials license issued pursuant to 10 C.F.R. Part 40. Therefore, the decontamination standards of 10 C.F.R. § 40.42 apply, including related Staff guidance.

The application of state law, on the other hand, is beyond the NRC's jurisdiction. Northern States Power Co. (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 375 (1978); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 748 (1977). Indeed, it would be presumptuous for the Coalition to litigate any

supposed compatibility issue when neither the State of Ohio nor any of its regulatory agencies have sought a hearing in this proceeding on Chemetron's proposed remediation plan.

2. Applicability of Ohio Senate Bill 130. The next concern raised by the Coalition is whether the license amendment sought by Chemetron "avoids" the application of Ohio Senate Bill 130 to the remediation.[6/] As noted, however, it is beyond the jurisdiction of this Board to decide issues of Ohio law such as the applicability of Senate Bill 130, if any, to the Harvard Avenue and Bert Avenue sites. Further, the Coalition implicitly argues that requirements under Senate Bill 130 could supersede NRC requirements where they differ. Obviously, the Coalition's concern could raise issues of federal preemption.[7/] Such issues are beyond those included in the Notice of opportunity for hearing, and it is questionable whether even the Commission itself has jurisdiction to consider constitutional issues such as federal preemption. Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231, 244-45 (3d Cir. 1980), cert. denied, 449 U.S. 1096 (1981).

3. The possibility of future rulemaking. The Coalition asserts that rulemaking is in progress and implies that Chemetron's proposed remediation plan might be inadequate under

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6/ Ohio Senate Bill 130 was enacted in 1992. It amended Ohio Rev. Code §§ 3701.99 et seq. with regard to Ohio requirements for the disposal of low-level radioactive waste.

7/ See e.g., Brown v. Kerr-McGee Chemical Corp., 767 F.2d 1234 (7th Cir. 1985), cert. denied, 475 U.S. 1066 (1986) (finding state law preempted as conflicting with NRC regulations on materials licensing). In this regard, it is crucial that Ohio is not an Agreement State delegated authority by the NRC under Section 274(d) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2021(d), to terminate Chemetron's license under standards "compatible" with the NRC's decommissioning requirements under 10 C.F.R. § 40.42 and related guidance.

the new rules. This concern is not justiciable for several reasons. First, speculation as to future changes in the law is not a basis for staying the proceeding. Kerr-McGee Corp. (West Chicago Rare Earth Facility), CLI-82-2, 15 NRC 232, 269-70 (1982); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-45, 15 NRC 1527, 1529-30 (1982).

Second, the Commission's adjudicatory boards must construe and apply the regulations as they currently exist at the time of the hearing. Indeed, in the Draft Radiological Criteria for Decommissioning (January 26, 1994), the Commission expressly stated at page 43:

> The proposed rule would apply to the decommissioning of all facilities licensed by the Commission except for facilities or portions thereof (e.g., waste disposal sites and uranium mill tailings) which are already specifically covered in the regulations. The proposed rule would not apply to sites already covered by a Commission approved decommissioning plan, if the plan was approved prior to the effective date of the rule. This provision is designed to encourage licensees to continue with ongoing and planned decommissioning. [Emphasis added.]

Third, the Coalition is essentially asking this Board to stay the proceeding indefinitely. Authority to stay proceedings or the grant of licenses and amendments in proceedings under 10 C.F.R. Part 2, Subpart L, is governed by 10 C.F.R. § 2.1263, which in turn refers to the four traditional stay criteria of 10 C.F.R. § 2.788. Inasmuch as the Coalition has not even addressed the four criteria, it is unnecessary for Chemetron to belabor them. But without even so much an allegation that it will suffer irreparable harm, the most crucial element, the Coalition is clearly not entitled to a stay. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 408 (1989); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 (1985).

Further, unlike formal reactor proceedings under 10 C.F.R. Part 2, Subpart G, the regulations under Subpart L expressly authorize the NRC Staff to issue such licenses or amendments prior to the conclusion of a hearing under Subpart L. See 10 C.F.R. § 2.1205(l) (grant of a request for a hearing "need not delay NRC staff action regarding an application for a licensing action covered by this subpart"). This makes a stay even more inappropriate.

4. Post-closure monitoring requirements. The Coalition asserts that post-closure monitoring requirements are different for "various agencies." As discussed above, any requirements under Ohio law for post-closure monitoring are beyond the jurisdiction of this Board. Whatever such requirements might be, if any, the NRC has no authority to apply or enforce them. Instead, this Board is bound by the requirements for post-decommissioning surveys under 10 C.F.R. § 40.42(c)(3) (as final step in decommissioning, licensee shall again submit information required in paragraph (c)(1)(b) of this section and certify disposition of accumulated waste from decommissioning).

5. Lack of post-closure monitoring. In contrast to its prior concern of different monitoring requirements, the Coalition next alleges that there will be a "lack of post-closure radionuclide monitoring." As the preceding discussion makes clear, the decommissioning requirements under 10 C.F.R. Part 40.42 anticipate that the decommissioned property can be returned to unrestricted use upon completion of the decommissioning. Hence, the results of the radiation survey and certification required under 10 C.F.R. § 40.42(c)(3) assure that no ongoing post-closure monitoring is required.

Insofar as the Coalition implicitly argues that some form of post-closure monitoring is necessary, its assertion constitutes an impermissible attack upon the NRC's regulations. Yet,

it has long been recognized that the NRC rules are not subject to collateral attack in adjudicatory proceedings. American Nuclear Corp. (Revision of Orders to Modify Source Materials Licenses), CLI-86-23, 24 NRC 704, 708 (1986), citing, Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974). Without prior approval by the Commission, no party to a Subpart L proceeding may challenge the adequacy of any decommissioning requirement under 10 C.F.R. Part 40 or elsewhere. See 10 C.F.R. § 2.1239. See generally Seabrook, CLI-89-8, 29 NRC 399, 415 (1989); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 2), ALAB-456, 7 NRC 63, 67 (1978).

