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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

| | | |
|-----------------------------|---|--------------------------------|
| In the Matter of |) | Docket No. 40-9027-MLA |
| |) | |
| CABOT PERFORMANCE MATERIALS |) | (Re: Site Decommissioning Plan |
| Reading, Pennsylvania |) | |
| |) | ASLBP No. 99-757-01-MLA |
| |) | |

NRC STAFF'S NOTICE OF PARTICIPATION AND RESPONSE
TO REQUEST FOR HEARING FILED BY THE REDEVELOPMENT
AUTHORITY OF THE CITY OF READING AND THE CITY OF READING

INTRODUCTION

On August 28, 1998, Cabot Performance Materials (Cabot) submitted a Site Decommissioning Plan (SDP) and Radiological Assessment for its site in Reading, Pennsylvania. Cabot is the holder of source material license SMC-1562 which authorizes it to possess 100 tons of contaminated material (elemental uranium and thorium) total, at its Reading and Revere, Pennsylvania sites. The contaminated material at the Reading site consists of slag and soil deposited on a slope. The SDP concludes that no additional decommissioning is required. The NRC staff (Staff) considered the submittal to be a license amendment request and, on October 28, 1998, caused a "Notice of Consideration of Amendment Request for Decommissioning the Cabot Performance Materials Reading, Pennsylvania, Site, and Opportunity for Hearing" to be published in the *Federal Register*. 63 Fed. Reg. 57715.

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On November 24, 1998, the Redevelopment Authority of the City of Reading and the City of Reading (Requestors) filed a Request for Hearing (Request) on the amendment request, pursuant to 10 C.F.R. 2.1205. On December 2, 1998, the Commission designated a Presiding Officer to rule upon the hearing request and, if necessary, to serve as the Presiding Officer in the event that an informal hearing is ordered.¹

For the reasons stated below, Staff does not oppose the Request as to the City of Reading, and opposes it as to the Redevelopment Authority of the City of Reading. In addition, the Staff hereby notifies the Presiding Officer and the parties, pursuant to 10 C.F.R. § 2.1213, that it wishes to participate as a party.

BACKGROUND

Cabot Performance Materials operated a metals processing facility in the 1960's. The contaminated slag material produced as a result of that operation was deposited along the edge of a slope on the Reading site. The City of Reading's right of way, along with railroad tracks and the Schuylkill River, is located at the bottom of the slope. The site has been undergoing decontamination and decommissioning for a period of time and the on-site buildings have previously been decontaminated and released. Cabot's SDP concludes that no further decommissioning is required for the slag pile.

The Staff has completed its acceptance review of the submittal, but has not yet established a schedule for review of the SDP.

¹ Designation of Presiding Officer, December 2, 1998.

DISCUSSION

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

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

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

- (1) The interest of the 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 [§ 2.1205(h)];
- (3) The requestor's areas of concern about the licensing activity that is the subject matter of the proceeding; and
- (4) The circumstances establishing that the request for a hearing is timely in accordance with [§ 2.1205(c)].

Pursuant to 10 C.F.R. § 2.1205(h), the Presiding Officer must determine "that the requestor meets the judicial standards for standing," and shall consider, among other factors, "(1) [t]he nature of the requestor's right under the Act to be made a party to the proceeding; (2) [t]he nature and extent of the requestor's property, financial, or other interest in the proceeding; and (3) [t]he possible effect of any order that may be entered in the proceeding upon the requestor's interest."

The Commission has long held that contemporaneous judicial concepts of standing will be applied in determining whether a petitioner for leave to intervene has sufficient interest in a proceeding to be entitled to intervene as a matter of right under Section 189a of the Act. *See, e.g., Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327, 332 (1983); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units I and 2), CLI-76-27, 4 NRC 610, 613 (1976); *Envirocare of Utah, Inc.* (Byproduct Material Waste Disposal License), LBP-92-8, 35 NRC 167, 172 (1992); *Babcock and Wilcox* (Apollo, PA Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 80-81 (1993); *Sequoyah Fuels Corp.* (Source Material License No. SUB-1010), LBP-91-5, 33 NRC 163, 164-65 (1991); *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 312-13 (1989). These judicial standards are applicable to informal hearings held pursuant to Subpart L. *Chemetron Corp.* (Bert Avenue, Howard Avenue, McGean-Rohco Sites, Newburgh Heights and Cuyahoga Heights, Ohio), LBP-94-20, 40 NRC 17, 18 (1994).

