January 29, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
SHIELDALLOY METALLURGICAL CORP.	)	Docket No. 40-7102
	)	
(Licensing Amendment Request for Decommissioning the Newfield, New Jersey Facility)	)	

NRC STAFF'S RESPONSE TO REQUEST FROM
LORRETTA WILLIAMS FOR A PUBLIC HEARING ON SHIELDALLOY
METALLURGICAL CORPORATION'S DECOMMISSIONING PLAN

INTRODUCTION

On January 3, 2007, Lorretta Williams ("Petitioner") filed a request for a hearing on the decommissioning plan (DP) submitted by Shieldalloy Metalurgical Corporation (SMC or "the Licensee").[1] For the reasons stated below, the NRC staff ("Staff") respectfully requests that the Petitioner's request be denied.

PROCEDURAL BACKGROUND

On June 30, 2006, SMC filed a site DP with the NRC. "Shieldalloy Metallurgical Corporation Supplement to Decommissioning Plan," June 30, 2006 (ADAMS ML061980092). The DP is for SMC's Newfield Facility in Newfield, New Jersey, where SMC conducted smelting and alloy production beginning in 1940. Between 1955 and June 1998, SMC processed pyrochlore, which contains thorium and uranium and is a licensed source material, at the Newfield facility. In August 2001, SMC notified the NRC that they had ceased activities using source material at the Newfield facility and intended to decommission the facility.
On October 21, 2005, SMC submitted its initial DP, proposing the use of a possession only

[1] "Request for a Hearing Submitted by Loretta Williams" (Jan. 3, 2007) (ADAMS ML0701902710) ("Hearing Request").

license for long term control of the site, to the NRC. The NRC rejected the 2005 DP, and on June 30, 2006 SMC submitted its revised DP. The NRC accepted the revised DP for technical review, and issued a notice of opportunity to request a hearing on the revised DP in the *Federal Register* on November 17, 2006. "Notice of Consideration of Amendment Request for Decommissioning for Shieldalloy Metallurgical Corporation, Newfield, NJ and Opportunity to Request a Hearing," 71 *Fed. Reg.* 66,986 (Nov. 17, 2006) ("Notice"). On January 3, 2007, the Petitioner filed the Hearing Request in response to the Notice.

DISCUSSION

I. Timeliness

Pursuant to 10 C.F.R. § 2.309(b)(3), the Notice required interested parties to file hearing requests by January 16, 2007. The Petitioner's request was filed on January 3, 2007, well before the time limit provided in the Notice. Therefore, the Petitioner's request is timely.

II. Standing

A. Injury-in-Fact Standing

An individual who requests a hearing before the Commission must demonstrate that they have standing to do so. 10 C.F.R. § 2.309(a); *see also* 42 U.S.C. § 2239(a) ("the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding"). 10 C.F.R. § 2.309(d) sets out the requirements petitioners must meet in order to show standing to participate in a hearing before the Atomic Safety and Licensing Board. Section 2.309(d)(1) requires that a request for a hearing: (1) identify the petitioner; (2) state the nature of the petitioner's right under the Atomic Energy Act to be made a party to the proceeding; (3) state the petitioner's interest in the proceeding; and (4) state the possible effect of any order or decision in the proceeding on the petitioner's interest.

In addition to these requirements, the NRC has long applied judicial concepts of standing. *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185,

195 (1998). In accordance with judicial concepts of standing, the petitioner must allege an injury-in-fact, "a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision." *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993), *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Dellums v. NRC,* 863 F.2d 968, 971 (D.C. Cir. 1988); *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-67 (1991)). This injury must be actual or threatened, rather than abstract and conjectural. *Perry*, CLI-93-21, 38 NRC at 92; *see also Lujan*, 504 U.S. at 560. The injury-in-fact also must be "arguably within the zone of interests protected by the governing statute," in the case of the NRC, either the Atomic Energy Act or the National Environmental Policy Act. *Yankee*, CLI-98-21, 48 NRC at 195; *Perry*, CLI-93-21, 38 NRC at 92.

