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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

February 6, 2007 (3:37pm)

Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)
)
SHIELDALLOY METALLURGICAL)
CORPORATION)
)
)
)

Docket No. SMB-743

**SHIELDALLOY'S ANSWER TO
REQUEST FOR HEARING AND PETITION TO INTERVENE OF
GLOUCESTER COUNTY BOARD OF CHOSEN FREEHOLDERS**

On January 11, 2007, the Gloucester County Board of Chosen Freeholders ("Petitioner") filed a "Request for Hearing and Petition to Intervene on Shieldalloy's Decommissioning Plan" ("Petition"). A copy was also served by express mail on Shieldalloy Metallurgical Corporation ("Shieldalloy" or the "Licensee"). Pursuant to 10 C.F.R. § 2.309(h)(1), Shieldalloy submits this answer in opposition to the Petition.

The Petition fails to propose any contentions that meet the admissibility requirements of 10 C.F.R. § 2.309(f). Accordingly, Petitioner's request for hearing should be denied and its Petition should be dismissed. 10 C.F.R. § 2.309(a).¹

I. PROCEDURAL BACKGROUND

The Petition seeks a hearing on the Decommissioning Plan ("DP") for Source Material License No. SMB-743 issued to Shieldalloy for its Newfield Facility in Newfield, New Jersey

¹ Should a hearing be held, however, because another intervenor has submitted an admissible contention, Petitioner – being a governmental entity – might participate in the hearing, if it so chooses, as an "interested state" pursuant to 10 CFR 2.315(c).

("the Newfield plant"). Shieldalloy resubmitted the DP to the NRC on October 24, 2005.² Shieldalloy submitted a supplement to the DP on June 30, 2006. The DP was accepted for review by the NRC Staff on November 9, 2006. The NRC provided an opportunity for "any person whose interest may be affected by this proceeding and who desires to participate as a party must file a written request for a hearing and a specification of the contentions which the person seeks to have litigated in the hearing." *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").

II. STANDING

Licensee does not contest that Petitioner has standing to seek to participate in this proceeding.

III. NRC STANDARDS GOVERNING THE ADMISSIBILITY OF CONTENTIONS

The Commission's rules for admissibility of contentions in NRC licensing proceedings are clear and controlling. Under 10 C.F.R. § 2.309(f)(1)³ a hearing request or petition to intervene "must set forth with particularity the contentions sought to be raised." To satisfy this requirement, Section 2.309(f)(1) specifies that each contention must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;

² The DP filed by Shieldalloy in October 2005 was 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.

³ In 2004 the Commission revised its procedural rules governing adjudicatory proceedings. *See* Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2,182, 2,217 (Jan. 14, 2004). 10 C.F.R. § 2.309(f)(1) is one of the provisions added by the revised rules, although a similar provision existed in the earlier version of the rules in 10 C.F.R. § 2.714(b)(2).

- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate 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;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1)(i)-(vi). The purpose of the contention rule is to “focus litigation on concrete issues and result in a clearer and more focused record for decision.” 69 Fed. Reg. at 2,202. The Commission has stated that it “should 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.* The Commission has also stated that the “contention rule is strict by design,” having been “toughened . . . in 1989 because in prior years ‘licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.’” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001) (citation omitted).

These pleading standards governing the admissibility of contentions are the result of a 1989 amendment to 10 C.F.R. § 2.714, now § 2.309, which was intended “to raise the threshold for the admission of contentions.” Final Rule, “Rules of Practice for Domestic Licensing

Proceedings – Procedural Changes in the Hearing Process,” 54 Fed. Reg. 33,168 (Aug. 11, 1989); *see also Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 334 (1999); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-6 (1991). The pleading standards are to be enforced rigorously. “If any one . . . is not met, a contention must be rejected.” *Id.* at 155 (citation omitted). A licensing board is not to overlook a deficiency in a contention or assume the existence of missing information. *Id.*

The Commission has explained that this “strict contention rule” serves multiple purposes, which include putting other parties on notice of the specific grievances and assuring that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions. *Oconee*, CLI-99-11, 49 NRC at 334. By raising the threshold for admission of contentions, the NRC intended to obviate lengthy hearing delays caused in the past by poorly defined or supported contentions. *Id.* As the Commission reiterated in incorporating these same standards into the revised Part 2 rules, “[t]he threshold standard is necessary to ensure that hearings cover only genuine and pertinent issues of concern and that issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues.” 69 Fed. Reg. at 2,189-90.