To show an interest in the proceeding sufficient to establish standing, the requestor must show that the proposed action will cause "injury in fact" to its interest and that its interest is arguably within the "zone of interests" protected by the statutes governing the proceeding. *Georgia Power Co.* (Vogtle Electric Generating Plant, Units I and 2), CLI-93-16, 38 NRC 25, 32 (1993); *Three Mile Island, supra*, 18 NRC at 332-33; *Pebble Springs, supra*, 4 NRC at 613-14. Further, it has been held that in order to establish standing, the petitioner (or requestor) must establish that he personally has suffered or will suffer "distinct and palpable" harm that constitutes injury in fact, that the injury can fairly be traced to the challenged action,

and that the injury is likely to be redressed by a favorable decision in the proceeding. *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988); *Vogtle, supra*, CLI-93-16, 38 NRC at 32; *Babcock and Wilcox, supra*, LBP-93-4, 37 NRC at 81; *Envirocare, supra*, LBP-92-8, 35 NRC at 173. See also *Warth v. Seldin*, 422 U.S. 490, 504 (1974). A petitioner (or requestor) must have a "real stake" in the outcome of the proceeding in order to establish injury in fact for standing. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48 (1979). While the petitioner's stake need not be a "substantial" one, it must be "actual," "direct" or "genuine." *Id.* at 448.

In a proceeding not involving a reactor construction permit or operating license, "a petitioner who wants to establish 'injury in fact' for standing purposes must make some specific showing outlining how the particular radiological (or other cognizable) impacts from the . . . materials involved in the licensing action at issue can reasonably be assumed to accrue to the petitioner." *Atlas Corp.* (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 426 (1997), citing *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 247-48 (1966).

The Supreme Court of the United States has recently reiterated the "irreducible constitutional minimum" requirements for standing -- that the plaintiff suffer an "injury-in-fact" which is "concrete and particularized and . . . actual or imminent, not conjectural or hypothetical," that there is a causal connection between the alleged injury and the action complained of, and that the injury will be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. 154, 167, 117 S. Ct. 1154, 1163 (1997). In addition, the petitioner must meet the "prudential" standing requirement that the complaint must arguably fall within the "zone of interests" of the governing

law. *Id.* at 1167. See also *Vogle*, CLI-93-16, 38 NRC at 32; *Three Mile Island*, CLI-83-25, 18 NRC 327; *Pebble Springs*, CLI-76-27, 4 NRC 610.

In their request for hearing, the Requestors allege that the Request is timely. The Staff agrees. The Request was filed within thirty days of the publication of the *Federal Register* notice announcing the opportunity for a hearing.

City of Reading

The City of Reading (Reading) alleges that the site in question is located in the City of Reading, Pennsylvania on a parcel of real estate known as the "American Chain and Cable Property." The decommissioning plan is for a slag pile containing radioactive slag which encroaches onto Reading's right of way for an unopened street. Reading claims title to the right of way. Request at ¶ 1-2. If Reading decides to open the street, there could be a release of radioactive material, resulting from street construction activities (*e.g.* earth moving) in and around the slag pile. Such release might directly expose workers and the general public to airborne residual radioactive material. If the NRC were to permit the slag pile to remain on the right of way, it may prevent access to other industrial areas of Reading. *Id.* at ¶ 5-7.

