RCRA Permit Appeal Fact Sheet **1989**

FACILITY: The BFGoodrich Company
Calvert City, Kentucky
KYD 006 370 167
RCRA Appeal No. 89-29

PETITIONER: BFGoodrich

PETITION FILED: November 1, 1989

STATUS OF PETITION: See Permit Appeal Status Report

ISSUES:

- RFI conditions are not justified
- Definition of solid waste management unit
- Other corrective action issues (release reporting and recordkeeping requirements; interim measures)
- Procedural issues
- Miscellaneous other issues (reporting requirements for planned facility changes)

Summary of Petition:

The petitioner is requesting review of HSWA corrective action provisions contained in the facility's post-closure permit. BFGoodrich contends that EPA has no authority to impose corrective action conditions at this facility, which has ceased hazardous waste management operations and is currently engaged only in post-closure care activities. BFGoodrich also requests review of permit conditions relating to the definition of solid waste management unit (SWMU), the implementation of interim measures, and recordkeeping and reporting requirements.

- **RFI Conditions are not Justified.** The petitioner contends that RCRA Section 3004(u) authorizes corrective action only when there has been an actual release from a SWMU. If no releases are found at SWMUs during the preliminary assessment/site investigation, the petitioner argues that the Agency's jurisdiction over that SWMU ceases. Thus, the BFGoodrich is appealing the definition of SWMU in its permit which extends corrective action requirements to potential releases.

- **Definition of Solid Waste Management Unit.** BFGoodrich contends that the permit's definition of SWMU is overbroad, in that it covers areas contaminated by routine, systematic, and deliberate discharges from process areas and raw material and product loading and unloading areas.

  - The petitioner argues that because these units are not now and have never been intended for the management of solid wastes, these units can not be termed "SWMUs."

  - The petitioner also claims that these units can not be considered SWMUs under the "omnibus" authority of RCRA Section 3005(c), because that authority is limited to "special" or "unique" circumstances.

- **Release Reporting and Recordkeeping Requirements.** BFGoodrich contests conditions that require it to maintain records of all releases or spills and to submit an annual summary report on these releases.

  - The petitioner claims that such recordkeeping and reporting provisions are overly broad and unjustified, since they would require reporting releases that pose no threat to human health and the environment, or that may have originated from areas other than SWMUs. BFGoodrich claims that this is in direct contrast to the statutory mandate requiring corrective action for releases from SWMUs as necessary to protect human health and the environment.

  - The petitioner also contends that these requirements are in contrast to the reporting requirements under Section 103(a) of CERCLA.

- **Interim Measures.** BFGoodrich petitions for review of permit conditions that impose interim measures to ensure the containment of groundwater contamination from two landfills.

  - BFGoodrich argues that the Agency can not demonstrate that: (1) these units have released hazardous constituents; and (2) interim measures are necessary to protect human health or the environment.

  - The petitioner contends that the groundwater contamination is being addressed by a pump-and-treat system required under a CERCLA response action.

  - The petitioner also argues that additional interim measures can not be effectively designed or implemented at permit issuance without the completion of more detailed investigations.

- **Procedural Issues.** The petitioner argues that EPA has no authority to issue a HSWA permit to a facility that has ceased active hazardous waste management operations and is undertaking only post-closure care obligations. The petitioner states that RCRA permitting requirements apply only to facilities that are currently engaged in the treatment, storage, or disposal of hazardous waste, or intend to engage in such activities in the future.

- **Reporting Requirements for Planned Facility Changes.** BFGoodrich contends that the condition requiring notification of any planned physical alterations or additions to the permitted facility is unlawfully broad.

  - The petitioner complains that this condition would require the reporting of even the smallest of changes at the facility.

  - The petitioner argues that the permit unlawfully requires reporting of changes to SWMUs from which hazardous constituents have never been released, and over which EPA has no jurisdiction.

  - The petitioner claims that it should not have to report SWMUs that may be added by future facility modifications.

