

RAS 13300

UNITED STATES OF AMERICA
 NUCLEAR REGULATORY COMMISSION **DOCKETED 03/28/07**

ATOMIC SAFETY AND LICENSING BOARD

SERVED 03/28/07

Before Administrative Judges:

Alan S. Rosenthal, Chairman
 Dr. Richard E. Wardwell
 Dr. William H. Reed

In the Matter of

SHIELDALLOY METALLURGICAL CORP.

(Licensing Amendment Request for
 Decommissioning of the Newfield, New Jersey
 Facility)

Docket No. 40-7102-MLA

ASLBP No. 07-852-01-MLA-BD01

March 28, 2007

MEMORANDUM AND ORDER
 (Ruling on Hearing Requests)

This proceeding had its genesis in the publication of a notice in the Federal Register to the effect that the Commission was considering the issuance of an amendment to Source Material License No. SMB-743 that had been issued to the ShieldAlloy Metallurgical Corporation [Licensee]. If granted, the amendment will authorize, in accordance with a submitted plan, the decommissioning of the Licensee's facility where the licensed activities had been conducted. The site is located in the Borough of Newfield, Gloucester County, New Jersey. The notice provided the customary opportunity for persons whose interest might be affected by the proceeding to file a written request for a hearing on the proposed amendment. 71 Fed. Reg. 66,986 (Nov. 17, 2006).

In response to the notice, hearing requests were filed by or on behalf of a number of governmental entities within the State of New Jersey: the New Jersey State Department of Environmental Protection [New Jersey]; Gloucester County; nearby Cumberland County; and the

Borough of Newfield. In addition, a joint request was received from three members of the New Jersey State Legislature (Fred H. Madden, David R. Mayer, and Paul Moriarity) and two such requests were submitted by private citizens (Loretta Williams and Terry Ragone, the latter said to be acting in a representational capacity on behalf of Newfield residents). Responses to each hearing request were filed by the Licensee and the NRC Staff. New Jersey alone submitted a reply to those responses.

Upon consideration of the filings before us, and for the reasons set forth below, solely the New Jersey request is being granted. Each of the others is being denied as not satisfying the requirements of the applicable provisions of the Commission's Rules of Practice. Despite the denial of their requests, however, as will be seen, the two counties and the borough will be entitled to participate as non-parties in any hearing ultimately held on issues raised by New Jersey.

Subject to reconsideration at the behest of one or more of the parties, we have additionally decided to defer all further proceedings in this matter to await the completion of the NRC Staff's safety and environmental review of the tendered decommissioning plan and the issuance of the documents reflecting the results of that review. That deferral includes threshold consideration of all of New Jersey's contentions other than the one that we have found to provide a sufficient basis for the grant of its hearing request.

BACKGROUND

As explained in the Federal Register notice, supra, the Licensee has been conducting smelting and alloy production at its Newfield site since 1940. Among other things, during an extended period ending in June 1998, the facility processed pyrochlore, a concentrated ore

containing columbium (niobium), to produce ferrocolumbium, an additive/conditioner used in the production of speciality steel and super alloy additives.

Because pyrochlore contains more than 0.05 percent by weight uranium and thorium, it is subject to NRC regulation as a source material. See 10 C.F.R. § 40.4. Accordingly, the Licensee sought and obtained license No. SMB-743 that entitled it to ship, to receive, to possess, and to store such material.

In August 2001, the Licensee advised the Commission that it had ceased using source material and intended to decommission the Newfield facility. As a consequence of this development, the license was later amended in November 2002 to authorize only decommissioning activities. In October 2005, the Licensee submitted its initial decommissioning plan (DP), which proposed the use of a possession-only license for long-term control of the site. According to the Federal Register notice, that plan was rejected by the NRC Staff. A revised DP, submitted on June 30, 2006, was, however, found acceptable by the Staff for the purpose of initiating the technical review of the plan that will eventually produce both a safety evaluation report (SER) and an environmental impact statement (EIS).

In broad outline, although not discussed in the notice, the revised DP now under NRC Staff review addresses principally an accumulation on the Newfield site of 18,000 cubic meters of slag and 15,000 cubic meters of baghouse dust, all of which contains uranium and thorium. It appears that the plan contemplates that the contaminated material will be maintained in a pile on eight acres within the facility's storage yard. The pile is to be graded and shaped and then covered with an engineered barrier consisting principally of native soil and rocks. Long-term maintenance and monitoring of this restricted area would be performed by the Licensee under conditions imposed by the NRC Staff. The remainder of the site would be released for unrestricted public use.