6. Deed restrictions and future property use. The Coalition is concerned about compliance with the NRC's "unrestricted use" release standard, and what effect presumed non-compliance should have in creating new deed restrictions on deeds and future property use. Significantly, the Coalition does not allege that Chemetron's remediation plan fails to meet the decommissioning/decontamination criteria of 10 C.F.R. § 40.42.[8/]

[8/] Chemetron's Site Remediation Plan is based upon Option 2 of the five options presented by a Branch Technical Position approved by the Commission in 1981. See 46 Fed. Reg. 52061, 52062 (October 23, 1981). Option 2 governs disposal of "certain low concentrations of natural thorium with daughters in secular equilibrium and depleted or enriched uranium with no daughters present when buried under prescribed conditions with no subsequent land use restrictions and no continuing NRC licensing of the material." Under Option 2, the "average activity concentration of radioactive material that may be buried" in the case of depleted uranium if insoluble is 300 pCi/g. Id. at 52062.

Moreover, in its Action Plan to ensure timely clean-up of radiologically contaminated sites listed in the NRC's Site Decommissioning Management Plan, the NRC explicitly approved Option 2 of the Branch Technical Position previously cited, pending NRC rulemaking on generic radiological criteria for decommissioning. 57 Fed. Reg. 13389, 13390 (April 16, 1992).

Insofar as the Coalition is asking this Board to establish new regulatory requirements in the form of deed restrictions or other restrictions upon future use of property released for "unrestricted use," its request exceeds current regulatory requirements. As such, the Coalition's concern constitutes an unauthorized attack upon the Commission's regulations under 10 C.F.R. § 40.42. This is clear from the text of the regulation.

A licensee seeking to terminate its license under 10 C.F.R. Part 40 must demonstrate "that the premises are suitable for release for unrestricted use . . . . " 10 C.F.R. § 40.42(c)(1)(b). By definition, "unrestricted use" means that there are no administrative controls or other restrictions governing future use. Where the NRC otherwise intends such restrictions to apply, it carefully defines the area as "restricted." See 10 C.F.R. § 20.1003 (definition of "restricted area"). Hence, "unrestricted use" contemplates use by the general public of the decommissioned area for any purpose, without necessity for deed restrictions or restrictions on use.[9/] Any assertion of additional requirements is an impermissible challenge to the NRC's regulations, as discussed above.

7. Exemptions for onsite burial. According to the Coalition, the Ohio Environmental Protection Agency and Ohio Department of Health will have to grant exemptions to permit the onsite burial of depleted uranium because of proximity of the burial sites to local

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9/ Indeed, Option 2 to be employed at the Harvard Avenue and Bert Avenue remediations explicitly states that it includes "no subsequent land use restrictions and no continuing NRC licensing of the material." 46 Fed. Reg. at 52062. And as regards local homeowners, Option 2 assumes that, for the average activity concentration of radioactive material prescribed by this option, there will be "acceptable exposure of individuals in private residences if houses were built over buried materials." Id.

residences and Ohio waterways.[10/] But, as discussed, the Commission does not permit its hearing procedures to be used by a party to litigate the concerns of another individual or entity which has chosen not to participate in the proceeding, including a governmental agency. Fermi, LBP-78-37, 8 NRC at 585.

Even assuming that the Coalition could prove such a concern in its own right, it is not a basis for a hearing in this case. Once again, the issue of what regulatory actions, including any exemptions, might have to be made by the Ohio agencies is not before this Board. In preparing its Environmental Assessment for the license amendment application, the NRC Staff will no doubt take into consideration the views of these agencies, but this Board has no such adjudicatory function. Significantly, the Coalition does not allege, as it cannot allege, that Chemetron has sought any exemption from NRC requirements under 10 C.F.R. Part 40.

8. Unequal regulatory attention. The Coalition alleges that certain unnamed regulators are giving the Bert Avenue site more attention than the Harvard Avenue site, despite their proximity. Whether these unnamed regulators include the NRC is not even clear. Assuming so, however, no concern of any substance is raised. The Coalition's subjective view as to the appropriate attention due each site is not germane to this proceeding. Moreover, there is no relief the Presiding Officer could provide inasmuch adjudicatory officers have no power

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[10/] As discussed in the text that follows, the Coalition's concern about Ohio law is irrelevant because it lacks standing and further because possible actions by Ohio agencies are beyond the scope of NRC proceedings. For the Board's information, however, it is Chemetron's understanding that no such exemption under Ohio law will be necessary. Although an exemption might be necessary for a new landfill constructed in proximity to local residences, the Ohio EPA made it clear in February 1994 that the remediation of the Bert Avenue site is not deemed a "new landfill."

to direct the NRC Staff in the performance of its independent responsibilities in NRC licensing proceedings, including those under Subpart L. Rocketdyne, ALAB-925, 30 NRC at 921-22. Thus, the Coalition may not litigate whether the Staff is giving each aspect of an application appropriate attention.[11/]

9. Sufficiency of groundwater data. Without even referring to the Site Remediation Plan, the Coalition asserts that groundwater data is insufficient at this time. As a matter of fact, abundant groundwater sampling data is provided. See Chemetron Site Remediation Plan §§ 3.1.4.1.1.2 and 3.1.4.2.1.2 (copy attached). Nowhere does the Coalition even refer to these data, much less explain why they are insufficient. Nor does the Coalition assert that the proposed remediation will fail to meet any NRC regulation. While an individual or organization requesting a hearing under 10 C.F.R. Part 2, Subpart L need not submit contentions with the bases and specificity required for a formal proceeding, it must still be shown that there is some reason for a hearing. The mere allegation that groundwater data are insufficient does not begin to advise this Board, the licensee or the NRC staff exactly what is thought to be missing or what safety /environmental implications are alleged.

10. Desires for proposal of offsite disposal. In its final concern, the Coalition alleges that certain Ohio agencies and the governor of Ohio would "like to see" Chemetron propose some form of offsite disposal. Once again, the Coalition impermissibly seeks to

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11/ The Coalition asserts that it is unclear whether waste from one site will be disposed of at the other. In fact, the Chemetron Site Remediation Plan calls for separate onsite burial cells at the Harvard Avenue and Bert Avenue sites. See Site Remediation Plan §§ 1.8.1 and 1.8.3 (copies attached).

represent the interests of Ohio. Even so, the mere desire of non-applicants for different proposals states no germane concern. There is no assertion that the onsite burial cells described in Chemetron's site Remediation Plan fail to meet regulatory requirements. As stated in 10 C.F.R. § 40.42(c)(2)(i), a licensee is required to "submit a plan for completion of decommissioning if the procedures necessary to carry out decommissioning have not been previously approved by the NRC and could increase potential health and safety impacts to workers or to the public . . . ." Chemetron has done so.

