

March 2, 2007
DOCKETED
USNRC

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

March 5, 2007 (7:48am)

Before the Atomic Safety and Licensing Board

**OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF**

In the Matter of)
)
SHIELDALLOY METALLURGICAL)
CORPORATION)
(License Amendment Request for)
Decommissioning the Newfield Facility))
)
)

Docket No. 40-7102-MLA
ASLBP No. 07-852-01-MLA-BD01

**SHIELDALLOY'S ANSWER TO NRC STAFF'S MOTION FOR LEAVE TO RESPOND
TO NJDEP'S REPLY BRIEFS AND MOTION TO STRIKE REPLY EXHIBITS AND
ASSOCIATED ARGUMENTS OR FOR LEAVE TO FILE RESPONSE**

On March 1, 2007, the NRC Staff filed a "Motion for Leave to Respond to NJDEP's Reply Briefs" (Staff Motion), in which it seeks leave of the Atomic Safety and Licensing Board ("Board") to file a response to new factual assertions and legal arguments contained in the State of New Jersey Department of Environmental Protection ("NJDEP")'s "New Jersey Department of Environmental Protection's Reply to the Answer of Shieldalloy" and "New Jersey Department of Environmental Protection's Reply to the Response of NRC Staff" ("NJDEP Replies"), both filed on February 27, 2007 in this proceeding. Pursuant to 10 C.F.R. § 2.323(c), Licensee Shieldalloy Metallurgical Corporation ("Shieldalloy") files its response in support of the Staff's Motion. In addition, Shieldalloy moves that the new exhibits filed with the NJDEP Replies and the text of the Replies accompanying the exhibits be stricken or, in the alternative, that Shieldalloy be granted leave to file a response to the new matters contained in the NJDEP Replies.

RESPONSE TO STAFF MOTION

It is evident, even on a cursory review, that the NJDEP Replies exceed the permissible scope of replies to answers to petitions to intervene under 10 C.F.R. § 2.309(h)(2). For example, the NJDEP Replies attach four exhibits (Exhibits "A" through "D"), none of which were included with NJDEP's "Petition for Hearing and to Intervene on Shieldalloy's Decommissioning Plan" ("Petition") of January 16, 2007. Filing of these exhibits and the text that accompanies them is clearly an improper attempt by NJDEP to supplement its Petition by introducing new arguments and bases in its Replies. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223 (2004), *reconsideration denied*, CLI-04-35, 60 NRC 619 (2004).

Therefore, although no further written answers or replies to a petition to intervene are normally permitted by 10 C.F.R. § 2.309(h)(3), under these circumstances fairness dictates that the NRC Staff be allowed to provide responses to the new materials included in the NJDEP Replies, and the Staff Motion should be granted.

MOTION TO STRIKE NJDEP'S REPLY EXHIBITS AND ASSOCIATED TEXT OR, ALTERNATIVELY, FOR LEAVE TO FILE RESPONSE

Pursuant to 10 C.F.R. § 2.323(a), Shieldalloy respectfully moves the Board to strike Exhibits A through D to the NJDEP Replies and the accompanying text in the Replies.¹ Alternatively, should its motion to strike be denied, Shieldalloy requests leave to file, by no later

¹ The same documents are attached as Exhibits A through D to both replies.

than March 12, 2007,² a response to the new legal arguments and factual allegations raised in the NJDEP Replies.

The four exhibits included with the NJDEP Replies and the accompanying text should be stricken.³ It is well settled that replies to answers to petitions to intervene are to “be narrowly focused on the legal or logical arguments presented” in the answers of the applicant and NRC Staff. *Final Rule: “Changes to Adjudicatory Process,”* 69 Fed. Reg. 2,182, 2,203 (Jan. 14, 2004). The Commission has squarely ruled on several occasions that a reply to an answer may not be used as a vehicle to raise new arguments or claims not found in the original contention or be used to cure an otherwise deficient contention. *LES*, CLI-04-25, 60 NRC at 225 (2004); *Nuclear Management Company* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006); *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 439 (2006).

In this case, NJDEP has gone far beyond any reasonable interpretation of an allowable reply by raising numerous new facts, claims and arguments in its Replies, most notably by submitting four new exhibits and raising arguments based on them. If the hearing procedures established in 10 C.F.R. Part 2 are to have any meaning, the new exhibits and the portions of the Replies that discuss them must be disregarded, for permitting their consideration would completely “bypass and eviscerate” the hearing rules. *LES*, CLI-04-35, 60 NRC at 623. Striking such extraneous matter is an appropriate remedy pursuant to the Commission rules of practice. *See, e.g., Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 182, 191, 195, 199 (2006).

² The NJDEP Replies were filed electronically at 5:23 PM on February 27, 2007, so motions arising from them are timely if filed by March 12, 2007. 10 C.F.R. §§ 2.306 and 2.323(a).

