

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 1683

DOCKETED 5/2/00

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 RESPONSE TO
"JOBERT, INC'S AND METALS TRUCKING, INC'S RESPONSE TO
LICENSEE'S AND NRC STAFF'S ANSWERS TO REQUEST FOR HEARING"

I. INTRODUCTION

On December 11, 1998, Jobert, Inc. (Jobert) and Metals Trucking, Inc. (Metals Trucking) filed a "Request for Hearing" concerning the August 28, 1998, Site Decommissioning Plan (SDP) and Radiological Assessment of Cabot Performance Materials (Cabot) for its site in Reading, Pennsylvania. On April 3, 2000, Cabot submitted "Licensee's Answer to Request for a Hearing of Jobert, Inc. and Metals Trucking, Inc." (Licensee's Answer"), and on April 13, 2000 the NRC Staff filed the "NRC Staff's Response to Request for Hearing Filed by Jobert, Inc. and Metals Trucking, Inc." (Staff Answer).¹

On April 14, 2000, Jobert and Metals Trucking filed "Jobert, Inc's and Metals Trucking, Inc's Response to Licensee's and NRC Staff's Answers to Request for a Hearing" (Supplemental Request) which "more fully set for the reasons supporting their Request for

¹ The Staff Answer opposed the Request for Hearing. Jobert and Metals Trucking did not establish standing because they alleged injury to purely economic interests, specifically a reduction in the value of the property, an injury not within the zone of interests protected by either the Atomic Energy Act or the National Environmental Policy Act (NEPA), and because they failed to show the likelihood that the alleged injuries would be redressed by a favorable decision. Staff Answer at 6-10. The Staff also opposed the Request for Hearing because Jobert and Metals Trucking failed to allege an area of concern germane to the proceeding. Staff Answer at 12-13.

Hearing, including their response to the Answers filed by Cabot and the NRC Staff.” Supplemental Request at 2.

By an “Order” issued April 20, 2000, the Presiding Officer ordered that, in the event timely preliminary objections are filed to the March 13, 2000, Declaration of Taking filed by the Redevelopment Authority of the City of Reading², the Staff address the following question in any response to the Supplemental Request:

In light of the pendency of Preliminary Objections to the Declaration of Taking, would it be prudent for me to withhold decision on the acceptability of the Metals Trucking/Jobert hearing request to await further developments in the condemnation proceeding?

For the reasons stated below, the Staff opposes the Supplemental Request.

II. BACKGROUND

Cabot operated a metals processing facility in the 1960's. Jobert is the former owner of the property and holds a purchase money mortgage for the property. Metals Trucking is the current owner and the mortgagee of Jobert. Contaminated slag material produced as a result of licensed activities 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. Site decontamination and decommissioning activities have been conducted. The on-site buildings have been decontaminated and released. The SDP and revised SDP both propose unrestricted release of the site, estimate that the total effective dose equivalent (TEDE) to the average member of the critical group will be far below 25 mrem per year, state that the residual

² The Staff understands that the condemnee had 30 days from the date of service of the Declaration (which was March 25, 2000), or until April 24, 2000, to file preliminary objections.

dose will be as low as is reasonably achievable (ALARA), and conclude that no further decommissioning is required for the slag pile.³

III. DISCUSSION

A. Standing

(1) Injury to interests within the zone of protected interests

The Staff has discussed at length the legal principles underlying the requirement that in order to establish standing, the petitioner or requestor must demonstrate injury in fact to interests within the zone of interests protected by statutes governing the proceeding. See Staff Answer at 3-8.

The Supplemental Request alleges that the SDP's conclusion, that any further expense on the part of Cabot to eliminate residual radioactivity is economically disproportionate to the achievable results, is suspect because the underlying ALARA analysis does not properly consider unspecified future uses and unspecified exposure scenarios. Supplemental Request at 5-6, 9. The Supplemental Request claims that the ALARA analysis does not properly assess potential future uses of the property because it does not assess viable and economically feasible alternatives to leaving a pile of radioactive slag on the property. *Id.* at 5-6. The SDP considered continued industrial use or new commercial-industrial redevelopment around the site to be the most likely future use scenario.⁴ The Supplemental Request does not identify other uses which should have been

³ "Decommissioning Plan for Reading, Pennsylvania Slag Pile Site" (August 28, 1998) at 1-1 to 1-2, and "Decommissioning Plan for Reading Slag Pile Site" (Rev. 1, March 2000) at 1-1 to 1-2.