Failure to satisfy the admissibility requirements in 10 C.F.R. § 2.309(f)(1) must result in rejection of a proffered contention. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). Failure to proffer at least one admissible contention requires that a request for hearing or petition to intervene be denied. 10 C.F.R. § 2.309(a).

A. Contentions Must Have an Adequately Articulated Basis

A “brief explanation of the basis for the contention” is a necessary prerequisite of an admissible contention. 10 C.F.R. § 2.309(f)(1)(ii). “[A] petitioner must provide some sort of minimal basis indicating the potential validity of the contention.” 54 Fed. Reg. at 33,170. This brief explanation of the logical underpinnings of a contention does not require a petitioner “to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention.” *Louisiana Energy Serv., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004). The brief explanation helps define the scope of a contention – “[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases.” *Public Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff’d sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991); *see also Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39, 41 (1998). (“It is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions”).

B. Contentions Must be Within the Scope of the Proceeding, Must be Material to the Findings the NRC Must Make, and May Not Challenge NRC’s Rules

10 C.F.R. §§ 2.309(f)(1)(iii) and (iv) require a petitioner to demonstrate that the issue raised by each of its contentions is within the scope of the proceeding and material to the findings that the NRC must make. Licensing boards “are delegates of the Commission” and, as such, they may “exercise only those powers which the Commission has given [them].” *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170 (1976) (footnote omitted); *accord, Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979). A contention is not cognizable unless the

issues it raises fall within the scope of the proceeding for which the Commission has delegated jurisdiction to the licensing board, as set forth in the Notice of Opportunity for Hearing. *Id.*; see also *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985); *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426-27 (1980).

An issue is only “material” if “the resolution of the dispute would make a difference in the outcome of the licensing proceeding.” 54 Fed. Reg. at 33,172. This means that there must be some link between the claimed error or omission regarding the proposed licensing action and the NRC’s role in protecting public health and safety or the environment. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81, 89 (2004), *aff’d*, CLI-04-36, 60 NRC 631 (2004).⁴

It is also well established that a petitioner may not raise contentions that merely attack NRC requirements or regulations. *Oconee*, CLI-99-11, 49 NRC at 334. “[A] licensing proceeding . . . is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission’s regulatory process.” *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, *aff’d in part on other grounds*, CLI-74-32, 8 AEC 217 (1974) (footnote omitted). A contention whose import is to attack a Commission rule or regulation is not appropriate for litigation and must be rejected. 10 C.F.R. § 2.335(a); *Potomac Electric Power Co.* (Douglas Point Nuclear

⁴ As observed by the Commission, this materiality requirement is consistent with judicial decisions, such as *Conn. Bankers Ass’n v. Bd. of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980), which held that: “[A] protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that . . . a dispute exists. The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an ‘inquiry in depth’ is appropriate.”

Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 89 (1974); *Peach Bottom*, ALAB-216, 8 AEC 13, 20 (1974). Also, a contention that “advocate[s] stricter requirements than those imposed by the regulations” is “an impermissible collateral attack on the Commission’s rules” and must be rejected. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); *see also*, *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, *aff’d in part and rev’d in part on other grounds*, CLI-91-12, 34 NRC 149 (1991). Likewise, a contention that seeks to litigate a generic determination established by Commission rulemaking is “barred as a matter of law.” *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 30 (1993).

C. Contentions Must Be Specific and be Supported by Facts or Expert Opinion

Admissible contentions “must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application].” *Millstone*, CLI-01-24, 54 NRC at 359-60. A contention is admissible only if it provides a “specific statement of the issue of law or fact to be raised or controverted,” together with a “concise statement of the alleged facts or expert opinions supporting the contention and “specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue.” 10 C.F.R. §§ 2.309(f)(1)(i), (v).