THE HEARING REQUEST REQUIREMENTS

As customary, the opportunity for hearing provided in the Federal Register was accompanied by a specific reference to the provisions of the Commission's Rules of Practice respecting the required content of hearing requests in proceedings such as this one. As the Commission and its licensing boards have made quite clear, full compliance with the dictates of these provisions is a condition precedent to the grant of such a request.¹

To begin with, the hearing requestor must demonstrate the existence of the requisite standing to raise questions regarding the acceptability of the particular proposal at hand. To that end, the Rules require that the requestor set forth, inter alia, his or her interest in the proceeding, as well as the possible effect that any order or decision entered therein might have upon that interest. 10 C.F.R. § 2.309(d)(1). In that regard, the Commission has long applied the test that is employed in the federal courts in resolving standing issues – i.e., the requestor must allege “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)). In addition, the claimed injury must be arguably within the zone of interests protected by the governing statute (here either the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 et seq.; or the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq.). See ibid.

It is not enough, however, that the requestor satisfy the standing requirement. In order to obtain a grant of the sought hearing, the request must also advance at least one contention that

¹ See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); Arizona Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

meets the admissibility standard set forth in 10 C.F.R. § 2.309(f)(1). See 10 C.F.R. § 2.309(a). That standard requires the requestor to provide, with regard to every contention sought to be admitted, (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 that 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 that 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, among other things, references to specific portions of the application that the requestor disputes. 10 C.F.R. § 2.309(f)(1)(i)-(vi).

In the case of governmental entities, however, status as a party is not a condition precedent to participation in NRC adjudicatory proceedings. By virtue of 10 C.F.R. § 2.315(c), an interested state or political subdivision thereof that has not become a party to the proceeding must be accorded a reasonable opportunity to participate, through a single representative, in the hearing of one or more of the admitted contentions. It may introduce evidence; interrogate witnesses in circumstances where cross-examination by the parties is allowed; advise the Commission without being required to take a position on any issue; file proposed findings where such are allowed; and seek Commission review on admitted contentions.

ANALYSIS

A. With the foregoing regulatory requirements in mind, we now turn to consider seriatim the several hearing requests to determine whether (1) the requisite standing has been established in accordance with 10 C.F.R. § 2.309(d); and (2) whether there has been advanced at least one admissible contention meeting the requirements of 10 C.F.R. § 2.309(f)(1).

1. Gloucester County

Given that the facility is located within its boundaries, Gloucester County's standing is beyond cavil. Its hearing request sets forth four separate contentions; each is addressed in turn below.²

Contention 1

"Permitting [the Licensee] to Facilitate their DP Plan would have profoundly negative economic implications for the residents and businesses of Newfield, the surroun[ding] areas and the County of Gloucester."

Gloucester Hearing Request at 3.

Gloucester asserts that property values will decrease because "it is extremely dangerous and undesirable to reside near a facility storing hazardous radioactive material," and, as a result, businesses will lose revenue and potential businesses will choose not to begin operations in the area. Id. at 4. To support this thesis, Gloucester cites a yet-to-be prepared expert report by Allen Black, Special Appraiser for the firm Todd & Black, Inc., that assertedly will demonstrate the DP's "severe and detrimental economic consequences to the residents and businesses of the Township of Newfield and the surrounding areas." Id. at 5. Additionally, Gloucester references the statement of Sue Mavilla, a Newfield resident, claiming that "she moved to Newfield 30 years ago from Northern New Jersey to escape the refineries present there," as evidence that other residents and businesses might relocate to escape potential dangers presented by the Licensee's site. Ibid.

At issue at this stage in the proceeding is the Licensee's DP and its accompanying environmental review documents. As the Licensee and the Staff point out,³ however, the

² See Gloucester County Board of Chosen Freeholders Request for Hearing and Petition to Intervene (Jan. 11, 2007) [hereinafter Gloucester Hearing Request].

³ See NRC Staff's Response to Request for Hearing by Gloucester County Board of
(continued...)

contention fails to identify the portions of the Licensee's DP deemed to be inadequate. Although it is true that the DP must address economic considerations, a contention that seeks to raise issues in that sphere must "include references to specific portions of the [DP] that the petitioner disputes" in order to demonstrate a genuine dispute. 10 C.F.R. § 2.309(f)(1)(vi). Accordingly, Gloucester's first contention is inadmissible.

Contention 2

"Approving [the Licensee's] Decommissioning Plan would have a detrimental effect on the health and safety of the residents of Newfield, the surrounding areas and the County of Gloucester."

Gloucester Hearing Request at 5.

As the basis for its second contention addressing health and safety concerns, Gloucester states that the "hazardous radioactive waste [the Licensee] proposes to store at their Newfield site is extremely dangerous and causes severe and life threatening illnesses." Id. at 6. To support this claim, Gloucester points to the statements made at a December 12, 2006, public information session by members of the public who reside near the Licensee's facility, describing instances of cancer and tumors in their neighborhoods and families. See id. at 7. According to the hearing request, these statements describe a high rate of cancer and tumors in the area surrounding the Licensee's facility and provide the required support for its contention. See ibid.

We agree with the Licensee and the Staff that, in common with the first contention, this contention does not controvert the DP.⁴ Without specific references to alleged inadequacies in the Licensee's analysis regarding the health and safety concerns raised in the contention,

³(...continued)

Chosen Freeholders (Feb. 5, 2007) at 5 [hereinafter Staff Answer to Gloucester]; Shieldalloy's Answer to Request for Hearing and Petition to Intervene of Gloucester County Board of Chosen Freeholders (Feb. 6, 2007) at 13 [hereinafter Licensee Answer to Gloucester].

