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April 19, 1989

VIA FACSIMILE

Mr. Robert M. Bernero
Director of Office of
Nuclear Material and Safeguards
Nuclear Regulatory Commission
Washington, DC 20555

Re: REQUEST FOR AN EMERGENCY STAY

Dear Mr. Bernero:

This law firm represents Heary Bros. Lightning Protection Co., Inc. ("Heary Bros.") and Lightning Preventor of America, Inc. ("LPA"). I am writing at the suggestion of William Briggs, Esq., Solicitor of the Nuclear Regulatory Commission ("NRC"). The purpose of this letter is to request an immediate, emergency stay of the NRC's final order (1) directing cessation of the distribution of lightning protection terminals containing thorium-232 ("Preventors") pursuant to 10 CFR §40.22(a); and (2) further directing the establishment of a recall plan with respect to these products. This final order was effectuated by the following documents:

1. The March 20, 1989 Memorandum of Vandy Miller to John McGrath which indicates that the NRC has or will issue a letter to all "Agreement" and "Non-Agreement" States informing them that the NRC no longer considers the distribution of lightning rods containing thorium to be an authorized activity pursuant to 10 CFR 40.22(a) and directing John McGrath to obtain a commitment from the State of New York to take prompt action to cease the distribution of Preventors by the general licensee and to request New York to obtain a plan from the general licensee for the recovery of devices already distributed.

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2. The letter of John R. McGrath to the New York State Department of Labor dated April 6, 1989 asserting that the NRC has developed a new "interpretation" of 10 CFR 40.22(a) regarding the distribution of Preventors "different from that previously posited" and requesting New York State to order Heary Bros. to: (1) cease distribution of the Preventors; (2) request recovery of devices already distributed; and (3) seek NRC authority for further distribution pursuant to 10 CFR 40.13 which applies to "unimportant amounts of source materials."
3. The March 1, 1989 Memorandum of John Austin to Bruce S. Mallett recognizing that the NRC has previously interpreted 10 CFR 40.22 as authorizing the manufacture and distribution of lightning rods containing small quantities of thorium-232 and stating a new and "different perspective" pursuant to which the NRC's position has now become that these products constitute "consumer products" and therefore are not subject to the general license set forth in 10 CFR 40.22(a).

LEGAL OBJECTIONS TO THE NRC'S FINAL ACTION

We believe the NRC's final agency action is both procedurally and substantively defective and will be set aside if presented to the U.S. Court of Appeals. The grounds upon which we intend to challenge this action, if not voluntarily withdrawn in its entirety by the NRC, are as follows:

1. The NRC's action is not an "interpretation" but instead is a new substantive ruling that lightning protection terminals containing thorium-232 are "consumer products" outside the scope of 10 CFR 40.22(a). Not only is this new ruling in violation of procedural requirements, but the determination that the Preventor is a "consumer product" also is lacking in a rational basis because (in all but a few rare instances) the product is sold for commercial and industrial use and not to individual members of the general public. Furthermore, the Preventor does not come into contact with consumers or the general public and does not constitute the type of item treated as a "consumer product" under 10 CFR 40.13.

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2. As a "commercial product" and not a "consumer product," the Preventor falls squarely within 10 CFR §40.22(a). Therefore, the NRC's ruling constitutes a revocation of our client's previously-recognized general license without adherence to the necessary notice and opportunity for hearing requirements of 10 CFR §2.200 et seq. and 42 U.S.C. §2239.
3. As a "commercial product" and not a "consumer product," the Preventor falls squarely within 10 CFR §40.22(a). Therefore, the NRC's ruling has effectively amended 10 CFR §40.22(a) without compliance with the notice and comment rule making requirements of 5 U.S.C. §553, 42 U.S.C. §2239 and 10 CFR §2.800 et seq.
4. The NRC's ruling is not an "interpretation" because it purports to have the force and effect of law and alters the substantive rights of our clients under the Atomic Energy Act which rights have been consistently recognized in the past by the NRC and Agreement States. The NRC has further recognized that its action is not an interpretation by reason of its failure to comply with 10 CFR §40.6. Because of the NRC's failure to comply with the procedural requirements of the Administrative Procedure Act in issuing this ruling, it is invalid.
5. The NRC's demand for a recall plan is arbitrary and capricious and lacking in a rational basis. As explained below, it is an unnecessary, destructive and unworkable ruling.