In accordance with these requirements, it is the obligation of the petitioner to present the factual information or expert opinions necessary to support its contention adequately. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 262 (1996). Failure to do so requires that the contention be rejected. *Palo Verde*, CLI-91-12, 34 NRC 149, 155. Under these standards, a petitioner is obligated “to provide the [technical] analyses and expert opinion” or other information “showing why its bases support its contention.” *Georgia*

Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *aff'd in part*, CLI-95-12, 42 NRC 111 (1995). Where a petitioner has failed to do so, “the [Licensing] Board may not make factual inferences on [the] petitioner’s behalf.” *Id.*

A contention, therefore, is not to be admitted “where an intervenor has no facts to support its position and where the intervenor contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts.” 54 Fed. Reg. at 33,171. As the Commission has emphasized, the contention rule bars contentions where petitioners have what amounts only to generalized suspicions, hoping to substantiate them later, or simply a desire for more time and more information in order to identify a genuine material dispute for litigation. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 424 (2003). Therefore, under the Rules of Practice, a statement “that simply alleges that some matter ought to be considered” does not provide a sufficient basis for an admissible contention. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994). Similarly, a mere reference to documents provides no basis for a contention. *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348 (1998).

D. Sufficient Information to Show that a Genuine Dispute Exists

An admissible contention must include “sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact,” which showing must include “references to specific portions of the application (including the applicant’s environmental report and safety report) that the petitioner disputes and the supporting reasons for

each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief." 10 C.F.R. § 2.309(f)(1)(vi). Making a "bald or conclusory allegation that such a dispute exists" is not sufficient, as a petitioner "must make a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate." 54 Fed. Reg. at 33,171 (quoting *Connecticut Bankers Ass'n v. Board of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980)).

E. Contentions Can not Ignore Publicly Available Documentation

NRC's pleading standards require a petitioner to read the pertinent portions of the licensing request and supporting documents, state the applicant's position and the petitioner's opposing view, and explain why it has a disagreement with the applicant. 54 Fed. Reg. at 33,170; *Millstone*, CLI-01-24, 54 NRC at 358. Indeed, an intervenor

[h]as an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention. Neither Section 189a of the Atomic Energy Act nor [the corresponding Commission regulation] . . . permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or Staff.

54 Fed. Reg. at 33,170 (1989) (quoting *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983)). The obligation to make specific reference to relevant facility documentation applies with special force to an applicant's Safety Analysis Report and Environmental Report, and a contention should be rejected if it inaccurately describes an applicant's proposed actions or misstates the content of the licensing documents. *See, e.g., Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2076

(1982); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-32-107A, 16 NRC 1791, 1804 (1982); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1504-5 (1982).

If the petitioner does not believe the licensing request and supporting documentation address a relevant issue, the petitioner is “to explain why the application is deficient.” 54 Fed. Reg. at 33,170; *see also Palo Verde*, CLI-91-12, 34 NRC at 156. A contention that does not directly controvert a position taken by the applicant in the license application is subject to dismissal. *See Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992). An allegation that some aspect of a license application is “inadequate” or “unacceptable” does not give rise to a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 521 & n.12 (1990).

IV. PETITIONER HAS NOT SUBMITTED AN ADMISSIBLE CONTENTION

The Petition raises four contentions challenging the DP. The contentions, however, are inadmissible because they lack specificity, provide no supporting basis, are offered without factual support, are not backed by expert testimony, and reference no supporting documentation. They also do not raise a genuine dispute with the Licensee on any material issue of fact or law.

A. Contention 1 (Economic Impact of DP)

Petitioner’s Contention 1 asserts:

Permitting SMC to facilitate their DP plan would have profoundly negative economic implications for the residents and businesses of Newfield, the surrounding areas and Petitioner of Gloucester.

Petition at 3. The contention fails to satisfy the requirements of 10 C.F.R. §§ 2.309(f)(1) (i), (ii), (v) and (vi) and is therefore inadmissible.

1. Contention 1 is impermissibly vague

The Petition fails to identify or specifically describe what “profoundly negative economic implications” would result to the residents and businesses of Newfield, the surrounding areas and Gloucester County were the DP to be approved. Such broadly worded, non-specific challenges do not give rise to a litigable issue. 10 C.F.R. §§ 2.309(f)(1)(i); *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003); *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000).

2. Contention 1 has an insufficient basis

The Petition alleges that approval of the DP “would cause surrounding property values to decrease substantially as it is extremely dangerous and undesirable to reside near a facility storing hazardous radioactive material. Further, local businesses would lose revenue and many would likely relocate as a result of the economic degradation to the area and the fact that residents would relocate to areas not containing hazardous radioactive material. Potential business would refrain from operating in the area due to adverse economic conditions and the efflux of residents as a result of SMC’s dangerous and detrimental DP.” Petition at 4.