B. "Proximity-Plus" Standing

In addition to applying the "injury-in-fact" test, the Commission has historically presumed standing in power reactor construction and operating license proceedings based on a petitioner's proximity to the facility. *See, e.g., Virginia Electric Power Company* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979). A presumption of standing based on geographic proximity alone is not applied in cases other than those involving construction and operating licenses for power reactors. *See Georgia Institute of Technology*(Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995). Rather, for all other cases, including materials decommissioning cases, a showing of potential harm must be made in addition to a demonstration of geographic proximity. *Id.* Under this "proximity-plus" theory, "a presumption of standing based on geographical proximity may be applied . . . where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences." *Id.*, *citing Sequoyah Fuels Corporation* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n. 22 (1994). Whether or not a proposed action carries with it an "obvious potential for offsite consequence," and, if so, at what

distance a petitioner can be presumed to be affected, must be determined "on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source." *Id.; see also Exelon Generation Company, LLC and PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580 (2005).

C. The Petitioner's Standing

The Petitioner's claim of standing appears to be based on a statement that she lives "within a few blocks of the Shieldalloy Metallurgical Corporation in [the] 1.7 square mile community" of Newfield.[2] Hearing Request at 1. Residence anywhere within the very small community of Newfield would place a petitioner within a less than two mile radius of the site. Thus, it appears, construing the Hearing Request in favor of the Petitioner, that the Petitioner has demonstrated the requisite geographic proximity to the site. The Petitioner does not make any specific claim regarding the potential for offsite consequences at the site. However, the Staff does intend to perform an environmental impact statement (EIS) as part of its evaluation of the DP. An EIS is only performed in the case of a "major Commission action significantly affecting the quality of the human environment." Thus, the Staff concedes that the proposed action carries with it a potential for offsite consequences. Therefore, given the Petitioner's close proximity to the site, the Staff agrees that the Petitioner has demonstrated standing to request a hearing.

III. Contentions

In addition to establishing standing, a hearing request must include at least one admissible contention. 10 C.F.R. § 2.309(a). For each contention, the petitioner must provide: (1) a specific statement of the issue of law or fact to be raised; (2) a brief explanation of the

[2] The NRC's regulations require that hearing requests "provide a detailed description as to why [petitioners] have standing." *Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354 (1999). Here, the Petitioner has offered only the barest explanation as to standing and has offered no support for the standing claim. However, it is the Commission's historical practice when evaluating a petitioner's claim of standing to "construe the petition in favor of the petitioner" where possible. *Georgia Tech Research Reactor*, CLI-95-12, 42 NRC at 115; *citing Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995).

basis for the contention; (3) a demonstration that the issue raised in the contention is within the scope of the proceeding; (4) a demonstration that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) a concise statement of the alleged facts or expert opinions which support the requestor's position; and (6) sufficient information to show that a genuine dispute exists on a material issue of law or fact, including references to specific portions of the application that the petitioner disputes and the supporting reasons for each dispute or the identification of each failure to include necessary information in the application and the supporting reasons for the petitioner's belief. 10 C.F.R. § 2.309(f)(1). As explained below, in the present instance, the Petitioner has not set forth any valid contention.

"The contention rule is strict by design." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 433 (2003). The Commission's procedures do "not permit 'the filing of a vague, unparticularized contention,' unsupported by affidavit, expert, or documentary support." *North Atlantic Energy Service Corporation* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999), *quoting Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant), CLI-98-25, 48 NRC 325, 349 (1998). Likewise, Commission practice does not "permit 'notice pleading,' with details to be filled in later." *Id.* A sufficiently detailed and precise contention "focuses the hearing process on real disputes susceptible of resolution in an adjudication [and] helps to assure that . . . hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334. Precise contentions also place "other parties in the proceeding on notice of the petitioners' specific grievances and thus gives them a good idea of the claims they will be either supporting or opposing." *Id.* Proposed contentions also must concern matters within the scope of the proceeding. *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta,

Georgia), CLI-95-12, 42 NRC 111, 118 (1995); *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790 (1985).