⁴ "Decommissioning Plan for Reading Slag Pile" (Rev. 1, March 2000) at pp. 1-14 to 1-16.

considered. Additionally, the SDP considered a resident gardener exposure scenario and both current and future exposure scenarios for workers and trespassers.⁵ Although the Supplemental Request references the 10 C.F.R. § 20.1402 requirement that unrestricted release must be ALARA, no authority or Staff guidance is cited to support the claim that additional exposure scenarios or other future uses of the property should have been considered. Nor is it apparent that any additional exposure scenarios or future uses should have been considered. Accordingly, the Supplemental Request alleges a conjectural, hypothetical injury rather than the concrete, particularized injury required to demonstrate standing. *Bennett v. Spear*, 520 U.S. 154, 167, 117 S. Ct. 1154, 1163 (1997).

Jobert and Metals Trucking allege that the SDP's conclusion, that any further expense on the part of Cabot to eliminate residual radioactivity is economically disproportionate to the achievable results, is suspect because the underlying ALARA analysis does not consider the burdens placed on the landowner. Supplemental Request at 5-6, 9. The Supplemental Request claims that the ALARA analysis of the SDP is defective because it does not consider how any proposed alternative plans would impact Jobert and Metals Trucking, and fails to consider whether it is reasonable to shift all cost associated with further reduction of the residual radioactivity to Metals Trucking and Jobert.

Id. The Supplemental Request cites no authority, however, for the proposition that the ALARA analysis is required to consider the burdens placed upon the landowner in this case.

⁵ "Decommissioning Plan for Reading Slag Pile" (Rev. 1, March, 2000) at Section 1.5.2, pp. 1-20 to 1-21; "Radiological Assessment for Reading Slag Pile" (Rev. 1, March 2000) at § 3.5 at pp. 3-9 to 3-14 and Appendix B.

The slag at the site is basically surface soil mixed with contaminated waste.⁶ In fact, Commission and Staff guidance indicate that removal for offsite disposal of surface soil is not cost effective, is beyond ALARA, for unrestricted release exposure scenarios in this case. When adopting the rule for unrestricted release, 10 C.F.R. § 20.1402, the Commission clarified the ALARA concept and anticipated that Staff guidance then under development would likely indicate that an ALARA analysis need not be done for soil removal when doses will be below 25 mrem per year because it would not be cost-effective.⁷ Ultimately, Staff guidance estimated that when the cost per life saved exceeds \$ 3 million, further reductions in dose below 25 mrem per year are not cost effective, and concluded that the cost of dose reduction per mrem per year for soil cleanup at reference rare metal extraction facility sites converted to industrial use (such as the Cabot site) would be \$160-270 million per life saved.⁸ Accordingly, Cabot is not required to consider the costs and benefits of soil cleanup/removal in an ALARA analysis for the site, including any reduction in the value of the property or burden upon the landowner. Therefore, the Supplemental Request fails to state an injury within the zone of interests protected by the Atomic Energy Act or the National Environmental Policy Act, and thus fails to establish standing. *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 215 (1983). See *Northern States Power Co.* (Pathfinder

⁶ See "Decommissioning Plan for Reading Slag Pile Site" (Rev. 1, March 2000) at pp. 1-3 and 1-6.

⁷ *Statement of Consideration*, "Radiological Criteria for License Termination", 62 *Fed. Reg.* 39058, 39065-39066 (July 21, 1997).

⁸ "Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Nuclear Facilities", NUREG-1496, Vol. 1, §§ 6.1-6.2 at pp. 6-1 to 6-3 and Table 6.4 (July 1997).

Atomic Plant), LBP-89-30, 30 NRC 311, 312-13 (1989); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 432, 437 (1991); and *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 80 (1993).

The Supplemental Request further alleges that the SDP would result in the presence and potential excavation of the slag pile, which “could create unconsidered environmental harm”, which would thus damage the economic interests of Jobert and Metals Trucking in the property. Supplemental Request at 7. The Supplemental Request alleges that environmental harm may result from the unrestricted movement of the material on or off the site because of Cabot’s failure to perform an appropriate analysis pursuant to 10 C.F.R. § 20.1402. *Id.* at 8. In fact, the SDP did consider the environmental effects of excavating and moving the slag pile and the environmental effects of movement of the slag pile.⁹ Accordingly, there is no injury resulting from unconsidered environmental damage.

(2) Redressibility

In ruling upon a request for hearing, the Presiding Officer “shall determine that the requestor meets the judicial standards for standing and shall consider, among other factors—[T]he possible effect of any order that may be entered in the proceeding upon the requestor’s interest”. 10 C.F.R. § 2.1205(h)(3). Judicial concepts of standing require that the petitioner demonstrate that the alleged injuries will be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. 154, 167, 117 S. Ct. 1154, 1163 (1997); *Dellums v. NRC*, 863 F. 2d 968, 971 (D.C Cir. 1988); *Babcock and Wilcox* (Apollo, PA Fuel Fabrication

⁹ “Decommissioning Plan for Reading Slag Pile Site” (Rev. 1, March 2000) at pp 1-11 to and 1-16 to 1-20; and “Radiological Assessment for Reading Slag Pile Site” (Rev. 1, March 2000) at pp. 3-5 to 3-8.

