

RAS 12857

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 01/12/07
SERVED 01/12/07

Dale E. Klein, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

_____)
In the Matter of)
)
SHIELDALLOY METALLURGICAL)
CORPORATION and)
NUREG-1757)
_____)

Docket No. SMB-743

ORDER

This matter is before the Commission on a Petition for Hearing filed by the State of New Jersey. The State’s Petition requests a hearing to rescind specified portions of NUREG-1757. In addition, both the Petition for Hearing and an associated Petition for Rulemaking request a stay of “any action” to review the proposed decommissioning plan submitted by the Shieldalloy Metallurgical Corporation (“SMC”) until the Commission rules on the petitions. Both the NRC Staff and SMC have filed pleadings in opposition to SMC’s filings. Pursuant to 10 C.F.R. § 2.346(h), the Commission denies both the Petition for Hearing and both requests for stay. The Petition for Rulemaking (which seeks to rescind portions of NUREG-1757) has been referred to the appropriate NRC Staff Office.

First, the Petition for Hearing requests a hearing to rescind portions of NUREG-1757, “Consolidated Decommissioning Guidance,” which the Commission placed (in revised form) on its public website on or about October 27, 2006. The Petition appears to argue that the NUREG is a “rule or regulation dealing with the activities of licensees[.]” 42 U.S.C. § 2239(a)(1)(A), and that issuance, modification, or suspension of the NUREG requires an adjudicatory hearing under the Atomic Energy Act. However, NUREG-1757 does not establish “binding” agency requirements; instead, it simply provides guidance on how a licensee may

comply with various provisions of the Commission's decommissioning regulations. See NUREG-1757, Vol. 1, Rev.2, xvii. No NRC licensee is required to comply with NUREG-1757. Moreover, New Jersey had advance notice of the proposed NUREG revisions and submitted comments on them, and the NRC has responded to those comments. See 71 Fed. Reg. 78234 (Dec. 28, 2006).

Furthermore, if a licensee is involved in a proceeding in which it seeks to obtain a license or license amendment by seeking to demonstrate compliance with regulatory requirements by showing that its proposed action is consistent with regulatory guidance set forth in a NUREG, any petitioner requesting intervention in that proceeding may seek to challenge the application of the NUREG to the licensee's request. Thus, if a person successfully petitions to intervene in the proceeding to review SMC's proposed decommissioning plan, that person may contest SMC's attempt to rely on the disputed portions of NUREG-1757 in that proceeding. In other words, a person may file contentions with their Petition to Intervene contending that compliance with NUREG-1757 does not demonstrate that the proposed decommissioning plan meets the requirements of the applicable NRC regulations and that additional specified actions are necessary. See *generally* 10 C.F.R. § 2.309.

Second, the Petition for Hearing (and the Petition for Rulemaking) requests that the Commission stay the proceeding to consider SMC's proposed decommissioning plan, citing 10 C.F.R. § 2.802(d). That regulation provides that a person who has submitted a petition for rulemaking "may request the Commission to suspend all or any part of any licensing proceeding to which the petitioner is a party pending disposition of the petition for rulemaking." *Id.* (emphasis added). However, while New Jersey has submitted a Petition for Rulemaking, the State is not a "party" to the proceeding it seeks to stay. The NRC Staff has published a Notice of Opportunity for a Hearing regarding the proposed decommissioning plan. See 71 Fed. Reg.

66986 (Nov. 17, 2006). That Notice offers “any interested person” the opportunity to intervene in the proceeding to review the proposed decommissioning plan and to request a hearing on that plan. *Id.* If a person responds to the Notice of Opportunity for a Hearing, and if the Atomic Safety and Licensing Board grants the request to intervene, that person may then seek to invoke Section 2.802(d).

Furthermore, as SMC’s opposition argues, the requests for a stay appear to constitute “Motions” under the Commission’s Rules of Practice. As such, they should comply with 10 C.F.R. § 2.323. In this case, both of New Jersey’s stay requests - on their face - do not meet the requirements of section 2.323.

In summary, the Petition for a Hearing on the revisions to NUREG-1757 is denied. In addition, both requests for a stay of the proceeding to consider the proposed SMC decommissioning plan are denied.

IT IS SO ORDERED.

For the Commission

/RA/

Annette Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 12th day of January, 2007.

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NUCLEAR REGULATORY COMMISSION

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SHIELDALLOY METALLURGICAL CORP.) Docket No. SMB-743
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(Newfield, New Jersey))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION ORDER ADDRESSING INTERVENTION PETITION AND STAY REQUESTS have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, and NRC internal mail.

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COMMISSION ORDER ADDRESSING INTERVENTION
PETITION AND STAY REQUESTS

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 12th day of January 2007