

February 9, 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 RESPONSE TO
HEARING REQUEST FROM TERRY RAGONE

INTRODUCTION

On January 15, 2007, Terry Ragone (“Petitioner”) filed a request pursuant to 10 C.F.R. § 2.309 for a hearing on the decommissioning plan (“DP”) submitted by Shieldalloy Metallurgical Corporation (SMC or “the Licensee”).¹ For the reasons stated below, the NRC staff (“Staff”) respectfully requests that the Hearing Request be denied.

BACKGROUND

On June 30, 2006, SMC filed a site DP for its Newfield Facility in Newfield, New Jersey with the NRC. “Shieldalloy Metallurgical Corporation Supplement to Decommissioning Plan,” June 30, 2006 (ADAMS ML061980092). SMC had conducted smelting and alloy production at the Newfield Facility beginning in 1940 and between 1955 and June 1998 processed pyrochlore, which contains thorium and uranium and is a licensed source material, at the site. In August 2001, SMC notified the NRC that they had ceased operations involving licensed source materials at the Newfield Facility and intended to decommission the site. On August 30, 2002, the Licensee submitted an initial DP, which was rejected by the Staff. On October 21, 2005, the Licensee submitted a revised DP (Rev. 1) to the NRC, proposing the

¹ “Hearing Request from Terry Ragone” (Jan. 15, 2007) (“Hearing Request”).

use of a possession-only license for long-term control of the site. The NRC rejected that DP as well. On June 30, 2006, the Licensee submitted a second revised DP (Rev. 1a).

“Shieldalloy Metallurgical Corporation Supplement to Decommissioning Plan,” June 30, 2006 (ADAMS ML061980092). The NRC found that this second revised DP (Rev. 1a) met the requirements for technical review by the NRC Staff, and the Staff is presently conducting that review. On November 17, 2006, the NRC placed in the *Federal Register* a notice of the opportunity to request a hearing on the Licensee’s revised DP (Rev. 1a). “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). On January 15, 2007, the Petitioner timely filed the Hearing Request in response to the Notice.

DISCUSSION

I. Standing

An individual who requests a hearing before the Commission must demonstrate that he or she has 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 (AEA) 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 evaluating claims of standing pursuant to 10 C.F.R. § 2.309(d)(1), 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)).

In addition to considering whether a petitioner has shown an “injury-in-fact”, the Commission has in the past in materials licensing cases presumed standing based upon a petitioner’s geographic proximity to the facility and a showing of potential harm resulting from the licensing action at issue. See *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995). 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).

Here, the Petitioner lays out the information required by 10 C.F.R. §2.309(b), including a statement that the Petitioner is “a resident living within 2 miles of the SMC site,” and also a statement that the proposed DP “will directly impact real estate values and the Borough [of Newfield’s] ability to sustain a viable tax base as well as cause unanticipated adverse environmental or health and well-being issues to surface.” Based on these statements, the Staff does not contest that the Petitioner has established standing as an individual based on her

proximity to the facility. However, the Hearing Request also indicates that the Petitioner is seeking a hearing on “behalf of the residents of Newfield, New Jersey and contiguous regional neighbors.” The Petitioner has not shown that she is authorized to represent any other resident of the Borough of Newfield. See 10 C.F.R. §2.314(b). Thus, the Petitioner has not demonstrated standing to represent the residents of Newfield in general or any individual other than herself, and that portion of the Petitioner’s Hearing Request should be denied on this basis.

II. 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, a petitioner must provide: (1) a specific statement of the issue of law or fact to be raised; (2) a brief explanation of the 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 a valid contention.

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.* In crafting precise, specific contentions a petitioner “has an

ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention.” *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982). Neither the AEA nor 10 C.F.R. § 2.309(f) “permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff.” *Id.*

Here, the Petitioner has presented three generalized areas of concern. The first, labeled “Technical/environmental”, states:

At the recent NRC Scoping Meeting 12/06, a representative from NJ State DEP spoke about the unusual precedent of establishing a low level radioactive waste site in a densely populated area. This measure would call for a variance of the NRC’s present guideline’s concerning a manufacturer’s monitoring of their own pollution.

