

January 8, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
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January 8, 2007 (8:40am)

Before the Commission

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)
)
Petition for a Hearing on NUREG-1757)
Pursuant to 10 C.F.R. § 2.309 and)
42 U.S.C. § 2239(a)(1)(A))
)
Petition for Rulemaking on NUREG-1757)
Pursuant to 10 C.F.R. § 2.802(a))
)

**SHIELDALLOY'S RESPONSE IN OPPOSITION TO STAY REQUESTS BY
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION**

INTRODUCTION

On December 22, 2006 the State of New Jersey Department of Environmental Protection ("NJDEP") filed the above captioned petitions (hereinafter "NUREG-1757 Hearing Petition" and "NUREG-1757 Rulemaking Petition," collectively, the "Petitions") seeking (1) the institution of a rulemaking proceeding to rescind portions of NUREG-1757, "Consolidated Decommissioning Guidance," finalized on October 27, 2006, and (2) the holding of a hearing "pursuant to 10 C.F.R. § 2.309" to rescind the same portions of NUREG-1757. In addition to seeking rescission of portions of NUREG-1757, the Petitions request a stay of any NRC Staff ("Staff") action on the Decommissioning Plan ("DP") for Source Material License No. SMB-743 ("SMB-743") issued to Shieldalloy Metallurgical Corporation ("Shieldalloy" or the "Licensee") for its Newfield Facility in Newfield, New Jersey.

Shieldalloy submitted the DP to the Staff on October 24, 2005, and submitted a supplement to the DP on June 30, 2006.¹ The Staff gave official notice of its acceptance of the DP for review on November 9, 2006. *See* 71 Fed. Reg. 66,986 (Nov. 17, 2006).²

While not styled as such, the requests for stay of Staff action on Shieldalloy's DP are effectively motions, and as such are subject to the provisions of 10 C.F.R. § 2.323. Pursuant to 10 C.F.R. § 2.323(c), Shieldalloy submits this response ("Response") in opposition to the motions. As discussed below, the Petitions fail to satisfy any of the requirements for motions in general, and motions to stay in particular.

DISCUSSION

A. The Petitions do not meet the standards governing motions

The stay motions included in the Petitions do not satisfy the requirements of 10 C.F.R. § 2.323. They are untimely, lack basis and specificity, and do not cite any efforts on NJDEP's part to resolve the issue prior to filing the motions.

1. The stay motions are untimely

Motions "must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises." 10 C.F.R. § 2.323(a). The action complained of, acceptance of

¹ The DP filed by Shieldalloy in 2005 is the culmination of a process that developed over the last thirteen years. Shieldalloy submitted a conceptual decommissioning plan on April 7, 1993. The initial version of the DP was submitted on August 30, 2002.

The DP version accepted by the Staff for technical review was submitted by Shieldalloy pursuant to 10 C.F.R. § 40.42 to request restricted release pursuant to 10 C.F.R. § 20.1403. Additional, site-specific guidance for the preparation of the DP was provided to Shieldalloy by various NRC letters, including letters of February 11, 2000; December 7, 2000; February 28, 2003; July 2, 2003; May 15, 2004; June 24, 2005; and January 26, 2006.

The Petitions challenge the guidance in NUREG-1757 that was finalized on October 27, 2006. The finalized version of NUREG-1757 was issued almost four months after Shieldalloy supplemented its DP.

² The Staff notified Shieldalloy of its acceptance of the DP for review in October 2006. October 18, 2006 letter from Keith I. McConnell to David R. Smith, available in ADAMS with Accession No. ML062580126. NJDEP is shown as being sent a copy of the letter.

the DP for NRC technical review, occurred on October 18, 2006³ and was acknowledged by NJDEP in a letter from NJDEP to NRC dated November 13, 2006.⁴ NJDEP was on notice of the NRC Staff action at least five weeks, and probably over two months, before it filed its Petitions.⁵

2. The requests lack specificity and basis

Motions must state with particularity the grounds for the relief sought and be supported “by appropriate and accurate references to legal authority and factual basis” 10 C.F.R. §§ 2.323(b) and (d). The Petitions baldly ask for stay of Staff action on the DP without specifying why such relief is appropriate or warranted. The Petitions also fail to state what the legal basis is for granting a stay.

3. NJDEP made no attempt to consult with Shieldalloy prior to filing the motions

10 C.F.R. § 2.323(b) directs that a motion be rejected “if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful.” The Petitions do not contain any statement that NJDEP attempted to contact Shieldalloy with respect to the stay requests. In fact, Shieldalloy first learned of the NJDEP stay requests when it received in the mail copies of the NJDEP filings after the Christmas holiday. NJDEP’s failure to try to resolve the issues prior to filing its Petitions should be fatal to its stay requests. *Id.*

³ As noted above, NJDEP is shown as being sent a copy of the DP acceptance letter sent by the Staff to Shieldalloy on October 18, 2006.