⁴ See Licensee Answer to Gloucester at 15; Staff Answer to Gloucester at 7-8.

Gloucester's challenge falls short of demonstrating a genuine dispute of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi), and is therefore inadmissible.

Contention 3

"The interests of environmental justice require the NRC to deny [the Licensee's] DP and mandate the removal of the radioactive material from the Newfield, New Jersey Site."

Gloucester Hearing Request at 8.

Invoking the "interests of environmental justice," Gloucester's third contention focuses on the adequacy of the DP's provisions in the realm of financial assurance. The contention maintains that the Licensee's estimated costs improperly exclude several items and, therefore, the Licensee has not provided sufficient financial assurance to the taxpayers in the event that it should be required to declare bankruptcy. See *ibid.* In this connection, Gloucester claims that the DP is inadequate because it "only provides for monitoring the site for 1,000 years despite the fact the radioactive material will not break down for possibly billions of years." Id. at 9. To support the contention, Gloucester refers to statements made by the former mayor of the Borough of Newfield, Richard W. Westergaard, at the December 12, 2006, information session, listing an assortment of alleged costs the Licensee failed to consider, including the costs of sampling surface and ground water, security monitoring, cap and fence repair and replacement, the impact on property values, and the costs associated with groundwater clean-up. See *ibid.*

Although initially characterized as an environmental justice contention, as seen Gloucester raises exclusively financial concerns. Starting with the statements of Mayor Westergaard offered as support for the contention, we agree with the Licensee and the Staff that the allegations of unaccounted costs are no more than "bare assertions" and fail to provide the required supporting facts or expert opinion. See 10 C.F.R. § 2.309(f)(1)(v); *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

Contention 4

“The NRC’s review of [the Licensee’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 license program was not meant to cover manufacturing activities like SMC, which could open the door 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.”

Gloucester Hearing Request at 10.

Unlike its other three contentions, Gloucester’s fourth contention does not attempt to address the contention admissibility factors in 10 C.F.R. § 2.309(f)(1); rather, it appears simply to voice an objection to the NRC’s Long Term Control (LTC) license option and its application to the Licensee’s facility.⁵ As observed by the Licensee and the Staff,⁶ Gloucester has failed to provide any support for its claims that the LTC license option is inapplicable or impermissible in this case; rather, it merely asserts, without more, that it is “improper.” Because no legal authority or other support is cited to bolster its claims regarding the purpose and scope of the LTC license option, the contention is inadmissible. See 10 C.F.R. § 2.309(f)(1)(v).

It thus appears that none of Gloucester’s contentions meets the admissibility standards. Accordingly, its hearing request must be denied.

2. Borough of Newfield

The facility also being within its boundaries, the Borough of Newfield likewise has the requisite standing. In its hearing request, Newfield claims that the Licensee has failed to comply

⁵ See Staff Requirements - SECY-06-0143 - Stakeholder Comments and Path Forward on Decommissioning Guidance to Address License Termination Rule Analysis Issues (Sept. 19, 2006), ADAMS Accession No. ML062620515.

⁶ See Staff Answer to Gloucester at 11; Licensee Answer to Gloucester at 20.

with a Consent Order entered into by the Licensee and the New Jersey Department of Environmental Protection.⁷ As a result, it is said, the Licensee “has placed the Borough and its residents at significant risk for continued environmental harm which will cause significant health, safety and welfare concerns to the Borough’s residents and will otherwise significantly impact upon property values and the ability to use over seventy (70) acres of property available within the Borough.” Newfield Hearing Request at 2.

We agree with the Licensee and Staff that the issue of compliance with the State Consent Order is beyond the scope of this proceeding.⁸ The “Notice of Consideration of Amendment Request for Decommissioning for Shieldalloy Metallurgical Corporation, Newfield, NJ and Opportunity to Request a Hearing,” 71 Fed. Reg. at 66,986, defines that scope, which is limited to whether the Licensee’s DP complies with the Atomic Energy Act, the National Environmental Policy Act, and the NRC’s regulations. Accordingly, the Newfield hearing request must be denied for want of an admissible contention. See 10 C.F.R. § 2.309(f)(1)(iii). If the facility has in fact not complied with the Consent Order, the remedy is to seek enforcement by New Jersey Department of Environmental Protection.

3. Cumberland County

In its hearing request, Cumberland County asserts that one of its boundaries is immediately adjacent to the Licensee’s site and that the County lies downgrade and downwind

⁷ See Request for Hearing of the Borough of Newfield (Jan. 16, 2007) [hereinafter Newfield Hearing Request].