III. THE COALITION'S REQUEST FOR A HEARING IS UNTIMELY

Notice of the opportunity to request a hearing was given in the Federal Register on April 11, 1994. 59 Fed. Reg. 17124 (April 11, 1994). Licensee is advised by the Docketing and Service Section that the Coalition's petition, though dated May 9, 1994, is post-marked May 12, 1994. Inasmuch as the petition is deemed to have been filed on the date mailed, per 10 C.F.R. § 2.1203(b), the petition was not filed within thirty days of the publication of the Notice, as required.

Under the provisions of Subpart L governing this proceeding, a request for a hearing found by the presiding officer to be untimely "will be entertained only upon determination by the Commission or the presiding officer that the requestor or petitioner has established that --

(i) The delay in filing the request for a hearing or the petition for leave to intervene was excusable; and

(ii) The grant of the request for a hearing or the petition for leave to intervene will not result in undue prejudice or undue injury to any other participant in the proceeding, including the applicant and the NRC staff, if the staff chooses or

is ordered to participate as a party in accordance with § 2.1213."

10 C.F.R. § 2.1205(k)(1) (emphasis added).

Under applicable case law, the petitioner bears the burden of justifying his lateness. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 (1985). Moreover, unlike the five-part "balancing test" for considering late petitions in formal proceedings under 10 C.F.R. Part 2, Subpart G, a late petitioner in a Subpart L proceeding has the burden of meeting both prongs of the two-part test under 10 C.F.R. § 2.1205(k)(1), that is, the requestor or petitioner must establish excusable delay and that there will be no resulting undue prejudice or injury to other participants. In this instance, the Coalition has not met its burden of satisfying either requirement.

A. The Coalition Has Not Met Its Burden of Proving That the Delay in Filing Its Request for a Hearing Was Excusable

The Coalition's request for hearing was filed one day late. Although one day is not substantial, the inquiry under this factor is not whether the delay is substantial, but rather whether it is "excusable." The proponent of "excusable delay" generally must prove "unique or extraordinary circumstances" for failing to act timely. E.g., Pontarelli v. Stone, 930 F.2d 104, 111 (lst Cir. 1991); James v. Witham, 573 A.2d 793, 794 (Me. 1990). In this instance, the Coalition's petition was timely dated on May 9, 1994, but not post-marked (hence, filed) until three days later on May 12, 1994. No explanation or justification for this lapse has been offered by the Coalition. Delay is not excusable when it is "within the [actor's] control and could have been prevented by the exercise of diligence by the party failing to perform." Hanson

v. First Bank of South Dakota, 828 F.2d 1310, 1314-15 (8th Cir. 1987) (citation omitted). To the contrary, "excusable" delay requires a showing of "circumstances which were beyond the reasonable control of the person whose duty it was to perform." In re Power Recovery Systems, Inc., 950 F.2d 798, 801 n.8 (1st Cir. 1991), quoting In re Biddy, 7 B.R. 50, 52 (Bankr. N.D. Ga. 1980).

Absent such an explanation, the Coalition has failed to carry its affirmative burden for proving excusable delay. In fact, no explanation for the delay has even been given, much less one which shows the delay to be excusable. It has been repeatedly held that a mere showing of negligence, carelessness or inattentiveness without a valid reason for delay is insufficient to prove that the delay is "excusable." Cohen v. Brandywine Raceway Ass'n, 238 A.2d 320, 325 (Del. Super. 1968); Giese v. Giese, 43 Wis. 2d 456, 168 N.W.2d 832 (1969); Geigel v. Sea Land Service, Inc., 44 F.R.D. 1, 2 (D.P.R. 1968). Here, the fact that the Coalition's letter was postmarked three days after the date of the letter itself shows that the Coalition simply forgot about its petition for two or three days. Mere forgetfulness, however, is not a basis for finding "excusable" delay. Jones v. Chrysler Corp., 731 S.W.2d 422, 427 (Mo. App. 1987); Hill v. Tischer, 385 N.W.2d 329, 332 (Minn. App. 1986).

It is significant that, while most proposed material licensing actions are not noticed in the Federal Register, the proposed amendment to Chemetron's materials license was noticed. The regulations distinguish between noticed and unnoticed actions. A person other than the applicant who requests a hearing of a noticed licensing action must do so within thirty days of the notice. 10 C.F.R. § 2.1205(c)(1). On the other hand, if published notice is not given, a person may request a hearing within thirty days of actual notice of a pending application or agency action

granting the application or, as an outside limit, within 180 days after agency action granting the application regardless of the person's knowledge. 10 C.F.R. § 2.1205(c)(2).

In other words, the Commission deems publication in the Federal Register to be equivalent to actual notice inasmuch as the regulations require a person to seek a hearing within thirty days in those two situations -- notice by publication as well as actual notice. This parallelism emphasizes the Commission's determination that, when notice of the proposed action is published, those who request hearings will be strictly held to the customary thirty day deadline. Innumerable cases have reiterated the obligation of potentially interested parties to read the Federal Register and file timely requests. Pilgrim, ALAB-816, 22 NRC at 467-68; Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), LPB-82-4, 15 NRC 199, 201 (1982). Here, the Coalition apparently read the Notice published in the Federal Register, but did not take care to respond timely.

B. The Coalition Has Not Carried Its Burden of Showing That the Grant of the Request for a Hearing Will Not Result in Undue Prejudice or Undue Injury to Chemetron

The Coalition's petition simply does not address the issue of whether the grant of its request for a hearing will result in undue prejudice or undue injury to Chemetron. Here again, the Coalition's failure even to address this factor means that it has failed to carry out its affirmative duty to address the lateness factors in its petition. A petitioner has a duty to "confront" the lateness factors in its petition and cannot wait until the other parties raise lateness as an affirmative defense before responding on the lateness points. Pilgrim, ALAB-816, 22

NRC at 466.[12/] This means that if a licensee or NRC Staff should raise lateness in its answer to the petition, the petitioner has no right to respond. Id.