These allegations are on their face speculative and without factual basis, as demonstrated by further statements in the Petition, where Petitioner argues that “*it is reasonable* that many current residents and local residents would relocate to escape the dangers presented by the hazardous radioactive materials stored by SMC ant the Newfield plant. Additionally, potential residents and businesses *may* choose not to reside and operate in Newfield and the surrounding areas.” *Id.* at 5, emphasis added. The Petition does not cite a single instance of a resident or

business entity that has relocated or chosen not to move into Newfield and the surrounding areas for fear of the dangers posed by the Newfield site or, specifically, on account of the proposed DP.⁵ As discussed above, a contention lacking a factual basis is inadmissible. 10 C.F.R. § 2.309(f)(1)(ii).⁶

3. Contention 1 is not Supported by Facts or Expert Opinion

The Petition provides no documentary evidence or expert opinion in support of its broad claims of serious economic impact following approval of the DP. It asserts that “[p]ursuant to an expert report *to be prepared* by Allen Black, Special Appraiser for the firm Todd & Black, Inc., the facilitation of SMC’s DP would have severe and detrimental economic consequences to the residents and businesses of the Township of Newfield and the surrounding areas.” Petition at 5, emphasis added. Such a report is not attached to the Petition, and Petitioner concedes it is not even in existence. Promises to provide factual material at a later date in support of a proffered contention do not support the contention’s admissibility. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 639 (2004) (finding that a petitioner’s “willingness to produce supporting documentation at a future hearing,” was

⁵ As the Petition points out, the Newfield plant operations that generated the slag began in 1940 and continued through 2001. Petition at 1. Petitioner points to nobody who has left the area surrounding the site or failed to move into it on account of Newfield’s operations leading to the generation of radioactive slag during those sixty-one years, or in the following six since such operations ceased. Furthermore, there was a population *increase* in Newfield from 1616 in 2000 to 1661 (estimated) in July 2005, suggesting population is increasing, not decreasing, despite the presence of the slag in the Newfield plant. See <http://www.city-data.com/city/Newfield-New-Jersey.html>. Section 3.10.1 of the Environmental Report (“ER”), Appendix 19.9 to the DP, discusses population trends and documents that the population of Newfield grew over the 1990 to 2000 period and is projected to continue growing in the future.

⁶ The Petition refers to a statement by Ms. Sue Mavilla made at the December 12, 2006 public meeting with the NRC, in which Ms. Mavilla related that “she moved to Newfield 30 years ago from Northern New Jersey to escape the refineries present there.” Petition at 5. The Petition, however, did not indicate that Ms. Mavilla – who apparently moved to Newfield while the Shieldalloy plant was in operation -- has lived for 30 years in the vicinity of the plant – would leave the area if the DP were approved.

“not nearly enough to revive a contention that lacks support in the law or facts.”) Contention 1 thus fails to satisfy the requirements of 10 C.F.R. § 2.309(f) (1)(v).

4. Contention 1 does not Controvert the DP

Finally, Contention 1 ignores the discussion of socioeconomic impacts contained in Sections 3.10 and 4.10 of the ER, available online in the NRC ADAMS system with Accession No. ML053330384. Section 3.10.4 of the ER describes the ranking of municipalities by the State of New Jersey based on an index of socioeconomic distress known as the Municipal Distress Index (“MDI”). The ER indicates that, based on MDI data for the period 1993-96, neither Newfield nor Vineland showed any large movements towards more socioeconomic distress. Section 4.10.1 of the ER analyzes the potential socioeconomic impacts of proceeding with the DP and concludes: “Overall, the potential individual and cumulative impacts on local population, housing, and health, social, and educational services are expected to be minimal.” ER at 4-37. The Petition does not address these findings nor does it provide any facts that would controvert them. Therefore, Contention 1 does not raise a dispute with the Licensee on a material issue of fact and thus fails to satisfy the requirements of 10 C.F.R. § 2.309(f) (1)(vi).

For those reasons, Contention 1 fails to satisfy the requirements in 10 C.F.R. § 2.309(f)(1) for the assertion of admissible contentions.