⁸ See Shieldalloy’s Answer to Hearing Request of Borough of Newfield (Feb. 13, 2007) at 3; NRC Staff’s Response to Request for Hearing by the Borough of Newfield (Feb. 12, 2007) at 6.

from the facility.⁹ Continuing, it claims to have “taken a position consistent with that of Gloucester County and the New Jersey Department of Environmental Protection,” in that it believes that the DP poses a threat to the health, safety, and welfare of the general public. Cumberland Hearing Request at 1. Further, Cumberland states that it intends to “rely on the expertise of the New Jersey Department of Environmental Protection with respect to these issues and the purpose of this correspondence is to make sure that the process does not continue to ignore the needs of the citizens of Cumberland County and the State of New Jersey.” Id. at 2.

As noted by the Staff, Cumberland’s filing appears to be a statement of support for the hearing request filed by New Jersey and an expression of interest and concern in the proceeding, rather than a formal petition to intervene in this proceeding.¹⁰ Given the understandable absence of any challenge to its standing, we nonetheless treat the filing as a formal hearing request on behalf of the County. So regarded, we agree with the Licensee and the Staff that Cumberland has failed to proffer a specific contention meeting the admissibility requirements outlined in 10 C.F.R. § 2.309(f)(1). Its hearing request must therefore be denied. See 10 C.F.R. § 2.309(f)(1)(i).

⁹ See Request For Hearing By Cumberland County (Jan. 16, 2007) at 1 [hereinafter Cumberland Hearing Request].

¹⁰ See NRC Staff’s Response to Request for Hearing by Cumberland County (Feb. 12, 2007) at 2-3.

4. New Jersey State Senator Madden, Assemblymen Mayer & Moriarty

In their joint hearing request,¹¹ New Jersey State Senator Fred H. Madden, Assemblyman David R. Mayer, and Assemblyman Paul Moriarty (State Legislators) assert, in what appears to be an attempted demonstration of standing, that, “as representatives of the residents of the Newfield and surrounding areas, [they] have a sincere concern regarding the large quantities of radioactive contaminated waste remaining at the ShieldAlloy site.” State Legislators’ Hearing Request at 1. What then follows is a discussion of general concerns with regard to the Licensee’s site and the DP, including concerns related to possible economic, environmental, and public health and safety harms. See id. at 1-2.

Although it is clearly established in the Commission’s regulations and case law that a state or local governmental body has standing to intervene in a proceeding for a facility that is located within its boundaries, the same does not hold true for individual legislators wishing to participate as a party on behalf of unnamed constituents. Rather, as noted by both the Licensee and the Staff, licensing boards have consistently ruled that one does not acquire standing as a consequence of being a member of a legislative tribunal. See Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-35, 36 NRC 355, 358 n.9 (1992); Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 145 (1989); General Electric Co. (GE Test Reactor, Vallecitos Nuclear Center), LBP-79-28, 10 NRC 578, 582-83 (1979). In this instance, none of the legislators has attempted to demonstrate standing on any other basis and, thus, their hearing request must be denied. See 10 C.F.R. § 2.309(a).

¹¹ See Request from New Jersey State Senator Fred H. Madden, Assemblyman David R. Mayer, and Assemblyman Paul Moriarty for a Hearing (Jan. 12, 2007) [hereinafter State Legislators’ Hearing Request].

5. Loretta Williams

At the outset of her hearing request, Ms. Williams states that she lives “within a few blocks of the Shieldalloy Metallurgical Corporation in [the] 1.7 square mile community” of Newfield.¹² Moving on, she lists multiple grievances with the DP including: the adequacy of the DP’s cost estimates; unaccounted economic, environmental, and health and safety risks; security risks and costs associated with the storage of radioactive waste at the site; the accuracy of the licensee’s solubility testing and analysis; the application of the NRC’s dose criterion regulations; and the Licensee’s cost analysis regarding the possible off-site disposal of radioactive waste as an alternative to the procedure proposed in the DP. See Williams Hearing Request at 1-2.

The proximity of Ms. Williams’ residence to the Licensee’s facility satisfies the standing requirement. The question thus is whether her hearing request also satisfies the contention requirements. On this score, Ms. Williams alleges that the Licensee’s proposal poses numerous threats to the health and safety of Newfield residents and to the surrounding environment. What is missing, however, is a demonstration that she might, through expert opinion or factual development, connect the alleged threats to specific aspects of the Licensee’s DP. Where Ms. Williams does mention the Licensee’s DP, she does not address, with specific references to the Licensee’s analyses, how she intends to demonstrate that the DP is flawed. As the Commission has stressed on numerous occasions, “the contention rule is strict by

¹² See Request for a Hearing Submitted by Loretta Williams (Jan. 3, 2007) at 1 [hereinafter Williams Hearing Request].

design”¹³ and does “not permit the filing of a vague, unparticularized contention, unsupported by affidavit, expert, or documentary support.”¹⁴

Although a certain amount of latitude might appropriately be extended to pro se litigants such as Ms. Williams, there nonetheless must be a substantial endeavor to meet the clear regulatory requirement that a hearing request provide 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 opinion supporting the contention and specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue. See 10 C.F.R. § 2.309(f)(1)(i), (v). Such an endeavor falling far short in this instance, Ms. Williams’ hearing request must be denied.