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	
The BFGoodrich Company, Calvert City, Kentucky	RCRA Appeal No. 89-29
Permit No. KYD 006 370 167	

ORDER ON PETITION FOR REVIEW

The BFGoodrich Company has petitioned for review of a permit issued by Region IV under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C.A. §§6901-6992k. The permit imposes corrective action requirements under RCRA §3004(u) [1/] for solid waste management units ("SWMUs") at BFGoodrich's chemical production facility in Calvert City, Kentucky. As requested by the Agency's Chief Judicial Officer, the Region submitted a response to the petition ("Region Response").

Under the rules that govern this proceeding, a RCRA permit ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an

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1/ RCRA §3004(u) provides that "[s]tandards promulgated under this section shall require, and a permit issued after November 8, 1984 by the Administrator or a State shall require, corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit. Permits issued under section 6925 of this title shall contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for completing such corrective action." 42 U.S.C.A. §6924(u).

important matter of policy or exercise of discretion that warrants review. See 40 CFR §124.19; 45 Fed. Reg. 33412 (May 19, 1980). The preamble to §124.19 states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." Id. The burden of demonstrating that review is warranted is thus on the Petitioner.

Post-closure permits: BFGoodrich first argues that the Agency has no statutory authority to issue a permit for the Calvert City plant because, in its view, the facility no longer manages hazardous waste. See Petition at 4-6. Although BFGoodrich previously stored hazardous waste in surface impoundments at the facility, the impoundments have been closed. Id. Hazardous waste taken from the impoundments at closure has been placed in an on-site landfill, and the facility certified closure on February 27, 1989. See Region Response at 2, 4.

BFGoodrich notes that RCRA §3005(a) directs the Agency to issue rules requiring permits for each owner or operator of a facility used "for the treatment, storage, or disposal of hazardous waste," and it argues that no RCRA permit may be issued for its facility because the plant is no longer used for hazardous waste treatment, storage, or disposal. BFGoodrich recognizes that the Agency may require post-closure care for the facility under RCRA, but it contends that such requirements must be imposed directly by rule, not through a RCRA permit

(particularly one that includes corrective action requirements under RCRA §3004(u)). [2/]

The Agency's rules expressly authorize the issuance of a post-closure permit for a facility with a surface impoundment that received waste after July 26, 1982, or that certified closure after January 26, 1983. See 40 CFR §270.1(c). [3/] BFGoodrich certified closure on February 27, 1989, and the site thus falls within the scope of §270.1(c). See Region Response at 4. Although BFGoodrich questions the Agency's statutory (as opposed to its regulatory) authority for issuing the permit, one advantage of a rulemaking is to ensure that individual permit proceedings do not turn into arenas for collateral attacks on policies and requirements that have already been subject to full Agency deliberation, such as those embodied in §270.1(c). As a result, the Agency does not normally entertain challenges to the validity of its rules in permit proceedings. BFGoodrich provides no good reason for deviating from that practice in this case. [4/]

[2/] BFGoodrich acknowledges that the U.S. Court of Appeals for the District of Columbia Circuit has upheld the Agency's application of the corrective action requirements of RCRA §3004(u) to post-closure permits. See American Iron and Steel Institute v. EPA, 886 F.2d 390, 396-97 (D.C. Cir. 1989); United Technologies Corp. v. EPA, 821 F.2d 714 (D.C. Cir. 1987). It nonetheless questions whether the Agency is authorized to issue post-closure permits under RCRA §3005(a).

[3/] Section 270.1(c) provides for an exception to the post-closure permit requirement (inapplicable here) where the permittee demonstrates closure by removal.