IRREPARABLE HARM

LPA's sole product is the Preventor System and the NRC's order directing a cessation of the sale of the Preventor has effectively put LPA out of business. Hence, because NRC's action is immediately effective in all Non-Agreement States, and directs Agreement States immediately to take conforming action in their respective States, this final order is irreparably harming LPA with the likely result that its business will be entirely destroyed unless the NRC's action is stayed, suspended and vacated pending an appeal before the U.S. Court of Appeals.

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The NRC's action will adversely affect the public interest because it will deny the public the benefits of this technologically advanced and effective type of lightning protection system which has features far superior to those of traditional lightning rods. For example, the Preventor has capabilities not present in typical lightning rods, including extension of the zone of protection to areas adjacent to the structure, such as parking lots and other areas which cannot otherwise be protected.^{1/} Thus, the public will be deprived of the protection to life and property afforded by this product. Further, the destruction of LPA will eliminate from the marketplace the very company which services and maintains the Preventors currently installed throughout the United States and will render moot any demand on the part of the NRC for a "recall plan". This outcome will be particularly ironic since it appears that the NRC's objective here is not to "eliminate" the product but only to regulate it under 10 CFR §40.13 rather than 10 CFR §40.22(a).

In contrast to the irreparable harm to the LPA and the public which will result from the NRC's action, there does not appear to be any countervailing public interest in denying the temporary stay and suspension requested by this letter. Indeed, during a telephone conversation on April 17, 1989, I was informed by John Austin, the NRC's staff person responsible for the "new interpretation" of 10 CFR 40.22(a) that the NRC had made "no factual finding one way or the other of a public safety concern" with respect to the Preventor. Moreover, NRC staff have suggested that LPA apply for exemption for the Preventor pursuant to 10 CFR §40.13 ("unimportant amounts of source material").

Additionally, in my conversations with Robert Fonner of the General Counsel's Office on April 17, 1989, Mr. Fonner indicated that the NRC "possibly had an incomplete factual basis" to render its decision and suggested that the NRC might be willing to reconsider its position upon receipt of information bearing on the issue of whether or not the Preventor constitutes a "consumer product," including the specifics of how the product is used, who the users are and a better understanding of the mechanics of distribution.

^{1/} The enhanced capabilities of the Preventor which result from the addition of a very small amount of thorium-232 to the unit (a total of only 13.5 grams per unit) are documented in an article prepared by LPA's outside consultant and published in The IEEE Journal. This article was the result of extensive product testing conducted by LPA and its outside consultant which has fully established the product's efficacy.

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We believe that review of such facts will show that the NRC's new ruling with respect to the Preventor is without rational basis and, indeed, would lead the NRC to reconsider its position. It will also show that the "recall plan" is unnecessary, destructive and unworkable.

FACTS DEMONSTRATING THAT THE
PREVENTOR IS NOT A CONSUMER PRODUCT

The Preventor does not come into direct contact with consumers or the general public and is not a "consumer product" like those items listed in 10 CFR §40.13 or Table 1 of N.Y.C.R.R. Part 38 which include incandescent gas mantles, finished optical lenses, glazed ceramic tableware, photographic film and fire detector units--all of which are handled by and come into direct contact with consumers. Instead, the Preventor Terminal is installed on the outside of skyscrapers and commercial buildings on a twenty-foot pole. The unit is handled only by trained employees of LPA. Likewise, the Preventor is serviced only by trained employees of LPA and also is subject to periodic inspections by LPA trained employees to ensure that the product is in good working order.^{2/} In short, the very nature of the product is radically different from the typical consumer product. Indeed, once installed, it becomes an integral part of the operational systems of a building.