6. Terry Ragone

Included in Ms. Ragone’s hearing request is a statement regarding her standing to participate in this proceeding and a section labeled “Contentions.”¹⁵ The latter catalogues grievances associated with the alleged “unusual precedent of establishing a low level radioactive waste site in a densely populated area,” allegations “that the dump site will inevitably cause economic hardship,” and opposition voiced by the Borough of Newfield in the form of a Borough resolution. Ragone Hearing Request at 1-2.

¹³ Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001); Exelon Generation Co., LLC (Early Site Permit for Clinton ESP site), CLI-05-29, 62 NRC 801, 808 (2005).

¹⁴ North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999) (citation and internal quotation marks omitted).

¹⁵ See Hearing Request from Terry Ragone (Jan. 15, 2007) at 1 [hereinafter Ragone Hearing Request].

As noted by both the Staff and the Licensee, it is difficult to identify any specific contention in the request or to determine what, if any, specific aspects of the DP Ms. Ragone seeks to challenge.¹⁶ Her statements do not identify any portion of the DP that contravenes a statutory provision or NRC regulation and, therefore, she fails to provide sufficient information to demonstrate that a genuine dispute exists on a material issue of fact or law. See 10 C.F.R. § 2.309(f)(1)(vi). Further, absent from the request is any form of factual information, documentary evidence, or expert opinions to support its claims. See 10 C.F.R. § 2.309(f)(1)(v).

While it is true that, at the time contentions are filed, a petitioner is not required to have developed the entire factual record on which it intends to rely at a hearing, even in the case of a pro se litigant some level of factual or expert support must be furnished. Accordingly, although Ms. Ragone has established her standing as an individual, the conclusion is required that her hearing request is devoid of an admissible contention and thus must be denied.¹⁷

7. State of New Jersey

In common with that of the counties and borough, New Jersey's standing is readily apparent. We thus turn to its contentions.

a. New Jersey's Contentions

The New Jersey hearing request is divided into three parts, with "Technical Contentions" in Part I, "Environmental Contentions" in Part II, and a "Miscellaneous Contention" in Part III.¹⁸

¹⁶ See Shieldalloy's Answer to Hearing Request of Terry Ragone (Feb. 5, 2007) at 3; NRC Staff Response to Hearing Request from Terry Ragone (Feb. 9, 2007) at 5.

¹⁷ Given the failure to proffer an admissible contention, we need not address here the question as to whether Ms. Ragone has demonstrated standing in a representational capacity on behalf of "The Newfield Residents."

¹⁸ State of New Jersey Department of Environmental Protection Petition for Hearing the
(continued...)

As the sixteen contentions presented in Part I are identical to those advanced in Part II, we will refer only to the ones in Parts I and III. See New Jersey Hearing Request at 1-89, 178-82.

New Jersey sets forth multiple contentions challenging the DP with respect to the technical analyses performed by the Licensee, essentially arguing that the DP has not demonstrated compliance with the relevant statutory and regulatory standards, including those prescribed in 10 C.F.R. § 20.1403. The contentions include challenges to the analyses performed regarding the proposed disposal design and siting, the dose modeling results, the exclusion of certain exposure pathways, and the DP's dose modeling time-frame. Also advanced are challenges to the adequacy of the DP's site characterization, the Licensee's satisfaction of financial assurance requirements, and the Licensee's consideration of public input on the DP. To support these contentions, New Jersey provides the declarations and supporting statements of various purported experts in relevant fields.

In addition to challenges to the Licensee's technical analyses, New Jersey proffers numerous contentions addressing the legality of the regulatory avenues relied on in the submission of the Licensee's DP. Specifically, it questions the role of the License Termination Rule's restricted use provisions,¹⁹ the use of the Long Term Control-Possession Only License, and the Commission's decommissioning regulations generally.²⁰

¹⁸(...continued)

Shieldalloy Metallurgical Corporation (License No. SMB-743) Decommissioning Plan (Jan. 16, 2007) [hereinafter New Jersey Hearing Request].

¹⁹ See 10 C.F.R. § 20.1403; 62 Fed. Reg. 39,058 (July 21, 1997).

²⁰ See generally 10 C.F.R. Part 20, Subpart E.

In response, both the Licensee and the Staff acknowledge that New Jersey has standing to participate in this proceeding.²¹ The Licensee asserts, however, that none of New Jersey's seventeen proffered contentions satisfies the admissibility standards set forth in 10 C.F.R. § 2.309(f)(1).²² For its part, the Staff would have it that eight of New Jersey's contentions are admissible, in whole or in part, and contests the admission of the remaining nine contentions.²³

b. Contention 5

As previously noted, if (as here) the requisite standing has been established, under the terms of the Rules of Practice a hearing request must be granted upon a determination that it contains at least one admissible contention. With that in mind, we have elected to consider first New Jersey's Contention 5, which reads as follows:

"The DP obtains inaccurate dose modeling results by ignoring the likely scenario of groundwater contamination and ignoring other reasonable assumptions."