[4/] The portion of §270.1(c) that authorizes the issuance of a post-closure permit has been challenged in federal court. See In re Consolidated Land Disposal Regulation Litigation, No. 82-2205

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The definition of "SWMU": BFGoodrich next challenges an assertion made by Region IV, evidently in its response to comments on the draft permit, that the permit definition of "SWMU" is broad enough to include an area contaminated by routine, systematic, and deliberate discharges from process areas. See Petition at 6-10. [5/] This issue is not yet ripe for disposition. The Agency's rules provide that petitioners may seek review of permit conditions, not isolated assertions in the administrative record regarding the Region's intended application of the permit. See 40 CFR §124.19(a). Because BFGoodrich's petition does not directly call into question the propriety of any specific permit term in this regard, this issue may not be raised on appeal of the permit. [6/]

[4/](...continued)
(D.C. Cir.). BFGoodrich could have been, but is not, a party in that case. EPA interprets RCRA §3005 as authorizing the issuance of post-closure permits under §270.1(c), and it will continue to do so without entertaining challenges to the validity of §270.1(c) in individual permit or enforcement proceedings unless and until it is directed to do otherwise by a federal court.

[5/] The permit defines "SWMU" as "any unit from which hazardous constituents might migrate which has been used for the treatment, storage, or disposal of solid waste at any time, irrespective of whether the unit is or ever was intended for management of solid waste. RCRA regulated hazardous waste management units are also solid waste management units." See Region Response at 7.

[6/] See In re Midwest Steel Division, National Steel Corp., RCRA Appeal No. 88-38, at 2-3 (August 27, 1990) (the Region's intended application of a permit term prohibiting the acceptance of off-site waste is not subject to review under §124.19). It should be noted that the Region's intended application of the permit in this respect is consistent with the Agency's interpretation of the term "SWMU" as used in RCRA §3004(u). Although RCRA generally does not apply to production processes that do not involve solid waste management, the routine and systematic
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BFGoodrich also argues that the permit improperly extends the Agency's authority under RCRA §3004(u) to areas that have never been the source of a release. The solution, according to BFGoodrich, is to modify the permit definition of "SWMU" so that corrective action is limited to SWMUs that already have a release or from which there is likely to be a future release.

Although BFGoodrich is correct that RCRA §3004(u) requires corrective action only where there has been a release, this provision is written with sufficient breadth to reach releases that might be discovered after the permit is issued. Nothing in the statute suggests that corrective action requirements in a permit should be restricted to an inventory of SWMUs which, at the time of permit issuance, have confirmed (or likely future) releases, thereby ignoring other future releases during the life of the permit. BFGoodrich's proposed modification would improperly limit corrective action under the permit to such an inventory of SWMUs. The statute is best read as requiring the Agency to impose a continuing obligation upon the permittee to correct all future releases at the facility during the permit

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discharge or disposal of solid waste from a process area constitutes solid waste management. See, e.g., RCRA §1004(28), 42 U.S.C.A. §6903(28) ("The term 'solid waste management' means the systematic administration of activities which provide for the * * * disposal of solid waste."); 55 Fed. Reg. 30798, 30808 (July 27, 1990) ("the proposed definition [of 'SWMU'] also includes as a type of solid waste management unit those areas of a facility at which solid wastes have been released in a routine and systematic manner."). As noted by the Region (Response at 8), it is not the process unit per se that is the SWMU in such situations, but the area used for the routine and systematic discharge of solid waste.

term where necessary to protect human health and the environment. The Agency recently reaffirmed this reading in the preamble to the proposed Subpart S corrective action rule. See 55 Fed. Reg. 30798, 30849 (July 27, 1990). Accordingly, I reject the proposed modification of the permit definition of "SWMU." 7/

Interim corrective measures: BFGoodrich also objects to Permit Condition II.E, which requires interim corrective measures to ensure "the containment of the lateral and vertical spread of groundwater contamination known to exist * * * beneath Landfill L-3 and Landfill L-10 and adjacent areas and to prevent the migration of hazardous constituents into waters of the Tennessee River and Barge Slip." See Petition at 13. These measures would be implemented while BFGoodrich investigates, develops, and

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7/ BFGoodrich notes (Petition at 12) that the Agency has stated that groundwater monitoring for future releases from a SWMU will be required where "a SWMU is likely to release hazardous constituents that pose a threat to human health or the environment." 52 Fed. Reg. 45788, 45789 (December 1, 1987) (emphasis added); but cf. In re Envirosafe Services of Idaho, Inc., RCRA Appeal No. 88-41, at 9 n.13 (April 3, 1990) (even absent a likelihood of a release, a serious risk of a future release might warrant monitoring of a SWMU to protect human health and the environment). These authorities address monitoring obligations imposed at the time of permit issuance due to the possibility of a future release, and they are not directly relevant to the permittee's continuing obligation to address a release that occurs during the life of the permit.