It is significant that the rule in Subpart L speaks in terms of undue prejudice or undue injury that results from the "grant of the request for a hearing or the petition for leave to intervene" rather than any prejudice or injury arising from the delay itself. 10 C.F.R. § 2.1205(k)(1)(ii) (emphasis added). Therefore, the Coalition may not meet its affirmative burden under the second prong of the rule simply by showing that Chemetron will not be prejudiced or injured by a one-day delay. Instead, the Coalition must show that Chemetron will not be prejudiced or injured by the grant of its request for a hearing.

It is indisputable that the grant of its request for a hearing will, under the circumstances, cause prejudice and injury to Chemetron by requiring it to participate in a hearing which would otherwise not exist but for the Coalition's request. First, the attendant legal expenses and other costs of litigation in the time the Licensee's employees and contractors must devote to a hearing, even in an informal proceeding under Subpart L, will inflict economic injury upon Chemetron.[13/] Second, the dedication of the licensee's resources to the hearing process might

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12/ In its statement on the need to conduct all phases of the hearing process in a balanced and efficient manner, the Commission has previously stressed the need for all parties to fulfill obligations imposed by a Commission proceeding. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981).

13/ By analogy, the Appeal Board has recognized in formal reactor licensing proceedings that allowance of a late petition will necessarily delay completion of the proceeding if a hearing would not occur but for the grant of the late petition. As the Appeal Board held in Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982), grant of a late intervention petition after issuance of low-

(continued...)

very well come at the expense of attending to the Staff's processing of the amendment application. Although the regulations provide that the hearing process and Staff's review may proceed in tandem, see 10 C.F.R. § 2.1205(l), Chemetron's participation in a hearing might well detract from its ability to respond to Staff questions and requests for information at the same time.

CONCLUSION

For the reasons discussed above, the Coalition has not met the Commission's requirements for participation in this proceeding. The Coalition lacks standing in its own right and has not asserted representative standing on behalf of its members. It has shown no real or threatened injury to itself, nor has it shown how any injury, if injury exists, could reasonably be traced to Chemetron's application or would be remedied by denying the application. Further, the Coalition's petition is inexcusably late, and the grant of a hearing request would cause undue

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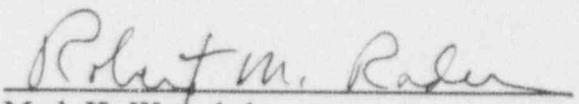
[13/](...continued)
power operating license in an uncontested proceeding "will perforce broaden now non-existent adjudicatory issues and delay conclusion of the proceeding". Id. at 1730 (emphasis added).

prejudice and undue injury to Chemetron. Finally, none of the concerns asserted by the Coalition in its petition is germane to the proceeding. For these reasons, the Coalition's request for hearing should be denied.

Respectfully submitted,



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June 9, 1994

1.0 GENERAL INFORMATION

1.1 Introduction

This document presents the Site Remediation Plan (SRP) for the Harvard Avenue and Bert Avenue sites including the associated Buildings at the McGean-Rohco, Inc. property, located at 2910 Harvard Avenue, Newburgh Heights, Ohio. The selected onsite remediation alternative for the Harvard Avenue and Bert Avenue sites consists of the excavation, consolidation, and subsequent placement of contaminated material from these sites in a permanent containment cell constructed at each site, in accordance with 10 CFR 20.302. The Harvard Avenue site and the Bert Avenue site, along with the associated buildings, will be decontaminated and released for unrestricted use. Site remediation activities of the Harvard Avenue and Bert Avenue sites will be carried out under the direction of Chemetron Corporation, Inc.,[1] a holder of NRC Source Material License SUB-1357. Following satisfactory remediation and verification by the NRC, termination of this license will be requested.

1.2 Purpose, Scope and Format

The purpose of this plan is to describe the methodology necessary to adequately remediate the Harvard Avenue and Bert Avenue sites.

The scope, format and content of this plan has been prepared consistent with the following guidelines:

- Regulatory Guide 3.65. *Standard Format and Content of Decommissioning Plans for Licensees* under 10 CFR Part 30, 40 and 70. Nuclear Regulatory Commission. August 1989.

[1]Chemetron Corporation, Inc. is a subsidiary of the Montey Corporation, One Citizens Plaza, Providence, Rhode Island 02903.

1.7.5 Conclusion

Onsite isolation is the preferred choice as this alternative is the best way to deal with the regulatory and other issues associated with these sites; projected costs are much lower than for offsite disposal. Enhanced segregation techniques employed before offsite disposal do not have sufficient advantage in reducing the volume or lowering the cost of offsite disposal. Furthermore, there is considerable uncertainty regarding the implementation of these techniques at the Harvard Avenue and Bert Avenue sites.

1.8 Summary of Planned Remediation Activities and Related Efforts

The activities necessary of Chemetron for the onsite remediation of the Harvard Avenue and Bert Avenue sites are:

1.8.1 Harvard Avenue Site

- Perform site characterization of the Harvard Avenue site to determine the type, concentration, quantities and extent of the chemical and radiological contaminants present onsite. This effort includes sampling and analysis of soils, groundwater, air, vegetation and ambient exposure rates, as well as performance of a pathway analysis to evaluate potential exposures to the public (COMPLETED).

- Identify and evaluate potential waste treatment; disposal and remediation alternatives for the Harvard Avenue Site (COMPLETED).

- Develop the Site Remediation Plan.

- Implement the Site Remediation Plan for the Harvard Avenue site which consists of the excavation, consolidation and placement of the contaminated material in a containment cell in accordance with 10 CFR 20.203.

- Performance of a Final Radiation Survey of the Harvard Avenue site to verify that the residual radioactivity is below the NRC release level for unrestricted use.

1.8.2 McGean-Rohco, Inc. Buildings

- Conduct radiological assessment of the McGean-Rohco, Inc. buildings (COMPLETED).

- Develop Site Remediation Plan.

- Implementation of Site Remediation Plan which consists of decontamination of contaminated floors, walls, ceilings, rooftops, and equipment to unrestricted release levels.