New Jersey Hearing Request at 27.

As the basis for this contention, New Jersey points to 10 C.F.R. § 20.1403(e) and the regulation's requirement that "the TEDE [Total Effective Dose Equivalent] 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)' under certain circumstances." Id. at 28 (citation omitted). According to New Jersey, the inclusion of the "likely scenario of radionuclides contaminating the groundwater" in the dose modeling results in a dose level that exceeds the TEDE limit in the regulation. Ibid.

²¹ See Shieldalloy's Answer to Petition for Hearing of State of New Jersey Department of Environmental Protection (Feb. 12, 2007) at 3 [hereinafter Licensee Response to New Jersey]; NRC Staff's Response to Request for a Hearing by New Jersey Department of Environmental Protection (Feb. 12, 2007) at 3 [hereinafter Staff Response to New Jersey].

²² See Licensee Response to New Jersey at 13.

²³ See Staff Response to New Jersey at 5.

Additionally, New Jersey insists that the DP improperly excludes other reasonable exposure scenarios, including resident farmer and suburban resident scenarios. See id. at 30-32. According to New Jersey, at some future time individuals might take up residence on currently restricted land and receive increased radiation exposure from activities associated with farming and the occupation of land in close proximity to the facility. Further, it takes issue with the DP's "all controls fail" dose modeling. See id. at 32. Here, New Jersey asserts that the Licensee has failed to perform adequate dose modeling for scenarios in which all engineered and institutional controls degrade or fail.

As support for the contention, New Jersey relies on the accompanying declaration and report of Jennifer Goodman, a research scientist with the Bureau of Environmental Radiation at the New Jersey Department of Environmental Protection.²⁴ The Goodman Report identifies numerous alleged deficiencies in the DP. In particular, with respect to the substance of Contention 5, it challenges the DP's treatment of groundwater exposure pathways and assumptions made in the dose modeling. Additionally, New Jersey cites declarations and/or reports filed by: Donna Gaffigan, Case Manager with the New Jersey Department of Environmental Protection, discussing groundwater exposure; Steven E. Spayd, Research Hydrogeologist & Supervising Geologist, Bureau of Water Resources, New Jersey Department of Environmental Protection, discussing dose modeling and the groundwater pathway; and Michael A. Malusis, Assistant Professor, Department of Civil and Environmental Engineering, Bucknell University, Lewisburg, PA, discussing groundwater pathway.

²⁴ See New Jersey Hearing Request at 29. Ms. Goodman also supplied a resume describing her relevant technical qualifications.

c. Responses to Contention 5

The Staff does not oppose the admission of Contention 5 to the extent that New Jersey challenges the DP's dose modeling for its failure to take into account certain exposure pathways and thus its underestimation of the peak annual TEDE.²⁵ The Staff does not, however, support the wholesale admission of the contention. First, it insists that NRC regulations do not require the Licensee to consider an "all controls fail" scenario in its dose modeling. See Staff Response to New Jersey at 10. Second, with respect to the "resident farmer scenario," the Staff claims that New Jersey has provided nothing more than a bare assertion that the Licensee should have addressed that scenario. Ibid.

As is the case with nearly all of the proffered contentions, the Licensee claims that Contention 5 fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi). Turning first to the assertion that the DP's dose modeling improperly excludes the groundwater pathway, the Licensee maintains that New Jersey's expert, Ms. Goodman, fails to address the DP's discussion "as to why groundwater need not be considered in the dose modeling" and, in particular, "ignores the fact that the groundwater is not potable because it is heavily contaminated with toxic chemicals." Licensee Response to New Jersey at 46. Further, the Licensee maintains that the contention and Ms. Goodman's supporting report do not address site-specific groundwater modeling performed by the Licensee that purportedly demonstrates that, even if the pathway was considered, there would be no significant radiological impact. See id. at 47. The Licensee would have it that, without addressing the DP's stated reasons for

²⁵ See Staff Response to New Jersey at 9-10. The Staff notes that Contention 5 presents arguments related to dose modeling and, in that respect, is closely related to the arguments presented in Contentions 9 and 10. Accordingly, the Staff addresses all three related contentions in combination and recommends that the Board do the same by consolidating the contentions.

excluding groundwater as a pathway in its dose modeling, the contention cannot establish a genuine dispute and does not raise a litigable issue.

The Licensee further insists that the contention's claims regarding the farming and resident scenarios similarly fail to raise genuine disputes. See id. at 48. Specifically, it claims that the contention does not address the DP's assertions that the Licensee will "retain the [] site, both restricted and unrestricted portions, for industrial use" and that the site will be restricted from residential use independent of its radiological status. Ibid. Moreover, with respect to each assertion advanced in support of a particular contention, the Licensee addresses the factual documentation and/or expert opinion offered by New Jersey and attempts to demonstrate that the assertion is nonetheless without merit. See id. at 49-57.

d. New Jersey's Reply

With respect to Licensee's assertions that groundwater pathways need not be modeled because there are no drinking water wells within the restricted area and the water is not potable due to non-radioactive contamination, New Jersey responds that "there is no reason to believe" that in the distant future "wells will not be used in the vicinity of the facility for drinking water."²⁶ New Jersey further notes that the Licensee, as directed in the Consent Order, is currently conducting groundwater remediation for the non-radioactive contamination with the end goal of removing restrictions on the water's use. New Jersey Reply to Licensee at 11. Responding to the Licensee's claims that it ignored the DP's site-specific groundwater modeling, New Jersey asserts that the modeling was not discussed because there was "insufficient information to evaluate it." Id. at 11-12.