BFGoodrich's proposed revision of the "SWMU" definition is unnecessary for the reasons set forth above, and it also conflicts with the plain and natural meaning of that term as used in RCRA §3004(u). It is axiomatic that the term "solid waste management unit" refers to any unit used for the management of solid waste. See In re Shell Oil Co., RCRA Appeal No. 88-48, at 4 (March 12, 1990). Any such unit constitutes a SWMU regardless of whether there has been a release from the unit.

implements permanent corrective action measures for the contaminant plume. BFGoodrich argues that the record does not support a finding that the plume results from a release from L-3 or L-10, and that it might result exclusively from other units subject to remediation under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C.A. §§9601-9675. It also contends that the plume does not pose an immediate threat to human health and the environment, that the interim measures in the permit duplicate remedial activities being conducted under CERCLA, and that adequate corrective measures cannot be designed or implemented in the absence of further investigation and study. See Petition at 13-21.

The Agency places strong emphasis on the use of interim measures to initiate expedited remediation where necessary at RCRA facilities that require corrective action. See 55 Fed. Reg. at 30838-39. The precise source of the plume is evidently unknown, but it originates from at least one of the SWMUs at the facility and is thus subject to the corrective action requirements (including interim measures) of RCRA §3004(u). Although the plume is also the focus of remedial requirements under a CERCLA Record of Decision ("ROD"), no remedial action is presently occurring under the ROD due to litigation, and thus the permit requirements at issue are not duplicative of other ongoing activities. [8/]

[8/] The Agency strives to achieve consistent policies and procedures for remedial action under RCRA and CERCLA. For

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BFGoodrich is correct that the use of interim measures should be based on the immediacy and magnitude of the threat involved (see 55 Fed. Reg. at 30839), but the requisite degree of immediacy that justifies such measures depends in part on the amount of time needed to establish and implement permanent corrective action measures. The submissions before me show that the Region properly considered both the magnitude and the immediacy of the threat in deciding whether to require interim measures. The Agency need not wait until human or environmental receptors are actually exposed to dangerous levels of contamination before it concludes that the risk posed by a contaminant plume is of sufficient immediacy and magnitude to warrant interim measures. BFGoodrich has failed to show that the Region's decision in this regard is clearly erroneous or inconsistent with Agency policy. Its unsupported assertions that interim measures are doomed to fail are likewise insufficient to warrant review.

Reporting requirements: BFGoodrich challenges Permit Condition I.D.10, which requires it to report "any planned physical alterations or additions to the permitted facility." See Petition at 28-33. It contends that this requirement is

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example, if, at the time of RCRA permit issuance, remedial work has already been completed according to the CERCLA National Contingency Plan, the Agency would ordinarily consider that work to meet the requirements of RCRA §3004(u). See 55 Fed. Reg. at 30852. Nothing precludes a RCRA permit writer, however, from requiring interim measures for contamination subject to a CERCLA ROD, particularly where the ROD is not currently being implemented due to litigation.

overbroad and bears no relation to the protection of human health and the environment.

The scope of the contested condition is identical to §270.30(l)(1) of the rules, which provides:

> The permittee shall give notice to the Director as soon as possible of any planned physical alterations or additions to the permitted facility.