Facility), LBP-93-4, 37 NRC 72, 81 (1993); and *Envirocare of Utah, Inc.* (Byproduct Material Waste Disposal License), LBP-92-8, 35 NRC 167, 173 (1992). To establish standing, Jobert and Metals Trucking must show the likelihood that the alleged injuries to their interests would be redressed by a favorable decision. *Westinghouse Electric Corporation* (Nuclear Fuel Export License for Czech Republic-Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 332 (1994).

Jobert and Metals Trucking state that their injuries could be redressed by an order requiring the SDP to include an evaluation of the reasonable “worse case” exposure scenarios and/or to consider who should bear the cost or burden of leaving the slag pile in place. Supplemental Request at 8-9. Since the claimed injury due to Cabot’s alleged failure to consider additional exposure scenarios and other potential future uses is hypothetical or conjectural, *see pp. 3-4, supra*, no order could redress the claimed injury. Since Cabot was not required to consider the costs and benefits of soil cleanup and/or removal, any reduction in the value of the property, or any burden upon the landowner in its ALARA analysis for the site, *see pp. 4-6, supra*, no order in this proceeding could redress the alleged economic injury resulting from the failure to consider any burden upon or cost to the landowner from leaving the slag pile in place.

B. Areas of Concern

The petitioner (or requestor) must identify its areas of concern about the licensing activity which is the subject matter of the proceeding. 10 C.F.R. § 2.1205(d)(3). The Presiding Officer must determine whether the proposed areas of concern are germane to the subject matter of the proceeding. 10 C.F.R. § 2.1205(h). The petitioner’s statement of its areas of concern must be sufficient to establish that the issues the petitioner wishes to

litigate generally fall within the range of matters properly subject to challenge in such a proceeding. *Statement of Consideration*, "Informal Hearing Procedures for Materials Licensing Adjudications", 54 *Fed. Reg.* 8269, 8272 (February 28, 1989). The proposed area of concern must be rationally related to the challenged action. *Babcock and Wilcox* (Pennsylvania Nuclear Services Operation, Parks Township, Pennsylvania), LBP-94-12, 39 NRC 215, 217 (1994). The proposed area of concern must be sufficiently specific such that the Presiding Officer can determine whether the petitioner has stated an area of concern relevant, and thus germane, to the challenged action. *Sequoyah Fuels Corporation*, LBP-94-39, 40 NRC 314, 316 (1994). The petitioner is not obliged to put forth a comprehensive exposition in support its proposed area of concern, *Babcock and Wilcox* (Apollo, PA Fuel Fabrication Facility), LBP-92-24, 36 NRC 149, 154 (1992), but must provide the minimal information necessary to ensure that the petitioner wishes to litigate an issue germane to the challenged action. *Sequoyah Fuels Corporation*, LBP-94-39, 40 NRC 314, 316 (1994).

Jobert and Metals Trucking allege that the ALARA analysis does not properly consider unspecified future uses and unspecified exposure scenarios. Supplemental Request at 5-6, 9. Although not styled as an area of concern, the Staff construes this claim as such. The SDP considered continued industrial use or new commercial-industrial redevelopment around the site to be the most likely future use scenario.¹⁰ The Supplemental Request does not identify other uses which should have been considered. Accordingly, the claimed area of concern regarding the failure to consider other unspecified

¹⁰ "Decommissioning Plan for Reading Slag Pile" (Rev. 1 March 2000) at pp. 1-14 to 1-16.

potential future uses of the property does not provide the minimal information necessary, and is not sufficiently specific, to assist the Presiding Officer in determining whether an area of concern relevant and thus germane to the challenged action has been stated. *Sequoyah Fuels Corporation*, LBP-94-39, 40 NRC 314, 316 (1994). Additionally, the SDP considered a resident gardener exposure scenario and both current and future exposure scenarios for workers and trespassers.¹¹ Although the Supplemental Request references the 10 C.F.R. § 20.1402 requirement that unrestricted release must be ALARA, no authority or Staff guidance is cited to support the claim that additional exposure scenarios or other future uses of the property should have been considered. Nor is it apparent that any additional exposure scenarios or future uses should have been considered. Accordingly, the claimed area of concern regarding the failure to consider other unspecified exposure scenarios does not provide the minimal information necessary, and is not sufficiently specific, to assist the Presiding Officer in determining whether an area of concern relevant and thus germane to the challenged action has been stated. *Sequoyah Fuels Corporation*, LBP-94-39, 40 NRC 314, 316 (1994).