²⁶ New Jersey Department of Environmental Protection's Reply to the Answer of Shieldalloy (Feb. 27, 2007) at 11 [hereinafter New Jersey Reply to Licensee].

Respecting the Licensee's insistence that farming encroachment is not likely due to land-use restrictions that exist with regard to the facility site, New Jersey points out that 10 C.F.R. § 20.1403(e) prescribes radiation standards that must be met against the possibility that, at some future time, such institutional controls will no longer be in effect. Id. at 12-13. In this regard, New Jersey would have it that, over the course of "a billion years," it is possible that the site will be inhabited by a resident farmer or suburban resident. Ibid. The remainder of its reply to the Licensee is devoted to addressing the dose modeling and technical challenges lodged by the Licensee in its answer.

As the Staff did not oppose the admission of Contention 5 in its entirety, New Jersey responded only to its claims regarding the "all controls fail" and "resident farmer" scenarios and, in that regard, repeats the argument it supplied in response to the Licensee.²⁷ Specifically, New Jersey cites 10 C.F.R. § 20.1403(e) and maintains that the regulation requires consideration of the "all controls fail" scenario. See New Jersey Reply to Staff at 4. It insists that, contrary to the claims of the Staff, it has supported sufficiently its claims with respect to these two scenarios by relying upon the LTR, the expert report of Jennifer Goodman, and facts available from the DP and other public sources. See id. at 5-6.

e. Board's Ruling

We entertain little difficulty in reaching the conclusion that Contention 5 is admissible in its entirety. In a word, New Jersey has provided adequate support for its insistence that the dose modeling provided in the DP is inadequate to determine the potential long-term impact that leaving the slag pile in situ might have upon those residing in the vicinity of the facility.

²⁷ See New Jersey Department of Environmental Protection's Reply to the Response of NRC Staff (Feb. 27, 2007) at 3-6 [hereinafter New Jersey Reply to Staff].

We are unimpressed with the Licensee's insistence that groundwater need not be considered in the dose modeling because it is currently contaminated with toxic chemicals. As New Jersey cogently observes in response, there is no assurance that this situation will remain for the duration of the lengthy period that the slag pile will continue to represent a radioactive hazard. In any event, as noted in paragraph 17 of the Gaffigan Declaration without contradiction, the Licensee is currently engaged in groundwater remediation for these non-radioactive contaminants that is mandated by a Consent Order that it had signed.²⁸

Notwithstanding that fact, it will be open to the Licensee to attempt to establish, by way of a motion for summary disposition or at an evidentiary hearing, that the possibility of the groundwater serving as drinking water over the relevant period is so remote that it can appropriately be entirely dismissed. At this preliminary stage, however, such a dismissal is plainly impermissible.

What that leaves for consideration is the admissibility of so much of Contention 5 as challenges the exclusion in the DP of the resident farmer/suburban resident and "all controls fail" exposure scenarios. Contrary to the insistence of both the Licensee and NRC Staff, we are satisfied that New Jersey has offered enough to support those challenges at this very early stage of the proceeding. Whether they will be found meritorious when the evidentiary stage is reached is of no present moment.

To begin with, insofar as concerns the possibility offered by New Jersey of a resident planting a vegetable garden and consuming its produce, the environs of the Borough of Newfield are hardly to be equated with the urban environment that marks the five boroughs of New York City some distance to the north. Moreover, we are told by New Jersey, again without

²⁸ See New Jersey Hearing Request at 36, Declaration of Donna L. Gaffigan (Jan. 16, 2007) ¶ 17.

contradiction, that there is currently someone residing within very close proximity of the Licensee's property. Our attention has also been called to the disclosure in the Licensee's Environmental Report to the effect that there are farms located within a one-mile radius of the facility.²⁹ That being so, and given the length of time that the slag pile might continue to represent a radioactive hazard, there would seem to be at least a reasonable possibility that, at a future date, there might be some exposure to the hazard on the part of one engaged in activities falling within the bounds of the resident farmer/suburban resident scenario. If, however, in justification of the DP's failure to address such a scenario, the Licensee has compelling reasons why such a possibility may be entirely ruled out, it will have the opportunity to present that showing once the merits of the contention are reached.