Although the elements of standing are not clearly stated in Reading's pleading, the Staff believes that, taken as a whole, the Request demonstrates the minimum threshold requirements for standing. Reading has alleged a property interest in that it holds title to a portion of the site upon which the slag pile has encroached. The allegation of possible harm to the health of residents and workers from radioactive toxic material located on its property, which may result if the NRC permits the slag pile to remain on the right of way, demonstrates an injury in fact

which is arguably within the zone of interests of the Atomic Energy Act. The injury may be redressed by a decision in this matter. In addition, Reading has raised areas of concern which are germane to this matter (*i.e.* the possible release of radioactive material and the exposure of the general public and workers to airborne residual radioactive material). Therefore, the Staff does not oppose the City of Reading's request for hearing.

Redevelopment Authority of Reading

The Redevelopment Authority alleges that it is a municipal authority having the power of eminent domain. It further alleges that it "may decide to take title" to the site as part of an Urban Redevelopment Plan. Under the plan, the Redevelopment Authority would "acquire blighted residential, commercial and industrial properties, such as the American Chain and Cable Property, attempt to remediate contamination under Pennsylvania's 'brownfields' statute if needed, and resell these properties to viable entities in need of industrial properties." *Id.* at ¶ 3, 8. Redevelopment of the area would improve the quality of life for the area's residents by bringing industrial jobs to an area populated with low-income and/or minority residents. *Id.* at ¶ 4. If the radioactive material remains on site, the property would be less attractive to a buyer because a subsequent buyer could be held responsible for any future environmental issues. *Id.* at ¶ 9. The Redevelopment Authority could also be held responsible for future environmental issues. *Id.* at 10.

The Staff submits that the Redevelopment Authority has not established standing to participate in this matter in that it has failed to establish a cognizable interest or an injury-in-fact. The property interest alleged is remote. The Redevelopment Authority has no property or other

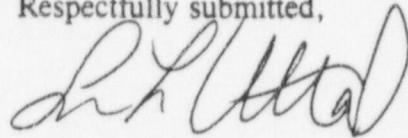
protected interest in the site at this time, nor is it certain that it will ever have such interest. It has alleged merely that it "may decide to take title." Request at ¶ 8 (emphasis supplied). This is a future, tentative interest, which should not confer standing in this matter. In addition, the injury alleged is speculative. It is not "concrete and particularized and . . . actual or imminent," but is "conjectural" and "hypothetical." *Bennett v. Spear*, 520 U.S. at 167, 117 S. Ct. at 1163. The specific injuries alleged are all contingent on the Redevelopment Authority's possible decision to some day, perhaps, take title to the property for purposes of resale. There is nothing actual or imminent about the injury. The Staff submits that the Redevelopment Authority has not demonstrated that it has standing to participate in this matter. Therefore, the Redevelopment Authority's request for hearing should be denied.

CONCLUSION

Based upon the foregoing, the Staff does not oppose the City of Reading's request for hearing. The Staff opposes the Redevelopment Authority of the City of Reading's request for hearing and respectfully requests that it be denied.

The Staff hereby notifies the presiding officer and the parties that it will participate in the hearing of this matter.

Respectfully submitted,



Susan L. Uttal
Counsel for NRC staff

Dated at Rockville, Maryland
this 14th day of December 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

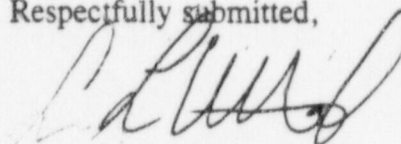
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| CABOT PERFORMANCE MATERIALS |) | (Re: Site Decommissioning Plan) |
| Reading, Pennsylvania |) | |
| |) | ASLBP No. 99-757-01-MLA |

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

| | |
|-------------------|---|
| Name: | Susan L. Uttal |
| Address: | U.S. Nuclear Regulatory Commission Office of the General Counsel Washington, D.C. 20555 |
| Telephone Number: | 301-415-1582 |
| Facsimile Number: | 301-415-3725 |
| E-Mail Address: | slu@nrc.gov |
| Admissions: | New Jersey Pennsylvania Maryland U.S. Supreme Court |
| Name of Party: | NRC Staff |