40 CFR §270.30(l)(1). Again, BFGoodrich has presented no good reason to depart from the Agency's policy of declining to consider challenges in individual permit proceedings to the requirements and policies embodied in its rules. [9/]

Finally, BFGoodrich objects to Permit Condition II.G.6.c, which requires it to maintain records and submit an annual report on all "releases or spills of hazardous waste or hazardous constituents to the environment" not otherwise required to be reported under the permit. See Petition at 21-28. It argues that this reporting requirement improperly applies to releases from non-SWMUs. BFGoodrich further contends that by extending to all releases, regardless of size, this condition improperly requires the reporting of trivial releases, such as a spill of drinking water that contains chloroform (a hazardous constituent). The Region responds that the Agency may use the

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[9/] The Region does not argue that §270.30(l)(1) provides direct legal authority for Permit Condition I.D.10, but instead asserts that this condition is based upon §264.101 of the rules, which currently implements RCRA §3004(u). Nevertheless, given the similarity between the contested condition and §270.30(l)(1), the Agency will not entertain a challenge to the scope of this condition in this proceeding.

omnibus authority in RCRA §3005(c)(3) [10/] to address releases from non-SWMUs, and that a reporting requirement may therefore properly apply to releases from non-SWMUs as well. It also contends that the permittee should be required to report all releases, regardless of size, so that the Agency may then determine whether further investigation or remediation is warranted. It notes that while the permit is written broadly to require the reporting of all releases, the permittee may exercise a "minimal amount of discretion" to exclude truly trivial spills from the requirement. Region Response at 17.

The proposed Subpart S rule includes a 20-day reporting requirement that applies only to releases from SWMUs. [11/] Although the Region is correct that the RCRA omnibus authority may be used to address releases from non-SWMUs where necessary to protect human health and the environment, [12/] the mere citation of

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[10/] See 42 U.S.C.A. §6925(c)(3) ("Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.").

[11/] 55 Fed. Reg. at 30882-83 (proposed §270.30(l)(12)(C)) ("If the permittee discovers a release of hazardous wastes (including hazardous constituents) from a solid waste management unit at the facility that may pose a threat to human health and the environment, the permittee shall, within twenty days of the discovery, submit [specified] information to the Director * * *.").

[12/] See 55 Fed. Reg. at 30809; In re American Cyanamid Co., RCRA Appeal No. 88-22 (October 31, 1989); In re Amerada Hess Corp., RCRA Appeal No. 88-10 (August 15, 1989). BFGoodrich suggests that the omnibus provision may not be used to "override" the "constraints" on EPA's corrective action authority under RCRA §3004(u). See Petition at 9. RCRA §3004(u) should not, however, be read as a constraint, but rather as the minimum corrective

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the omnibus provision is insufficient to justify its use. Invocation of the omnibus provision should be accompanied by an explanation of why reliance thereon is necessary to protect human health and the environment at the facility at issue. [13/] The Region has failed to articulate any reason why it is necessary to exercise the omnibus authority to impose a more stringent reporting requirement upon BFGoodrich in this case.

The reporting requirement in the proposed Subpart S rule does not apply to all releases from SWMUs, but is limited to releases that may pose a threat to human health and the environment. [14/] Although this risk-based standard is necessarily somewhat imprecise, it strikes a sound balance between breadth of reporting and regulatory certainty. It excludes truly trivial spills and yet, by extending to releases that "may" pose a threat, it requires the permittee to err on the side of reporting

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[12/](...continued)
action requirements imposed upon RCRA permittees. Other RCRA corrective action provisions (e.g., RCRA §3008(h)) are not limited to releases from SWMUs, and they thus provide strong evidence that the omnibus provision may similarly be used to address non-SWMU releases where necessary to protect human health and the environment. See American Cyanamid, supra; Amerada Hess, supra.

[13/] The RCRA omnibus authority may be used to address special circumstances at a facility that are not addressed by the rules that generally apply to all RCRA facilities, or to impose new requirements that the Agency intends to add to the rules but which have not yet been promulgated in final form. See S. Rep. No. 284, 98 Cong., 1st Sess. 31 (1983).