⁴ See November 13, 2006 letter from Nancy Wittenberg to Keith I. McConnell, ADAMS Accession No. ML063320233.

⁵ Even if the “occurrence” from which the motions to stay arose were deemed to be the formal November 17, 2006 *Federal Register* notice of the DP’s acceptance for review, that publication occurred over a month before the filing of the Petitions, so the motions to stay would still be untimely.

B. None of the grounds for granting a stay have been met

The Petitions also do not meet the standards for granting stays and there is no proceeding to which NJDEP is a party to which a stay request would apply.

1. The Petitions do not meet the standards for granting stays of adjudicatory or rulemaking proceedings

Stay requests are addressed in 10 C.F.R. § 2.342 with respect to decisions or actions of a presiding officer in an NRC adjudicatory proceeding. Although the regulations in this section are not directly applicable to NJDEP's stay requests, they provide useful guidance on what a stay petitioner must demonstrate in order to prevail.

10 C.F.R. § 2.342 establishes a four-fold test for ruling on applications for stay:

- 1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

10 C.F.R. § 2.342(e). The Petitions make no effort to show that: (a) NJDEP is likely to prevail on the merits;⁶ (b) NJDEP will suffer irreparable harm if the stay is not granted; (c) Shieldalloy would not be substantially harmed by a stay; or (d) the public interest favors a stay. "At the least, one seeking a stay bears the burden of marshalling the evidence and making the arguments which demonstrate his entitlement to it." *Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 785 (1977). NJDEP has utterly failed to demonstrate that it is entitled to the stay it seeks.

⁶ This Response does not address the merits of the Petitions. However, even if the Petitions were successful in their challenges to NUREG-1757, NJDEP does not explain how such success would require Staff rejection of the DP.

In the rulemaking arena, NRC regulations allow the submitter of a rulemaking petition to request that the Commission “suspend all or any part of any licensing proceeding to which the petitioner is a party pending disposition of the petition for rulemaking.” 10 C.F.R. § 2.802(d). The same standards discussed above for granting stay requests in adjudicatory proceedings govern stay requests made in the context of rulemaking. *See Environmental Radiation Protection Standards for Nuclear Power Operations* (40 C.F.R. 190), CLI-81-4, 13 NRC 298, 301 (1981); *Uranium Mill Licensing Requirements* (10 C.F.R. Parts 30, 40, 70 and 150), CLI-81-4, 13 NRC 460, 463 (1981). Applying those standards, it is clear that NJDEP is not entitled to a stay pending disposition of its rulemaking petition.

2. There is no proceeding to which NJDEP is a party that can be stayed

As noted, 10 C.F.R. § 2.802(d) allows the submitter of a rulemaking petition to request that the Commission suspend all or any part of any licensing proceeding to which the petitioner is a party pending disposition of the petition for rulemaking. However, no proceeding is currently pending with regard to Shieldalloy’s DP. Notice has been published of the Staff’s acceptance of the DP for review and of the opportunity to request a hearing on it. 71 Fed. Reg. 66,986. However, no request for a hearing has been filed and no proceeding has been instituted. Therefore, NJDEP is not a party to a proceeding that could be suspended pursuant to 10 C.F.R. § 2.802(d) and the regulation does not apply.

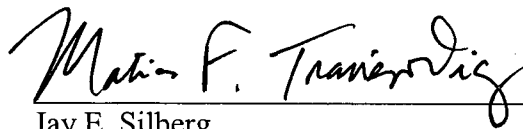
By the same token, filing of the NUREG-1757 Hearing Petition does not entitle NJDEP to seek a stay of the Staff review of the DP. That petition has not been granted and no

proceeding has been instituted as a result of it. Therefore, there is no regulatory basis for NJDEP to seek a stay.⁷

CONCLUSION

For the reasons stated above, the request for a stay of action on Shieldalloy's DP should be denied.

Respectfully submitted,



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Dated: January 8, 2007

⁷ Indeed, a request to stay the Staff's review of a licensing application in the context of an adjudicatory proceeding has been deemed unwarranted. *New England Power Co.* (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 279 (1978). *A fortiori*, a request for stay of a Staff review when no proceeding is ongoing is clearly impermissible.

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CERTIFICATE OF SERVICE

I hereby certify that copies of “Shieldalloy’s Response in Opposition to Stay Requests by New Jersey Department of Environmental Protection” dated January 8, 2007, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 8th day of January, 2007.

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