- Performance of a final radiation survey of the McGean-Rohco, Inc. buildings to verify that the residual radioactivity is below the NRC release level for unrestricted use.

1.8.3 Bert Avenue

- Perform site characterization of the Bert Avenue site to determine the type, concentration, quantities and extent of the chemical and radiological contaminants present onsite. This effort includes sampling and analysis of soils, water (groundwater, surface water seeps), air, vegetation and ambient exposure rates, as well as performance of a pathway analysis to evaluate potential exposures to the public (COMPLETED).

- Identify and evaluate potential waste treatment; disposal and remediation alternatives for the Bert Avenue Site (COMPLETED).

- Develop the Site Remediation Plan.

- Implement the Site Remediation Plan for the Bert Avenue site which consists of the excavation, consolidation and placement of the contaminated material in a containment cell in accordance with 10 CFR 20.203 and applicable OEPA requirements.

- Perform a Final Radiation Survey of the Bert Avenue site to verify that the residual radioactivity is below the NRC release level for unrestricted use.

1.9 Site Remediation Plan Overview

Consistent with the scope, format and content guidelines identified in Section 1.1.1, this Site Remediation Plan is comprised of six major sections:

Section 1. Provides background information involving applicable regulatory requirements, facility history and operations, environmental setting, site characterization data, and other general information related to the Harvard Avenue site, McGean-Rohco, Inc. buildings, and the Bert Avenue sites.

Section 2. Identifies the remediation objectives and describes how the proposed remediation activities and tasks will achieve these objectives. This section includes a description and an analysis of the proposed methods for accomplishing the remediation activities and tasks and contains a schedule for the estimated time for completion of the specified remediation efforts.

Section 3. Describes the methods used to ensure protection of workers, the public, and the environment against radiation hazards during remediation. This section includes discussion of the Chemetron ALARA, Health Physics and Radioactive Waste Management programs that will be implemented during remediation.

portion analyzed for levels of gross alpha, gross beta and/or isotopic uranium. Gross alpha and gross beta activities were below the NRC effluent release limits for gross alpha and gross beta levels in water specified in 10 CFR 20, Appendix B, Table II, Column II for unrestricted areas. Also included are those samples exhibiting LLDs higher than the reported value. High LLDs were again due to the high concentration of dissolved solids. Duplicate results differ from sample results by approximately 9-70% which indicates a high degree of variability in contaminant concentration.

Results of isotopic uranium analysis indicate that concentrations of U^{234}, U^{235}, and U^{238} in all surface water samples are below the NRC effluent release limits for isotopic uranium in water specified in 10 CFR 20, Appendix B, Table II, Column II for unrestricted areas. A comparison of isotopic uranium results between Rounds 2 and 3 indicates that isotopic uranium concentrations are consistent over the two sampling periods. The U^{238} concentration in soil samples collected from borings adjacent to SWS-3 contained some of the highest levels of depleted uranium (81 pCi/g).

Average background values are shown on Table 3-1. Gross alpha, gross beta, and isotopic uranium background concentrations were established by Dames & Moore, Inc. and ORAU during the site characterization activities. A comparison of sample results to background indicates that sample results generally exceed background values.

3.1.4.1.1.2 Groundwater

Groundwater samples from the uppermost aquifer were collected on four separate sampling periods from monitoring wells installed in the Harvard Avenue site at the locations shown in Figure 3-4. Three rounds of groundwater samples were collected from one upgradient monitoring well (HW-01) and one downgradient monitoring well (HW-02) installed during Phase I of the site characterization. Two additional upgradient monitoring wells (HW-3M and HW-3D) were installed during the Phase II and a complete round of samples were collected from all four monitoring wells. Radiological results were compared to EPA proposed drinking water standards. It should be noted, however, that these standards are not directly applicable, since this aquifer system is not a source for a public water supply system.

During the first round of Phase I, analysis for gross alpha and gross beta activity was performed on unfiltered groundwater samples collected from monitoring wells located on the Harvard Avenue site for preliminary evaluation purposes. A review of the results indicates that LLDs and error estimates for gross alpha and beta activities were greater than the estimated activity for each groundwater sample. This is due to high concentrations of total solids. LLDs and error estimates were above the EPA proposed drinking water limit for gross alpha activity. However, the LLDs for gross beta activity were below these standards and comparisons could be made. As a result, the gross beta activities in the groundwater from HW-01 (upgradient well) and HW-02 (downgradient well) are below the EPA proposed drinking water limit for gross beta (< 50 pCi/l) activity.

For consistency with ORAU sampling and analysis protocol, subsequent groundwater samples collected during Phase I and Phase II were filtered through a 0.45 micron membrane filter and the dissolved portion analyzed for levels of gross alpha, gross beta and/or isotopic uranium. High concentrations of dissolved solids resulted in high LLDs and error estimates of gross alpha activities which were above the EPA proposed drinking water standard. Therefore, comparison of these results to these standards could not be performed. However, LLD values for gross beta are within the EPA proposed drinking water limit for gross beta (50 pCi/l).

Results for isotopic uranium analysis indicated very low concentrations of U^{238}, U^{234}, and U^{235} in both upgradient (HW-01, HW-3M, and HW-3D) and downgradient (HW-02) wells. These values are below the proposed EPA drinking water limit for uranium (< 30 pCi/l). Downgradient well (HW-02) uranium concentrations are comparable to uranium concentrations measured in upgradient wells (HW-01, HW-3M, and HW-3D), which indicates that groundwater quality is not being impacted by the site.

3.1.4.1.1.3 Onsite Surface Soil

During Phase I, 483 soil samples were collected from the surface at regular grid intervals and the site fence line from the Harvard Avenue site and concentrations of U^{238} were determined. Concentrations of U^{238} in the surface soil samples ranged from the daily LLD (3-4 pCi/g) to 107 Ci/g.