³ The portions of the NJDEP Replies that should be stricken are identified in Attachment 1 hereto.

Accordingly, Exhibits A-D and the text of the NJDEP Reply Briefs relating to those exhibits, as identified in Attachment 1 hereto, should be stricken. Alternatively, should the Board decide not to strike these materials, Shieldalloy seeks leave to file a response to the new matters raised in the NJDEP Replies. The grounds for seeking leave to file such a response are the same as those asserted in the Staff Motion, which Shieldalloy adopts as its own.⁴

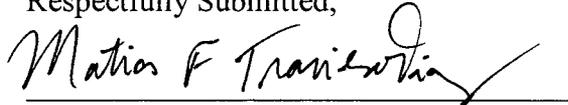
CONCLUSION

For the reasons stated above, the Staff Motion and should be granted. Also, Exhibits A through D to the NJDEP Replies and accompanying text should be stricken.

CERTIFICATION

In accordance with 10 C.F.R. §2.323(b), counsel for Shieldalloy has discussed the foregoing motion with counsel for the NJDEP and the NRC Staff. The NRC Staff does not oppose the filing of the motion. The NJDEP's position is that it cannot object to Shieldalloy filing such a motion, but will likely oppose the relief Shieldalloy seeks.

Respectfully Submitted,



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Dated: March 2, 2007

⁴ Should the Board decide to deny the requests by the NRC Staff and Shieldalloy to file written responses to the new legal claims and factual allegations raised in the NJDEP Replies, Shieldalloy respectfully requests the opportunity to address these new matters orally should a Prehearing Conference be held prior to the Board's ruling on NJDEP's Petition.

ATTACHMENT 1

PORTIONS OF NJDEP REPLIES THAT SHOULD BE STRICKEN

A. REPLY TO SHIELDALLOY'S ANSWER

Page 13: "In fact, a farm field is currently located less than 500 feet from Shieldalloy's slag pile. (Aerial photograph from www.maps.yahoo.com released April 2006, attached as Exhibit A)."

Pages 13-14: "The NJDEP Dose modeling summary report (Attachment 2 referenced in Goodman Report at page 11) was inadvertently omitted from the Request for Hearing package. It is attached hereto as Exhibit C. In order to be consistent with the RESRAD runs performed by Shieldalloy, the NJDEP used the only run that included all the drinking water parameters and distribution coefficients, newfield 3004008.RAD, which Shieldalloy termed the Recreational Hunter Scenario. Although the drinking water parameters were included in this run, the drinking water pathway was turned off, so the resultant dose from drinking water was not calculated by Shieldalloy. The Goodman run includes only the inhalation, drinking water, and soil ingestion pathways. The scenario is a resident with a drinking water well at the edge of the contaminated zone. The parameters that were changed were justified in the Malusis and Spayd reports. The source term used was the concentration of the slag since mixing of vitreous slag with baghouse dust would not decrease the concentration of the slag."

Page 14: "The NJDEP Microshield run with all progeny accounted for is included as Exhibit D. As can be seen, the dose rate is higher than Shieldalloy's modeling."

Page 20: "Another reason for the inadequate financial assurance is that the DP assumes a real rate of return of 1% on the financial assurance over the entire 1000 years. However, there is general agreement that a rate of return should not be assumed over the long term. See, e.g., Neill, H. and Neill, R., Perspective on Radioactive Waste Disposal: A Consideration of Economic Efficiency and Intergenerational Equity pages 6, 8 (WM'03 Conference, February 23-27, 2003), attached as Exhibit B. The attached article recommends that no discount rate be used after 300 years. Id."

B. REPLY TO STAFF'S ANSWER

Page 4: "In fact, a farm field is currently located less than 500 feet from Shieldalloy's slag pile. (Aerial photograph from www.maps.yahoo.com released April 2006, attached as Exhibit A)."

Pages 10-11: "Another reason for the inadequate financial assurance is that the DP assumes a real rate of return of 1% on the financial assurance over the entire 1000 years. However, there is general agreement that a rate of return should not be assumed over the long term. See, e.g., Neill, H. and Neill, R., Perspective on Radioactive Waste Disposal: A Consideration of Economic Efficiency and Intergenerational Equity pages 6, 8 (WM'03 Conference, February 23-27, 2003), attached as Exhibit B. The attached article recommends that no discount rate be used after 300 years. Id."

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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 NRC Staff's Motion for Leave to Respond to NJDEP's Reply Briefs and Motion to Strike Reply Exhibits and Associated Arguments or for Leave to File Response" dated March 2, 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 2nd day of March, 2007.

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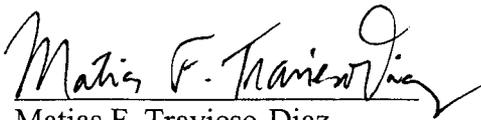
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