B. Contention 2 (Health and Safety Impact of DP)

In Contention 2, Petitioner asserts:

Approving SMC’s Decommissioning would have a detrimental effect on the health and safety of the residents of Newfield, the surrounding areas and Petitioner of Gloucester.

Petition at 5. The contention fails to satisfy the requirements of 10 C.F.R. §§ 2.309(f)(1) (i), (ii), (v) and (vi) and is therefore inadmissible.

1. Contention 2 is impermissibly vague

The Petition fails to identify or specifically describe what “detrimental effect” there would be on “the health and safety of the residents of Newfield, the surrounding areas and Petitioner of Gloucester” were the DP to be approved. Such non-specific challenges do not give rise to a litigable issue. 10 C.F.R. §§ 2.309(f)(1)(i).

2. Contention 2 lacks adequate basis

As the basis for this contention, Petitioner asserts that “[t]he hazardous waste SMC proposes to store at their Newfield site is extremely dangerous and causes severe and life threatening illnesses.” Petition at 6. These allegations assert no facts that would provide a basis for the contention. Petitioner does not indicate in which respects or under what circumstances the waste present at the Newfield site will cause “severe and life threatening injuries,” nor how approval of the DP would cause such alleged injuries to occur. There is not enough of a factual predicate to provide a minimum basis for the contention, as 10 C.F.R. §§ 2.309(f)(1)(ii) requires.

3. No expert opinions, facts or documents have been submitted in support of Contention 2

As discussed above, 10 C.F.R. § 2.309(f)(1)(v) requires that an admissible contention include a “concise statement of the alleged facts or expert opinion” supporting the contention and “specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue.” None of those requirements is satisfied by Contention 2. Petitioner neither provides nor references any documents, facts or expert opinions in support of its broad claim that approval of the DP would result in detrimental health effects. The Petition merely cites anecdotal statements by members of the public who attended a meeting with the NRC staff on December 12, 2006, including: (1) hearsay statements by U.S. Senator Lautenberg’s South Jersey Director and U.S. Senator Menendez about the existence of “public concerns about

possible cancer clusters in the area attributable to SMC;” (2) a statement by Ms. Stina Cipiano that “[t]here isn’t a household that you talk to that hasn’t had somebody that has died or has had cancer;” (3) a statement by Ms. Dawn Pennino that “several members of her family, all of which resided on Rena Street which is located very close to the SMC facility, became sick with cancer or developed some sort of tumor;” and (4) a statement by Mr. Doug Quene that “when you go up and down Rena Street . . . you can take about six or seven families right down the street that all have had cancer in their homes.” Petition at 7. No factual validation is offered in support of any of these hearsay claims, nor is there any attempt to provide a causal link between the Newfield plant and the alleged occurrence of cancer among the cited individuals or any other members of the community.⁷ Therefore, Contention 2 fails for lack of factual support. 10 C.F.R. §§ 2.309(f)(1)(v).

4. Contention 2 does not controvert the DP

Sections 3.11.1 and 3.11.2 of the ER discuss various assessments of health risks associated with the Newfield plant that conclude that radiological contamination levels outside the site boundary did not differ significantly from background, and that the only potential source of carcinogenic health risks was associated with ground water use, mainly attributable to the presence of arsenic, beryllium and trichloroethene. Section 4.12 of the ER and Chapter 7 of the DP analyze the potential health impacts of implementing the plan proposed in the DP and conclude that the incremental hypothetical health effects of implementing the plan proposed in the DP are insignificant and are only attributable to the seven-month construction period (air and particulate emissions and noise). Likewise, as discussed earlier, the radiological impacts of

⁷ Cancer is, of course, one of the top leading causes of death in the United States and it is a common occurrence in the population. *See, e.g.,* <http://www.americanheart.org/presenter.jhtml?identifier=3000963>. The occurrence of cases of cancer in any geographic location therefore has no probative value *per se*.

implementation of the DP will be limited to the construction phase and will be insignificant. See DP Section 7.2.1.

The Contention does not challenge any of these findings nor the analyses on which they are based. Therefore, Contention 2 fails to include references to specific portions of the application that Petitioner disputes and the supporting reasons for each dispute, and accordingly fails to comply with 10 C.F.R. § 2.309(f)(1)(vi).

C. Contention 3 (Environmental Justice)

Petitioner's proposed Contention 3 reads:

The interests of environmental justice require the NRC to deny SMC's DP and mandate the removal of the radioactive material from the Newfield, New Jersey site.