3.1.4.2.1.2 Groundwater

Groundwater samples were collected on four separate sampling periods from monitoring wells installed on the Bert Avenue site as shown in Figure 3-10. These include three monitoring wells (BW-01, BW-02, BW-03) installed during Phase I and nine additional monitoring wells (BW-4M, BW-4D, BW-5D, BW-6D, BW-7D, BW-8D, BW-9D, BW-10M, BW-10D) installed as part of Phase II characterization activities. These twelve wells are hydraulically upgradient of the site and represent background groundwater conditions. Results were evaluated against EPA proposed drinking water standards. It should be noted, however, that these standards are not directly applicable, since this aquifer source is not part of a public water supply system.

As a result of the hydrogeological conditions, groundwater discharges to the land surface at several locations near the base of the fill areas. These discharge points referred to as groundwater seeps are downgradient monitoring points (Figure 3-10) and were used to evaluate groundwater quality as it exits the site.

During the first round of Phase I, gross alpha and gross beta activity analyses were performed on unfiltered groundwater samples from the three monitoring wells (BW-01, BW-02, and BW-03) located on the Bert Avenue site for preliminary evaluation purposes. High LLDs and error estimates for gross alpha and gross beta levels were reported for all these wells (with the exception of BW-02 gross beta). High LLDs and error estimates were due to the high concentration of total solids in the samples. The high LLDs did not allow a direct comparison of gross alpha levels with the EPA proposed drinking water limit for gross alpha levels. However, using the LLDs for gross beta levels (20 pCi/l) such comparisons can be made. Gross beta levels in the groundwater from BW-01, BW-02, and BW-03 are below the EPA proposed drinking water limit for gross beta (< 50 pCi/l). Samples from groundwater seeps were not collected at this time.

For consistency with Oak Ridge Associated Universities (ORAU) sampling and analytical protocol, subsequent groundwater samples collected during Phases I and II were filtered through a 0.45 micron membrane filter and the dissolved portion analyzed for levels of gross alpha and gross beta and/or isotopic uranium. Selected samples were analyzed for Th^{232} and Ra^{226}. Due to high concentrations of

dissolved solids resulting in high LLDs and error estimates, direct comparison of gross alpha levels with the EPA proposed drinking water standard for gross alpha activity could not be performed with the exception of BW-01. This well contained a concentration of gross alpha of 56.3 ± 39.2 pCi/l which is above the EPA proposed drinking water standard for gross alpha activity ($\leq$ 30.0 pCi/l). However, this is an "unadjusted gross alpha" value (includes uranium and Ra^{226}). The gross beta levels for BW-01, BW-02, and BW-03 are all below the EPA proposed drinking water standard for gross beta activity ($\leq$ 50 pCi/l).

Results for isotopic uranium analysis indicate very low levels of U^{234}, U^{235}, and U^{238} in all monitoring wells. These values are below the EPA proposed drinking water limit for uranium (< 30 pCi/l) and are at background levels. Duplicate results differ from sample results by approximately 5-113%.

Groundwater from selected monitoring wells were also analyzed for Th^{232} and Ra^{226}. Ra^{226} results were below the EPA proposed drinking water limit for Ra^{226} (< 20 pCi/l). Th^{232} results were reported below the LLD (1.00 E-11 μCi/ml). The EPA has not proposed a drinking water standard specifically for Th^{232}.

Groundwater seeps were used to evaluate groundwater quality downgradient of the monitoring wells and were analyzed for isotopic uranium (see Figure 3-10). Selected groundwater seeps were analyzed for Th^{232} and Ra^{226}. The base of the fill area is a groundwater discharge zone; groundwater emerges at the surface and eventually flows into the Burke Brook Branch sanitary/storm sewer. Uranium concentrations measured in groundwater seep samples were below the EPA proposed drinking water limit for uranium (< 30 pCi/l). Ra^{226} concentrations for selected groundwater seeps were below the EPA proposed drinking water limit for Ra^{226} (< 20 pCi/l) Th^{232} concentrations for selected groundwater seeps were all less than the LLD (1.0 E-11 μCi/ml). EPA has not proposed a drinking water limit specifically for Th^{232}. Based on these results, groundwater quality (in terms of radioactive content) beneath the Bert Avenue site has not been impacted by previous site activities.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHERYL KALNASY, et al.,	)	Case No. 1:91 CV 1078
	)	
Plaintiffs,	)	JUDGE JOHN M. MANOS
	)	
vs.	)	
	)	**ORDER AND FINAL JUDGMENT**
McGEAN-ROHCO, INC., et al.,	)	
	)	
Defendants.	)	

This matter is before the Court on the motion of plaintiffs Cheryl Kalnasy, Angela Sestak, Jerri Payne, Lester Fryer and Kristie Monroe, individually and as representatives of the Class certified by Order of this Court dated February 18, 1994 (the "Class Plaintiffs"), pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, for approval of the terms of a settlement reached between the Class Plaintiffs on the one hand, and defendants Chemetron Corporation and McGean-Rohco, Inc. (collectively, the "Defendants"), on the other, and for approval of the allocation of the settlement proceeds among the members of the Class who have satisfied the requirements for participation in the distribution of the settlement proceeds.

Based on the presentations by the plaintiffs and the testimony and other evidence presented to the Court at the hearings held on this matter, and on the pleadings, motions, briefs, depositions, affidavits and other matters of record in this case, the Court finds as follows:

1. By Order effective February 16, 1994, this Court determined, based on the briefs, exhibits and affidavits filed by McGean-Rohco, Inc. in opposition to plaintiffs' (1) Motion for Preliminary Injunction Concerning McGean-Rohco's Violation of Clean Water Act §§ 301, 311 and 402; (2) Motion for Award of Civil Penalty; (3) second Motion for Award of Civil Penalty; and (4) Motion for Award of Costs of Litigation, which motions were overruled on their merits by an Order of this Court effective February 16, 1994, that plaintiffs' claims against McGean-Rohco, Inc. under the Clean Water Act, 33 U.S.C. § 1251, *et. seq.*, are without merit.

2. By Order of February 18, 1994, this Court certified this matter as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure composed of:

> Those natural persons who were alive on February 1, 1994, and whose full-time legal residence at any time between January 1, 1975 and February 1, 1994 was on any of the following streets in Newburgh Heights, Ohio; or who, on February 1, 1994 were the legal owners of residential structures on any of the following streets in Newburgh Heights, Ohio: E. 26th Street, E. 27th Street; E. 29th Street, Ross Avenue, Hermit Avenue, Bert Avenue, and Harvard Avenue (only between E. 26th Street and Washington Park Blvd.).