In January 2004 the NRC issued revisions to 10 C.F.R. Part 2. "Changes to the Adjudicatory Process," 69 Fed. Reg. 2182 (Jan. 14, 2004). Among the revisions were changes to 10 C.F.R. Part 2 Subpart L, which outlines the procedures for informal proceedings. *Id.* Prior to the revisions, petitioners under Subpart L needed to describe only "areas of concern about the licensing activity that is the subject of the matter of the proceeding." 10 C.F.R. § 2.1205(e)(3) (Jan. 1, 2004). The revised rules extended "to Subpart L proceedings the requirement to proffer specific, adequately supported contentions rather than simply state issues." 69 Fed. Reg. at 2202. The contention requirement was expanded "to ensure that the adjudicatory process is used to address real, concrete, specific issues that are appropriate for litigation" and to ensure that the Commission will "not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing." *Id.* Thus, even those seeking an informal hearing must meet the requirement to put forth at least one admissible contention.

Here, the Petitioner has not set forth any admissible contention. The notice to which the Petitioner responded in filing this request specifically cited and quoted the regulation setting out the requirements for an admissible contention, 10 C.F.R. § 2.309(f)(1). Rather than set out a concise, specific statement of the issue or issues to be placed in controversy accompanied by an explanation of the basis of the contention and a brief statement of the facts or expert opinions supporting the contention, the Hearing Request consists only of vague statements of general concern regarding the DP. The Hearing Request, as submitted, does not comply with contention requirements. Although petitioners proceeding *pro se* are generally not held to the same standards in pleading as petitioners represented by counsel, *see Shieldalloy*, CLI-99-12, 49 NRC at 354, absence of counsel does not absolve a petitioner from the requirement to set forth an admissible contention. The Hearing Request sets forth no specific contentions, but

does make vague claims that, as a result of the actions proposed in the DP, the site will become a health risk to the community, the cost estimates in the DP are incomplete, the DP will place an undue burden on the community, the site will be a security risk, the proposed plan does not comply with the requirement that doses be as low as reasonably achievable, and Shieldalloy has not considered alternatives to the current DP. Hearing Request at 1-2. These statements in the Hearing Request are so vague and unsupported that they will not serve to place other parties on notice regarding the claims to be adjudicated, nor do the statements demonstrate that the Petitioner is able to proffer any factual or legal foundation for the Hearing Request. Thus, the Hearing Request does not provide a contention that complies with the requirements of 10 C.F.R. § 2.309(f)(1)(i)-(ii) and (v)-(vi). Also, because the statements in the Hearing Request are vague and without any provided basis, there is insufficient information in the Hearing Request to determine whether or not the issues raised are within the scope of the proceeding or are material to the findings the NRC must make to support its review of the DP, as required by 10 C.F.R. § 2.309(f)(1)(iii) and (iv). None of the issues raised in the Hearing Request meets the requirements for an admissible contention. Therefore, the Hearing Request should be denied.

CONCLUSION

Although the Petitioner has established standing, as explained above, the Hearing Request does not include an admissible contention. Therefore, the Hearing Request should be denied.

Respectfully submitted,

/RA by Margaret J. Bupp/

Margaret J. Bupp
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 29th day of January, 2007

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NUCLEAR REGULATORY COMMISSION

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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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Name of Party:	NRC Staff

Respectfully submitted,

/RA by Margaret J. Bupp/

Margaret J. Bupp
Counsel for the NRC Staff

Dated at Rockville, Maryland
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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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Respectfully submitted,

/RA by Michael J. Clark/

Michael J. Clark
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 29th day of January, 2007

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO REQUEST FROM LORRETTA WILLIAMS FOR A PUBLIC HEARING ON SHIELDALLOY METALLURGICAL CORPORATION'S DECOMMISSIONING PLAN" and "NOTICE OF APPEARANCE" for Margaret J. Bupp and Michael J. Clark in the above captioned proceeding have been served on the following persons by deposit in the United States Mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk(*); and by electronic mail as indicated by a double asterisk (**) on this 29th day of January, 2007.

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