Petition at 8. The proposed contention fails to satisfy the requirements of 10 C.F.R. §§ 2.309(f)(1) (i), (ii), (iv), (v) and (vi) and is therefore inadmissible.

1. Contention 3 raises no issues against the DP

Proposed Contention 3 alleges no specific deficiency against the DP but instead claims that "[t]he interests of Environmental Justice require the NRC to deny SMC's DP and mandate the removal [of waste from the Newfield site] to a long term storage facility" Petition at 8. Thus, Petitioner's argument appears to be that the DP should be disapproved as a matter of law because to act otherwise would be contrary to the requirements of environmental justice.

Such an argument has no basis as a matter of law. The Commission has made it clear that environmental justice, as defined in Executive Order 12898, "Federal Actions to Address Environmental Justice on Minority Populations and Low-Income Populations," 59 Fed. Reg. 7629 (Feb. 16, 1994), does not "provide a legal basis for contentions to be admitted and litigated in NRC licensing proceedings." Policy Statement on the Treatment of Environmental Justice

Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040, 52,046 (Aug. 24, 2004) (“Policy Statement”), *citing Louisiana Energy Services* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998) and *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147 (2002). Therefore, a proposed contention that is founded on the requirements of environmental justice raises no cognizable claims against Licensee’s DP in this proceeding, and fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(i).

2. The basis asserted for Contention 3 is inconsistent with the contention and provides no support for it

Even if the “environmental justice” contention raised a cognizable issue (which it does not) it should be dismissed for failure to meet the “basis” requirements of 10 C.F.R. §§ 2.309(f)(1)(ii). The Petition claims that several (unspecified) unaccounted costs are not taken into account in SMC’s estimated costs of storing and monitoring the waste at the Newfield site and that “the DP does not provide sufficient financial assurances to the taxpayers in the event SMC declares bankrupt [sic] and cannot continue to monitor the Newfield site for the contemplated 1,000 years.” Petition at 8. The Petition goes on to assert that “[t]he interests of environmental justice demands [sic] that SMC be held accountable for any and all costs associated with the DP and requires [sic] the waste to be relocated to a permanent storage facility designed to house such radioactive material.” *Id.*

The asserted basis for Contention 3 does not support it, because environmental justice has nothing to do with providing “financial assurances to the taxpayers” but with “identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low income populations.” Executive Order 12898, *cited in* Policy Statement, 69 Fed. Reg. at 52,040. No claim is made in the contention that the DP will have disproportionately high and adverse effects

on minority or low income populations. Taxpayer relief is not the subject of environmental justice. The basis requirements of 10 C.F.R. § 2.309(f)(1)(ii) are not satisfied.

3. Contention 3 is not material to the findings the NRC must make

As discussed earlier, an admissible contention must be material to the findings that the NRC must make in order to support the action that is involved in the proceeding. 10 C.F.R. § 2.309(f)(1)(iv). A finding on environmental justice, however, is one that the NRC only needs to make if it appears from its NEPA analysis that the proposed action has a disproportionate adverse impact on minority and low-income populations. Policy Statement, 69 Fed. Reg. at 52,045, 52,047. Contention 3 alleges no such impact or provides no facts that would support inquiring into environmental justice issues. Thus, the Contention is not material to the findings that must be made by the NRC to approve the DP.

4. The contention is unsupported by expert testimony, documentary evidence or other facts

As is the case with the other contentions proffered by Petitioner, Contention 3 fails to comply with the requirement in 10 C.F.R. § 2.309(f)(1)(v) that an admissible contention include a “concise statement of the alleged facts or expert opinion” supporting the contention and “specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue.” All that Petitioner cites in support of the contention are: (1) a statement by the Mayor of the Newfield Borough that the DP “fails to consider the costs of sampling surface and ground water, security monitoring, cap and fence repair and replacement, the devastating impact on property values in the region, the danger of a groundwater clean up in case of cell leaks, soil sampling, sediment analyses of the Hudson Branch, storm water sampling of run off from the site pile, and groundwater monitoring of the plume,” and (2) another statement by NRC attorney John Hall that the agency “can’t make any conclusions at this point on would

[sic] if SMC later claims bankruptcy.” Petition at 9-10. Neither statement is that of an expert. The statements were not made in support of the contention, and in fact do not support it. Nor does the contention cite any documents or other factual sources that support it. 10 C.F.R. § 2.309(f)(1)(v) is clearly not met.