(as used herein, the "Class").

3. The parties informed the Court of a settlement of all outstanding issues in this matter, subject to the Court's approval, memorialized in a Settlement Agreement effective February 18, 1994 (the "Settlement Agreement"). A copy of the Settlement

Agreement is attached hereto as Attachment 1 and is hereby made a part of this Order as if fully rewritten herein.

4. Notice was directed to potential members of the Class of the terms of the Settlement Agreement in accordance with this Court's Order of February 18, 1994.

5. The following members or purported members of the Class submitted to Class Counsel Requests for Exclusion from the Class: Deborah D. Pinczuk, Denise D. Herrera, Theresa L. Ross, Ivan Schaffer, Amanda Schaffer, Sandra J. Hujarski, Phyllis A. Jones, Carol A. Schultz, Pamala J. Swansinger, Anthony W. Vans, Arlene Vans, Gregory M. Vans, Brittany Cull, Stephanie Schaffer, Robertt J. Butvin, Brian Butvin, Frank Butvin, Janice M. Butvin, Susan Butvin, Walter L. Anielski, Yvonne Bekoscke, Patricia Hujarski, Mary Louise Schaffer and Kathleen M. Edwards. Copies of the submitted Requests for Exclusion were filed with the Court by Class Counsel on April 4, 1994.

6. On April 5, 1994, pursuant to notice, a hearing was held on plaintiffs' motion for approval of the Settlement Agreement, including any objections by Class members to the terms and conditions of the Settlement Agreement.

7. By Order dated April 18, 1994, the Court approved the Settlement Agreement as a good faith, ethical, fair, adequate and reasonable settlement of the claims the Class Plaintiffs asserted against the Defendants in their Complaint, First Amended Complaint and Second Amended Complaint (the "Settled Claims"), including the Settled Claims as asserted by the Class Plaintiffs for and on behalf of any members of the class who may now be minors. The Court also determined that the designation of the subclasses described in the Settlement Agreement is rational and reasonable.

8. By Order dated May 5, 1994, the Court directed that notice be given to all persons who submitted Claim Forms that a hearing would be held on May 14, 1994 on Class counsel's request for attorney fees and litigation costs as set forth in that Order.

9. Notice was directed to all persons who submitted Claim Forms that they may appear and be heard at the May 14, 1994 hearing on the matter of Class counsel's request for attorney fees and litigation costs.

10. On May 12, 1994, plaintiffs filed with the Court a motion to approve payment of attorney fees and litigation costs from the Settlement Fund created by the Settlement Agreement (the "Settlement Fund") as set forth in this Court's Order of May 5, 1994.

11. A hearing was held on May 14, 1994 at which this Court heard testimony and received other evidence regarding plaintiffs' motion to approve payment of attorney fees and litigation costs.

12. By Order dated May 21, 1994, this Court granted plaintiffs' motion to approve payment of attorney fees and litigation costs.

13. By Order dated May 5, 1994, the Court directed that notice be given to all persons who submitted Claim Forms that a hearing would be held on May 21, 1994 on the proposed allocation of the Settlement Fund as set forth in the Order and on the Class Plaintiffs' recommendations that those individuals identified in the Order satisfy the requirements for membership in the Class and have properly completed Claim Forms entitling them to participate in the distribution of the Settlement Fund.

14. Notice was directed to all persons who submitted Claim Forms that they may appear and be heard at the May 21, 1994 hearing on the aforementioned matters;

15. A hearing was held on May 21, 1994 at which this Court heard statements by Class members or their counsel regarding the proposed allocation of the Settlement Fund and regarding the Class Plaintiffs' recommendations that those individuals identified in the Order of May 5, 1994 satisfy the requirements for membership in the Class and have properly completed Claim Forms entitling them to participate in the distribution of the Settlement Fund.

16. The allocation of the Settlement Fund to Subclasses A, B, C, D and E proposed in the Order of May 5, 1994 is fair and reasonable.

17. Daniel Collins meets the requirements to be a member of the Class and he played on the Bert Avenue Site, as defined in the Settlement Agreement, between January 1, 1975 and November 1, 1990.

18. Milos Jevtic untimely submitted a Claim Form to Class counsel on or about May 19, 1994 and was informed by Class counsel that he should appear before the Court at the hearing on May 21, 1994. The Court determined that it would treat the late Claim Form as a Motion for Leave to File a Late Claim Form.

19. Milos Jevtic did not appear at the hearing on May 21, 1994. Milos Jevtic's Motion for Leave to File a Late Claim Form is without merit.

20. For purposes of the distribution of the Settlement Fund, Subclasses A, B, C, D, and E are comprised of those persons listed in Attachments 2A through 2E hereto, respectively.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. The objections of members of the Class to the proposed allocation of the Settlement Fund created by the Settlement Agreement to the Class members are hereby OVERRULED; and

2. The proposed allocation of the Settlement Fund to the Class members as set forth in the Addendum to the Settlement Agreement and this Court's Order of May 5, 1994 is hereby APPROVED; and

3. The parties are directed to take all actions authorized or required by the approved Settlement Agreement, a copy of which is attached hereto as Attachment 1 and the terms and conditions of which are hereby made a part of this Order as if fully rewritten herein, to implement its terms, including the distribution of the Settlement Fund in accordance with the terms of the Settlement Agreement and the Addendum thereto. For purposes of distribution of the Settlement Fund:

a. Subclass A is comprised of those persons appearing on Attachment 2A hereto. The 120 members of Subclass A shall each receive $8,333.33 plus the pro rata interest accrued on the total Settlement Fund of $5 million in accordance with the terms of the Settlement Agreement; and

b. Subclass B is comprised of those persons appearing on Attachment 2B hereto. The legal owner(s) of the 14 properties in Subclass B shall each receive $13,095.24 (2/3 of $19,642.86) plus the pro rata interest accrued on the total Settlement Fund of $5 million in accordance with the terms of the Settlement