Hearing Request at 1 (emphasis in original). From these statements, it is difficult to discern any specific contention. To the extent that the contention is that the actions considered under the DP are “unusual”, the contention does not specifically identify any portion of the DP that the Petitioner would argue is insufficient, not provided, or does not otherwise comply with law or regulation, and, therefore, the contention does not provide a specific statement of the issue of law or fact to be raised by the contention. To the extent that any basis for the contention is presented, it consists solely of the statement that the DP would require “a variance of the NRC’s guideline’s” but does not specifically state from which “guidelines” SMC would require a variance or why such a variance would not be in the interest of public health and safety. The basis provided for this contention is wholly insufficient. The Petitioner also has not provided any factual or expert opinion support for the contention, nor does the Petitioner provide sufficient information to demonstrate that a genuine dispute exists on a material issue of fact or law. In fact, the Hearing Request states that, at present, the Petitioner does not have “an informed opinion whether the proposed alternative [in the DP] is viable,” and states that the Petitioner will require time prior to the hearing “to amass pertinent information or ‘expert

opinions' in support of [her] contentions." Hearing Request at 1. Although a petitioner is not required to have developed the entire factual record on which he or she will rely at a hearing at the time contentions are filed, failure to cite to any facts or expert opinions in support of a contention flies in the face of the requirement that a petitioner, at a minimum read the documents in the public record before filing a hearing request and also controverts the long-standing policy against allowing poorly supported contentions to be fleshed-out through the discovery process. See *Catawba*, ALAB-687, 16 NRC at 468. Thus, the "Technical/environmental" contention does not comply with the requirements of 10 C.F.R. § 2.309(f)(1)(i)-(ii) and (v)-(vi), and, therefore, is inadmissible.

What appears to be the second contention is labeled "Environmental /Misc" and states: "the dump site will inevitably cause economic hardship." This statement is clearly vague and lacks, on its face, any attempt at adequate specificity. Some elaboration on the contention is provided by the basis for the contention, which states:

Already the small Borough is unable to sustain a viable tax base having lost revenue from SMC's 70 + acres. As the Borough will begin to seek more services and outside support from larger contiguous townships and cities, the very uniqueness of its present "town meeting" style of small governance is threatened. This very American tradition is rapidly becoming an endangered species. To local residents, many of them several generations, this independent Borough government is an important aspect of how they constitute their sense of community. In this regard a certain socio-political fabric of the small community will be impacted.

Hearing Request at 2 (emphasis in original). However, both the contention and the basis remain insufficient because none of the information in the contention is tied to any specific attribute or portion of the DP which the Petitioner argues is either insufficient or absent. It is unclear whether the contention (encompassing both the very vague and brief statement of the contention itself and the basis for the contention) is within the scope of the current proceeding.² Indeed, the basis itself seems to identify a general societal concern for which it is not clear any

² The Staff will analyze the economic impacts of the proposed DP as part of its environmental impact statement (EIS), but any contentions regarding the Staff's analysis under the EIS are premature until a draft EIS is issued.

significant tie to the DP is demonstrated, even if adequate supporting material were provided to show such a socio-political impact. As stated in the Notice in response to which the Hearing Request was submitted, the scope of the proceeding is limited to whether the DP complies with the requirements of the AEA and the NRC's regulations. Because the contention does not address any specific portion of DP with which the Petitioner takes issue, it is impossible to judge how, if at all, the DP and the style of government in Newfield, New Jersey are related. For the same reason, the Petitioner has failed to demonstrate how the issues raised in the contention are material to the findings the NRC must make to support its review of the DP. Finally, the second contention is not supported by any facts or expert opinion as required. Overall, the lack of specificity with regard to the portions of the DP at issue under the contention and the lack of factual or expert opinion support show that the Petitioner has failed to show that a genuine dispute exists on a material issue of law or fact. Thus, the second contention does not comply with any of the requirements of 10 C.F.R. § 2.309(f), and the contention should not be admitted.

The Hearing Request includes what may be a third contention, although it is not labeled as a separate contention. The Hearing Request states:

In terms of a "material issue of law" the Borough of Newfield passed a Resolution . . . in 1994 in which it stated that "The Borough Council opposes the siting of a radioactive waste storage facility and an increase by further outside accumulation of radioactive waste materials at SMC plant in the Borough of Newfield."