5. Contention 3 does not controvert the DP

Section 4.11 of the ER contains an environmental justice evaluation that concludes that because of the ethnic and economic composition of the population in the vicinity of the Newfield plant, environmental justice is not an issue with respect to minorities or low-income populations. The Contention does not address this evaluation nor seeks to controvert it.⁸ Accordingly, Contention 3 fails to include “sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact,” and to provide “references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner’s belief.” 10 C.F.R. § 2.309(f)(1)(vi). The Contention is therefore inadmissible.

D. Contention 4 (Improper Application of NRC’s Regulatory Authority)

The last contention raised in the Petition, Contention 4, alleges:

The NRC’s review of SMC’s decommissioning plan under the NRC’s long-term storage license program is an improper and prejudicial application of its regulatory authority in that the NRC’s long term storage licensing program was not meant to cover manufacturing activities like SMC, which could open the door

⁸ With respect to the broad allegations attributed to the Mayor of the Newfield Borough on costs omitted in the DP cost-benefit analyses, i.e., that the DP “fails to consider the costs of sampling surface and ground water, security monitoring, cap and fence repair and replacement, the impact on property values in the region, the danger of a groundwater clean up in case of cell leaks, soil sampling, sediment analyses of the Hudson Branch, storm water sampling of run off from the site pile, and groundwater monitoring of the plume,” all relevant costs are included in the estimates presented in Chapter 15 and Table 17.4 of the DP. Contention 3 does not challenge these estimates.

for countless abandoned radioactive waste piles like SMC across the country. Nor was the NRC's long-term storage license regulation intended to give waste generators the right to handle or manage their waste (or abandon it, as the case may be) in a fashion different or less environmentally protective from other waste generators across the country.

Petition at 10. This Contention fails to meet the admissibility standards in 10 C.F.R. § 2.309(f)(1), for it is lacking specificity, is asserted without any basis, is unaccompanied by expert testimony, documentary evidence or factual support, and raises no issue of fact or law with the Licensee regarding the DP. Therefore, it fails to comply with the requirements of 10 C.F.R. §§ 2.309(f)(1) (i), (ii), (v) and (vi).

The contention is actually an unclearly articulated, and unsupported,⁹ challenge to the NRC's ability under the 10 C.F.R. Part 20 regulations to review the DP. It appears to question the NRC's authority to review the DP because Shieldalloy was engaged in "manufacturing activities." However, Petitioner has provided no basis whatsoever to call into question the NRC's jurisdiction to decide the appropriateness of the decommissioning method for the Shieldalloy site. In fact, the NRC's jurisdiction here is quite clear. When first proposing its radiological criteria for decommissioning, the Commission stated that

The proposed criteria would apply to the decommissioning of all facilities licensed under 10 CFR Parts 30, 40, 50, 60, 61, 70, and 72, as well as other facilities subject to the Commission's jurisdiction under the Atomic Energy Act of 1954, as amended, (AEA) and the Energy Reorganization Act of 1974. The Commission would apply these criteria in situations where remediation of radioactive material residues resulting from use or possession of Source, Byproduct, and Special Nuclear material is undertaken.

⁹ No authority is cited in support of either of the legal claims asserted in the contention, i.e., that (1) the NRC's long term storage licensing program was not meant to cover manufacturing activities like SMC's, and (2) the NRC's long-term storage license regulations were not intended to give waste generators the right to handle or manage their waste.

Proposed Rule, Radiological Criteria for Decommissioning, 59 Fed. Reg. 43,200, 43,201 (Aug. 22, 1994). Petitioner cites to no legal authority supporting its claim that the NRC is without authority to rule on the decommissioning of the Shieldalloy site. The Newfield plant is licensed under 10 C.F.R. Part 40 and contains residues resulting from the possession of source material. The NRC's jurisdiction is unquestionable.