[14/] See note 11, supra. The proposed notification requirements that will apply to the migration of existing releases beyond the facility boundary are similarly limited to migrations that exceed risk-based action levels. See 55 Fed. Reg. at 30882 (proposed §§264.560(a) & (b)).

so that the Region is in a position to make the ultimate determination as to whether the release actually poses a threat that requires further investigation or remediation. [15/] As a matter of permit-writing policy, a permit should not include an absolute, overly broad reporting requirement for all releases, thereby forcing the permittee to rely on the Region's exercise of prosecutorial discretion to refrain from enforcing the permit arbitrarily. The better approach generally is to write the permit to exclude inconsequential releases from the reporting requirement. [16/] Although the omnibus authority might be exercised to impose a reporting requirement more stringent than that called for by the rules or current Agency policy for most RCRA facilities, Region IV has again failed to identify any

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[15/] BFGoodrich argues that the release reporting requirement in the permit should be limited to releases that exceed reportable quantities ("RQs") under CERCLA §102. This provision authorizes the Administrator to designate hazardous substances which, when released, "may present substantial danger to the public health or welfare or the environment," and to establish quantities for such substances which, when released, must be reported to the National Response Center. See 42 U.S.C.A. §9602. Although CERCLA RQs might be relevant in determining whether a release at a RCRA facility poses a threat to human health or the environment, the extent to which RQs may be relied upon under RCRA §3004(u) would be best determined in the ongoing Subpart S rulemaking proceeding, not in this permit proceeding. Until Subpart S is issued in final form, release-reporting requirements in RCRA permits will be upheld on appeal where they are limited to releases from SWMUs that may pose a threat to human health and the environment (like the proposed rule in the Subpart S proceeding).

[16/] A permit may require the reporting of a spill which does not appear to pose a threat when viewed in isolation but which actually might pose a threat due to the cumulative effect of other spills at the facility.

reason for imposing a more stringent requirement upon BFGoodrich in this case.

Accordingly, Permit Condition II.G.6.c is remanded to the Region. The Region should limit this reporting requirement to releases from SWMUs that might pose a threat to human health or the environment (consistent with the proposed Subpart S rule), [17] or justify a more stringent requirement under the omnibus provision. [18] The Region shall give public notice of the remand under 40 CFR §§124.10 & 124.19(c). For the reasons set forth above and in the Region's Response (to the extent that Response is consistent with today's decision), review is denied on the other issues raised by the Petition.

So ordered.

Dated: DEC 19 1990

William K. Reilly
Administrator

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[17] The references to the proposed Subpart S rule throughout this order should not be read to suggest that the proposal provides legal authority for permit conditions under RCRA §3004(u). Until Subpart S is actually promulgated, such authority will reside in 40 CFR §264.101. The Subpart S proposal does, however, represent the Agency's most recent, comprehensive statement of its policies and interpretations regarding corrective action under RCRA §3004(u).

[18] The rules suggest that the parties generally will be given an opportunity for additional briefing upon the grant of review. See 40 CFR §124.19(c). The issues regarding the release-reporting requirement appear to have been adequately briefed, and further briefing would not aid in the disposition of these issues.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order on Petition for Review in the matter of The BFGoodrich Company, Calvert City, RCRA Appeal No. 89-29 were sent to the following persons in the manner indicated:

By First Class Mail,
Postage Prepaid:

Leonard A. Miller
Swidler & Berlin, Chartered
3000 K Street, NW
Washington, DC 20007

Mary B. Coe
Associate General Counsel
U.S. EPA, Region III
841 Chestnut Building
Philadelphia, PA 19107

Karl S. Bourdeau
Aaron H. Goldberg
Beveridge & Diamond, P.C.
Suite 700
1350 I Street, NW
Washington, DC 20005

Lee E. Larson
Senior Corporate Counsel
The BFGoodrich Company
6100 oak Tree Boulevard
Cleveland, OH 44131

Dated: December 21, 1990

Brenda H. Selden
Legal Staff Assistant