Agreement. The legal owner(s) of the 14 properties in Subclass B shall each receive $6,547.62 (1/3 of $19,642.86) plus the pro rata interest accrued thereon in accordance with the terms of the Settlement Agreement and at such time as provided in Paragraph 5(f) of the Settlement Agreement; and

c. Subclass C is comprised of those persons appearing on Attachment 2C hereto. The legal owner(s) of the 67 properties in Subclass C shall each receive $4,477.61 (2/3 of $6,716.42) plus the pro rata interest accrued on the total Settlement Fund of $5 million in accordance with the terms of the Settlement Agreement. The legal owner(s) of the 67 properties in Subclass C shall each receive $2,238.81 (1/3 of $6,716.42) plus the interest accrued thereon in accordance with the terms of the Settlement Agreement and at such time as provided in Paragraph 5(f) of the Settlement Agreement; and

d. Subclass D is comprised of those persons appearing on Attachment 2D hereto. The 14 members of Subclass D shall each receive $6,428.57 (1/2 of $12,857.14) plus the pro rata interest accrued on the total Settlement Fund of $5 million in accordance with the terms of the Settlement Agreement. The 14 members of Subclass D shall each receive $6,428.57 (1/2 of $12,857.14) plus the interest accrued thereon in accordance with

the terms of the Settlement Agreement and at such time as provided in Paragraph 5(f) of the Settlement Agreement; and

e. Subclass E is comprised of those persons appearing on Attachment 2E hereto. The 374 members of Subclass E shall each receive $2,673.79 plus the pro rata interest accrued on the total Settlement Fund of $5 million in accordance with the terms of the Settlement Agreement; and

4. All funds held by the Class counsel on behalf of the Class shall be maintained in interest-bearing accounts. All interest accumulated on such funds shall be paid to members of the Class as their respective interests may appear; and

5. Daniel Collins is a member of the Class and a member of Subclass A; and

6. Milos Jevtic is a member of the Class and is bound by the terms of the Settlement Agreement and the final judgment of the Court. Milos Jevtic will not participate in the distribution of the Settlement Fund; and

7. The following individuals are not members of the Class: Robert Wagner, Michael Bodanza, Irene Meler, Andrew Meler, Margaret Komar, Rosemary Shipman, Mather Melar and James Melar; and

8. The following individuals who submitted Requests for Exclusion forms to Class counsel, which forms were filed with the Court on April 4, 1994, are not members of the Class: Deborah D. Pinczuk, Denise D. Herrera, Theresa L. Ross, Ivan Schaffer, Amanda Schaffer, Sandra J. Hujarski, Phyllis A. Jones, Carol A. Schultz, Pamala J. Swansinger, Anthony W. Vans, Arlene Vans, Gregory M. Vans, Brittany Cull, Stephanie

Schaffer, Robertt J. Butvin, Brian Butvin, Frank Butvin, Janice M. Butvin, Susan Butvin, Walter L. Anielski, Yvonne Bekoscke, Patricia Hujarski, Mary Louise Schaffer and Kathleen M. Edwards; and

9. Plaintiffs' claims against McGean-Rohco, Inc. brought under the Clean Water Act, 33 U.S.C. § 1251, *et. seq.*, as asserted in the Complaint, First Amended Complaint and Second Amended Complaint and not already heretofore dismissed by the Order effective February 16, 1994, are hereby DISMISSED in their entirety on the merits, with prejudice, and without costs to any party; and

10. All claims in this action not heretofore dismissed, including plaintiffs' Complaint, First Amended Complaint and Second Amended Complaint, are hereby DISMISSED in their entirety, with prejudice, and without costs to any party; and

11. The rights of the Class members to any form of relief with respect to the claims herein dismissed, including, without limitation, those Class members who did not submit Claim Forms, shall be solely as provided herein. The settlement described herein shall be deemed in full satisfaction of any and all claims, monetary or otherwise, which were raised or could have been raised against the Defendants in plaintiffs' Complaint, First Amended Complaint or Second Amended Complaint; and

12. The Class members, including, without limitation, those Class members who did not submit Claim Forms, are hereby permanently barred and enjoined from prosecuting in any jurisdiction against any of the released parties, as defined by the Settlement Agreement incorporated herein, any and all actions and causes of action, suits or claims of any nature whatsoever which were asserted, or which could have been asserted,

against the Defendants in plaintiffs' Complaint, First Amended Complaint or Second Amended Complaint; and

13. Neither this Order, nor any other agreement or Order in this proceeding, nor any factual finding or legal conclusion rendered by this Court in any phase of this lawsuit, shall be construed to constitute, or shall be admissible in any proceeding as evidence of, any liability, wrongdoing or responsibility on the part of the Defendants; and

14. If for any reason this Order or any subsequent Order approving the settlement and/or overruling objections to the settlement is vacated or reversed by the court of last resort, then this Order and all previous settlement stipulations, orders and proceedings, shall be null and void and all monies contained in the Settlement Fund, and all interest accrued thereon, less any expenses incurred by the Escrow Agent, shall be returned to Chemetron Corporation within ten (10) business days of the vacation or reversal of any such Order or appeal; and

15. Jurisdiction over all matters relating to the consummation and enforcement of the Settlement Agreement and this Order is reserved in this Court; and

16. There being no reason for delay, the Clerk of the Court is hereby directed, pursuant to Rule 54 of the Federal Rules of Civil Procedure, to enter this Order as a final judgment.

DATE: 5/25/94

John M. Manos
United States District Judge

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of	)	
Chemetron Corporation	)	**Docket No. 040-08724**
(Bert Avenue and Harvard Avenue Sites Newburgh Heights and Cuyahoga Heights, Ohio)	)	**Source Material License No. SUB-1357**

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served, via U.S. first-class mail, postage prepaid, a true and correct copy of Licensee Chemetron Corporation's Answer to Request for Hearing by Earth Day Coalition Pursuant to 10 C.F.R. § 2.1205(c) this 9th day of June, 1994 to the following:

Administrative Judge James P. Gleason
Presiding Officer
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge Jerry R. Kline
Special Assistant
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Docketing and Service Branch

Chris Trepal
Co-Director
Earth Day Coalition
3606 Bridge Avenue
Cleveland, OH 44113

Eugene J. Holler
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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Fort Lauderdale, FL 33301

Robert M. Rader
Counsel for Chemetron Corporation