Hearing Request at 2. As with the two previous contentions, this contention is extremely vague and is unaccompanied by any supporting facts or expert opinion.³ To the extent that the Petitioner is arguing that the DP should be rejected because it will not comply with local laws, this contention is outside the scope of the current proceeding. This hearing concerns only whether the DP submitted by SMC meets NRC requirements relating to decommissioning. The "resolution" of the local government is not the standard by which the DP is to be judged.

³ In fact, the Petitioner states that "It is [the Petitioner's] intent to have more information on local and State laws in this regard," indicating that, at the time of filing the contention, the Petitioner had identified no supporting facts or expert opinion.

The mere existence of such a resolution does not create a material issue of law. Thus, the third contention does not comply with the requirements of 10 C.F.R. §2.309(f) and should not be admitted.

CONCLUSION

As stated above, the Staff does not contest that the Petitioner has demonstrated that she has standing as an individual to intervene, but the Staff argues that the Petitioner has not made the necessary showing to intervene on behalf of any other residents of the town of Newfield, New Jersey. Although the Petitioner has demonstrated individual standing, the Petitioner has not submitted an admissible contention. Therefore, the Petitioner's Hearing Request should be denied as to both the Petitioner as an individual and with respect to the Petitioner's request to act in a representative capacity.

Respectfully Submitted,

/RA/
Margaret J. Bupp
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 9th day of February, 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))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO HEARING REQUEST FROM TERRY RAGONE" 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 9th day of February, 2007.

Alan S. Rosenthal, Chair * **
Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: rsnthl@comcast.net

William Reed * **
Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: whrcville@earthlink.net

Richard E. Wardwell * **
Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: rew@nrc.gov

Loretta Williams
310 Oakwood Drive
P.O. Box 311
Newfield, NJ 08344

Adjudicatory File *
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555

Joseph J. McGovern, Esq.
Parker McCay, P.A.
Three Greentree Centre
7001 Lincoln Drive West
P.O. Box 974
Marlton, NJ 08053

Office of the Secretary * **
Attn: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
Washington, D.C. 20555
E-mail: hearingdocket@nrc.gov

Office of Commission Appellate Adjudication *
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
Washington, D.C. 20555

Terry Ragone **
Newfield Residents Environmental Group
White Dove Lane
P.O. Box 605
Newfield, NJ 08344
E-mail: foxragone@aol.com

Stuart Rabner, Esq.
Attorney General of New Jersey
Andrew W. Reese, Esq. **
Keneth Elwell, Esq. **
Deputy Attorneys General
New Jersey Office of the Attorney General
Department of Law and Public Safety
25 Market Street
P.O. Box 093
Trenton, NJ 08625
E-mail: reeseand@dol.lps.state.nj.us
Kenneth.elwell@dol.lps.state.nj.us

David R. Smith, Radiation Safety Officer
Sheildalloy Metallurgical Corporation
12 West Boulevard
P.O. Box 768
Newfield, NJ 08344-0768

Borough of Newfield, New Jersey
c/o John C. Eastlack, Jr., Esq. **
Solicitor for the Borough of Newfield
Holston, MacDonald, Uzdavinis, Eastlack,
Ziegler & Lodge
66 Euclid Street
Woodbury, NJ 08096
E-mail: jeastlack@holstonlaw.com

Gary D. Wodlinger, Esq. **
110 North 6th Street
Box 729
Vineland, NJ 08362
E-mail: gwodlinger@lipmanlaw.org

Fred H. Madden, State Senator
David R. Mayer, Assemblyman
Paul Moriarty, Assemblyman
New Jersey Senate and General Assembly
Holly Oak Office Park
129 Johnson Road, Suite 1
Turnersville, NJ 08012

Jered Lindsay, Law Clerk **
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C.
20555-0001
E-mail: jjl5@nrc.gov

Jay E. Silberg **
Matias Travieso-Diaz **
R. Budd Haemer **
Pillsbury Winthrop Shaw Pittman, LLP
2300 N St. NW
Washington, DC 20037
E-mail: jay.silberg@pillsburylaw.com
matias.travieso-diaz@pillsburylaw.com
robert.haemer@pillsburylaw.com

SherVerne R. Cloyd * **
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: src2@nrc.gov

/RA/

Margaret J. Bupp
Counsel for the NRC Staff