The only relevant issues are, then, what is required by the NRC's regulations and whether the Shieldalloy DP satisfies those requirements. The regulations on restricted use decommissioning provide in relevant part:

A site will be considered acceptable for license termination under restricted conditions if:

(a) The licensee can demonstrate that further reductions in residual radioactivity necessary to comply with the provisions of § 20.1402 would result in net public or environmental harm or were not being made because the residual levels associated with restricted conditions are ALARA. Determination of the levels which are ALARA must take into account consideration of any detriments, such as traffic accidents, expected to potentially result from decontamination and waste disposal;

(b) The licensee has made provisions for legally enforceable institutional controls that provide reasonable assurance that the TEDE from residual radioactivity distinguishable from background to the average member of the critical group will not exceed 25 mrem (0.25 mSv) per year;

(c) The licensee has provided sufficient financial assurance to enable an independent third party . . . to assume and carry out responsibilities for any necessary control and maintenance

** *

(d) The licensee has submitted a decommissioning plan or License Termination Plan (LTP) to the Commission. . . .

** *

(e) Residual radioactivity at the site has been reduced so that if the institutional controls were no longer in effect, there is reasonable assurance that the TEDE from residual radioactivity distinguishable from background to the average member of the critical group is as low as reasonably achievable and would not exceed either--

- (1) 100 mrem (1 mSv) per year; or
- (2) 500 mrem (5 mSv) per year provided the licensee—

* * *

- (ii) Makes provisions for durable institutional controls;
- (iii) Provides sufficient financial assurance. . . .

10 C.F.R. § 20.1403. Thus, a site may be decommissioned under restricted use if it meets certain criteria, namely that: (1) radiation levels are ALARA; (2) institutional controls are in place and will remain in effect to ensure that TEDE does not exceed 25 mrem per year; (3) the licensee has provided sufficient financial assurance to perform any control and maintenance responsibilities; and (4) should institutional controls no longer be in effect, TEDE would not exceed 100 mrem/year, or 500 mrem per year under certain circumstances.¹⁰

Contention 4 predicts that compliance with the NRC's regulations on restricted use decommissioning will lead to "countless abandoned radioactive waste piles." This is a direct challenge to the policy reflected in NRC regulations such as 10 C.F.R. §20.2002, which authorizes onsite disposals, and 10 C.F.R. 20.1403, which permits license terminations under restricted use if certain radiological criteria are met. Contention 4 is therefore an impermissible attack on the Commission's regulations and must be rejected. 10 C.F.R. § 2.335(a).

V. SELECTION OF HEARING PROCEDURES

The Notice granted the opportunity to address the selection of hearing procedures in accordance with 10 C.F.R. § 2.309(g). 71 Fed. Reg. at 66,987. Pursuant to 10 C.F.R. § 2.309(g), a petitioner who relies on 10 C.F.R. § 2.310(d) – i.e., a petitioner seeking to have a proceeding

¹⁰ The regulations also permit onsite disposal of radioactive materials. 10 C.F.R. § 20.2002. NRC guidance allows onsite disposals if a dose criterion of a "few millirem" per year (0 to 5 millirem) is met. NUREG-1757, Vol. 1, Rev. 2, Consolidated Decommissioning Guidance: Decommissioning Process for Materials Licensees (Sep. 2006) at 15-32.

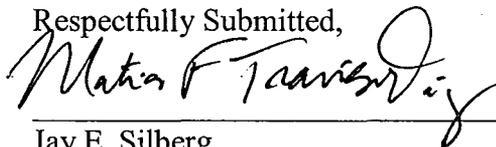
conducted under the Subpart G procedures – has the burden of demonstrating “by reference to the contentions and bases provided and the specific procedures in Subpart G of this Part, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures.”

Petitioner has not addressed the selection of hearing procedures nor has met the burden of demonstrating that the procedures in Subpart G are appropriate. Moreover, none of the contentions would necessitate “resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter.” *See* 10 C.F.R. § 2.310(d). Accordingly, if any of Petitioner’s contentions is admitted, the hearing on such contention should be governed entirely by the procedures of either Subparts L or N (assuming all parties agree to the applicability of the latter).

VI. CONCLUSION

For the reasons stated above, the Petition should be denied.

Respectfully Submitted,



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Dated: February 6, 2007

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)

SHIELDALLOY METALLURGICAL)
CORPORATION)

Docket No. SMB-743

CERTIFICATE OF SERVICE

I hereby certify that copies of "Shieldalloy's Answer to Request for Hearing and Petition to Intervene of Gloucester County Board of Chosen Freeholders" dated February 6, 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 6th day of February, 2007.

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