It also should be recognized that, in all but a few instances, the product is sold "commercially" and not to individual members of the general public. Therefore, the Preventor falls squarely within the express terms of 10 CFR §40.22(a) which grants a general license "authorizing commercial and industrial firms * * * to use and transfer quantities not more than fifteen (15) pounds of source material at any one time [or a total of 150 pounds in any one year] for commercial or

^{2/} By express contract terms, the installation, servicing and inspection described above are all done exclusively by LPA's trained employees. Likewise, the product is taken by LPA's trained employees to the installation site and never comes into the hands of the customer or anyone other than LPA's trained employees.

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operational purposes.^{3/} In all but a very few instances, these terminals are installed on commercial and industrial facilities and buildings such as the Citicorp Center in New York and government and military facilities. Once the system is installed, it becomes an integral part of the skyscraper or other commercial complex on which it is installed.

Often the steel structure of the building itself is incorporated into the lightning protection system. Typically, the Preventor is sold at the time of construction of the building pursuant to a subcontract with the electrical contracting company which in turn is a contractor to the general contractor on the construction project. The ultimate purchaser of the product does not contract directly with LPA and typically is a commercial or corporate entity which owns the commercial building or industrial facility in question. As these circumstances demonstrate, the Preventor is not being sold to "individual members of the general public" except in those rare instances where it is sold to a residence of a private individual.^{4/} The NRC's final action draws no distinction between residential installations and commercial installations and instead issues a blanket order directing that our client immediately cease distribution of thorium air terminal lightning preventors and develop a recall plan.

Not only is the NRC's recall program unnecessary, but its implementation is virtually impossible and would be highly destructive if pursued. The Preventor System is an integral part of the building and its removal and replacement would be virtually impossible or prohibitively expensive at best. This is because the installation of a lightning protection system on a commercial building is required to be done in stages during the construction of the building. Moreover, the removal will leave the building unprotected. Thus, the NRC is demanding our clients to take action with regard to the private property of others which could result in loss of life, personal injury and property

^{3/} As mentioned above, each Preventor contains a total of 13.5 grams of thorium-232. Thus, the limits for amounts of 10 CFR 40.22(a) are easily met and our client does not even approach the 150 pounds annual limit.

^{4/} Installation on private residences is rare because the expense of the system limits its availability as practical matter to affluent purchasers who have extremely large homes. There have been only seven installations on private residences and the hundreds of other installations are all on commercial, industrial and government buildings and complexes.

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damage in the event an unprotected building or area is struck by lightning.

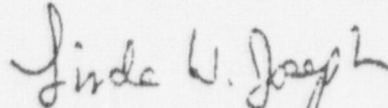
CONCLUSION

In sum, it is difficult to perceive how the destruction of LPA can meet any of the regulatory objectives of the NRC. We also believe that there is a strong likelihood that Heary Bros. and LPA will prevail on the merits of the appeal that we intend to take with respect to this final agency action. Because of the immediate and devastating effect of the NRC's action upon LPA, it is critical that we obtain immediate relief from the NRC's action during the pendency of the appeal. Therefore, we must ask that the NRC respond to our request for an order staying, suspending and vacating the NRC's action within 48 hours from the receipt of this letter. Otherwise, it will be necessary for us to proceed to seek this relief before the U.S. Court of Appeals. I would be happy to meet with you to discuss in detail our position and would come to your office in Rockville, Maryland for this purpose at your convenience. Again, however, it is critical that we have a reply within 48 hours.

Sincerely,

JAECKLE, FLEISCHMANN & MUGEL

By:


Linda H. Joseph

LHJ/jt

cc: William H. Briggs, Solicitor