Respectfully submitted,



Susan L. Uttal
Counsel for NRC Staff

Dated in Rockville, Maryland
this 14th day of December 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE PRESIDING OFFICER

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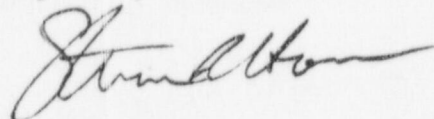
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| |) | ASLBP No. 99-757-01-MLA |

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

| | |
|-------------------|---|
| Name: | Steven R. Hom |
| Address: | U.S. Nuclear Regulatory Commission Office of the General Counsel Washington, D.C. 20555 |
| Telephone Number: | 301-415-1537 |
| Facsimile Number: | 301-415-3725 |
| E-Mail Address: | srh@nrc.gov |
| Admissions: | United States Court of Appeals For the Ninth Circuit State of New York State of California |
| Name of Party: | NRC Staff |

Respectfully submitted,



Steven R. Hom
Counsel for NRC Staff

Dated in Rockville, Maryland
this 14th day of December 1998

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

| | | |
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| In the Matter of |) | Docket No. 40-9027-MLA |
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| CABOT PERFORMANCE MATERIALS |) | (Re: Site Decommissioning Plan) |
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| |) | ASLBP No. 99-757-01-MLA |

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S NOTICE OF PARTICIPATION AND RESPONSE TO REQUEST FOR HEARING FILED BY THE REDEVELOPMENT AUTHORITY OF THE CITY OF READING AND THE CITY OF READING," and "NOTICES OF APPEARANCE" for Susan L. Uttal and Stephen R. Horn, in the above-captioned proceeding have been served on the following by e-mail or facsimile transmission and by deposit into the United States mail, or by e-mail and through deposit in the Nuclear Regulatory Commission's internal mail system as indicated with an asterisk, or with a double asterisk by hand delivery, or with a triple asterisk by deposit in the Nuclear Regulatory Commission's internal mail system on this 14th day of December 1998.

Administrative Judge*
Peter B. Bloch
Presiding Officer
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Administrative Judge*
Dr. Richard F. Cole
Special Assistant
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Adjudicatory File (2)***
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Office of Commission Appellate
Adjudication**
Mail Stop: O-16 G15
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Atomic Safety and Licensing Board
Panel***
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Office of the Secretary (2)**
ATTN: Rulemaking and
Adjudications Staff
Mail Stop: O-16 G15
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

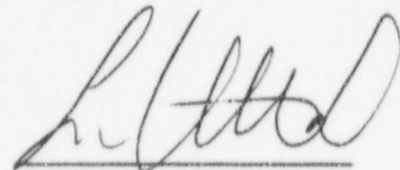
Timothy G. Dietrich, Esq.
Carl J. Engleman, Jr., Esq.
Rhoda, Stoudt & Bradley
501 Washington Street
The Berkshire, Sixth Floor
Reading, Pennsylvania 19603-0877
e-mail: rsblaw@rsblaw.com
Subject: for T.G. Dietrich
for C.J. Engleman, Jr.
Fax: 610-374-6061

Keith Mooney, Esq.
City of Reading
City Hall, Department of Law
815 Washington Street, Room 2-54
Reading, Pennsylvania 19601-3690
e-mail: kmooney@readingpa.org
Fax: 610-655-6427

Jonathan E. Rinde, Esq.
Manko, Gold & Ketcher, LLP
401 City Avenue, Suite 500
Bala Cynwyd, Pennsylvania 19004
e-mail: jrinde@mgklaw.com
Fax: 610-660-5711

Alvin H. Gutterman, Esq.
Morgan, Lewis, & Backius, LLP
1800 M Street, N. W.
Washington, D. C. 20036
e-mail: gutt7468@mlb.com
Fax: 202-467-7176

Paul C. Nightingale, Esq.
Cabot Corporation
175 State Street
Boston, Massachusetts 02109
e-mail: paul_nightingale@cabot-corp.com
Fax: 617-342-6256



Susan L. Uttal
Counsel for NRC Staff