Jobert and Metals Trucking further claim that the ALARA analysis should have considered the burdens placed on the landowner. Supplemental Request at 5-6, 9. The Supplemental Request claims that the ALARA analysis of the SDP is defective because it does not consider how any proposed alternative plans would impact Jobert and Metals Trucking, and fails to consider whether it is reasonable to shift all cost associated with further reduction of the residual radioactivity to Metals Trucking and Jobert. *Id.* Cabot was

¹¹ “Decommissioning Plan for Reading Slag Pile” (Rev. 1, March, 2000) at Section 1.5.2, pp. 1-20 to 1-21; “Radiological Assessment for Reading Slag Pile” (Rev. 1, March 2000) at § 3.5 at pp. 3-9 to 3-14 and Appendix B.

not required to consider the costs and benefits of soil cleanup/removal in its ALARA analysis, including any reduction in the value of the property. *See* pp. 4-6, *supra*. Because there is no regulatory basis upon which to litigate this claimed area of concern, it is not germane to the subject action. *Babcock and Wilcox Company*, LBP-94-12, 39 NRC 215, 217-128 (1994).

Jobert and Metals Trucking claim that the SDP would result in the presence and potential excavation of the slag pile, which “could create unconsidered environmental harm”, which would thus damage the economic interests of Jobert and Metals Trucking in the property. Supplemental Request at 7. The Supplemental Request alleges that environmental harm may result from the unrestricted movement of the material on or off the property because of the failure to perform an appropriate analysis pursuant to 10 C.F.R. § 20.1402. *Id.* at 8. In fact, the SDP did consider the environmental effects of excavating and moving the slag pile and the environmental effects of movement of the slag pile.¹² Accordingly, there is no area of concern to litigate.

C. Effect of Condemnation Proceeding

By an “Order” issued April 20, 2000, the Presiding Officer ordered that, in the event the condemnee filed timely preliminary objections to the condemnation of the property, the Staff address the following question in any response to the Supplemental Request:

In light of the pendency of Preliminary Objections to the Declaration of Taking, would it be prudent for me to withhold decision on the acceptability of the Metals Trucking/Jobert hearing request to await further developments in the condemnation proceeding?

¹² “Decommissioning Plan for Reading Slag Pile Site” (Rev. 1, March 2000) at pp 1-11 to 1-16 to 1-20; and “Radiological Assessment for Reading Slag Pile Site” (Rev. 1, March 2000) at pp. 3-5 to 3-8.

In the event that Jobert and Metals Trucking filed timely preliminary objections to the condemnation of the property¹³, it remains to be seen if their interest in the property will be finally extinguished by the condemnation proceeding and thus whether they have any injury in fact to a protected interest upon which standing could be demonstrated. In the event that Jobert and Metals Trucking did not file timely preliminary objections to the condemnation of the property, it appears that their interest in the property has been finally extinguished by the condemnation proceeding and that, wholly apart from the Staff's objections noted above, Jobert and Metals Trucking no longer have an interest which could possibly be injured by the challenged action, and thus cannot be found to have standing to challenge the SDP. The Staff recommends that, in the event timely preliminary objections were filed, the Presiding Officer withhold decision upon the Request for Hearing and Supplemental Request. The Staff recommends that, in the event timely preliminary objections were not filed, the Presiding Officer proceed to a decision. The Staff also recommends that the Presiding Officer require Jobert and Metals Trucking to report to the Presiding Officer whether they filed timely preliminary objections. The Staff will proceed to perform its reviews regardless of the status of the condemnation proceeding, so that, in the event Jobert and Metals Trucking successfully challenge the condemnation, any hearing will not be delayed.

¹³ The Staff has not been informed by counsel for Jobert and Metals Trucking whether or not they filed timely preliminary objections to the notice of condemnation.

CONCLUSION

Based upon the foregoing, the Staff opposes the Request for Hearing and Supplemental Request of Jobert, Inc. and Metals Trucking, Inc.

Respectfully submitted,

Giovanna M. Longo */RA/*
Counsel for NRC staff

Dated at Rockville, Maryland
this 1st day of May 2000

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO 'JOBERT, INC'S AND METALS TRUCKING, INC'S RESPONSE TO LICENSEE'S AND NRC STAFF'S ANSWERS TO REQUEST FOR HEARING'" in the above-captioned proceeding have been served on the following by deposit in the United States mail or by e-mail or by facsimile transmission, or through deposit in the Nuclear Regulatory Commission's internal mail system as indicated with a single asterisk, on this 1st day of May 2000.

Administrative Judge*
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Presiding Officer
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Adjudicatory File (2)*
Atomic Safety and Licensing Board
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