With respect to the "all controls fail" scenario, it might well be that, as the NRC Staff asserts, there is no specific Commission requirement that such a scenario be included in the DP. New Jersey points, however, to the regulatory provision requiring an assumption that institutional controls will fail. See 10 C.F.R. § 20.1403(e). As it sees it, given that required assumption, it is not unreasonable to indulge in the additional assumption that, over the course of the lifetime of the radiological hazard, the engineered barriers will fail. Although the matter might not be free from all doubt, we believe that there is sufficient reason to allow the inclusion of this scenario within the ambit of what is being accepted as Contention 5. This issue will, of course, be open to further exploration when the proceeding reaches the merits stage.

B. It follows from the foregoing that, its standing not being in serious question and at least one of its contentions having been found to meet the standard for admissibility imposed by

²⁹ See Shieldalloy Decommissioning Plan, Environmental Report, Appendix 19.9, § 3.0, Fig. 3-3, ADAMS Accession No. ML053330384.

Section 2.309(f) of the Rules of Practice, by virtue of Section 2.309(a) of those Rules the New Jersey hearing request must be granted. By the same token, given their failure to satisfy both the standing and the contention requirements, all of the other hearing requests must be denied.

In the case of the two counties and the borough, this does not mean, however, that they are precluded from participation in the evidentiary hearing that will ultimately be held in light of the grant of the New Jersey request. As earlier noted (see p. 5, supra), governmental entities (including counties and municipalities) are accorded by 10 C.F.R. § 2.315(c) the right to participate in adjudicatory proceedings such as this one without having to obtain party status. Indeed, it might well be concluded that, should they choose to invoke that right through the required designated representative, the counties and borough will assume a status preferable in some respects to that of a party. For, once again, the section explicitly authorizes the participating governmental entity to introduce evidence and to conduct such cross-examination as might be allowed to the parties, all without being obliged to take a position on the issues under consideration. In addition, as also seen, they enjoy the same entitlement possessed by the parties to file proposed findings and to seek Commission review of Board determinations.

It remains to be seen, of course, whether the counties and borough will desire to invoke the Section 2.315(c) entitlement to participate in the proceeding as a non-party. They might well be content simply to rely upon New Jersey to pursue their concerns, given the likelihood that, through its Department of Environmental Protection, the State has greater resources at its disposal for ventilating those concerns.

C. What is left for consideration is whether we need or should go forward at this juncture with a consideration of the admissibility of New Jersey's other contentions. As we read the Rules of Practice, there is no requirement that we do so. All that is mandated is that, within

45 days of the filing of the last pleading (here the February 27, 2007, New Jersey Reply to the Licensee and NRC Staff), the Board issue its decision on each hearing request before it. See 10 C.F.R. § 2.309(i). In this instance, insofar as the New Jersey request is concerned, that mandate has been met by our determination today that the request must be granted on the strength of its standing and the contention that we have found admissible. Insofar as the express terms of the Rules of Practice are concerned, it is left to us to decide whether, in the totality of circumstances, it is best to rule now on the admissibility of the balance of the New Jersey's contentions or, instead, to defer a ruling on them until a later date.

In another recent decommissioning proceeding, a licensing board addressed the same question. Its answer was that, having granted the hearing request there-involved on the strength of one admissible contention, it was appropriate, "in the interest of the economical use of [the board's] resources," to defer consideration of the remaining contentions pending the Staff's completion of its technical review of the proposal under scrutiny and its issuance of the SER and EIS or EA. See U.S. Army (Jefferson Proving Ground Site), LBP-06-06, 63 NRC 167, 185-86 (2006). Its rationale was this (ibid):

It seems quite possible, if not probable, that, upon its examination of the documents issued by the Staff at the end of the technical review, the Petitioner will find reason to alter in at least some respects the tack that it has taken in the challenge to the [Licensee's] proposal that is contained in the hearing request. For one thing, Petitioner might well find that some of the concerns that have been set forth in the request have been fully resolved. At the same time, it might determine, on the basis of the disclosures in the technical review documents, that there is cause to seek leave to amend one or more existing contentions or to add new ones. Any such endeavor would, of course, have to comply with the provisions of the Rules of Practice governing the submission of late contentions.

As it turned out, the Army Board's forecast of subsequent events proved to be on target. See LBP-06-27, 64 NRC__ (slip op.) (Dec. 20, 2006). And it seems patent to us that the same analysis applies in full measure to the case of New Jersey's challenges to the decommissioning

plan that is in issue here. There is no aspect of that plan that is set in stone and it is scarcely inconceivable that, whether as the result of the Staff's review or independent of it, the DP might undergo significant revision that would have a decided impact upon the New Jersey contentions now on the table.

In this connection, this Board and the parties to the proceeding have formally been made aware of a letter sent by an NRC Commissioner to the Licensee's President following the former's recent visit to the Newfield site.³⁰ In the letter, the Commissioner reiterated a suggestion, made at the time of a site visit, that there be further dialogue between the Licensee's staff and other interested parties to determine whether there might be "other options, in addition to onsite decommissioning," that might allow the "reuse of the site in a cost effective way."³¹

We do not presume to speculate on what might be the outcome of that suggestion. It does, however, indicate a belief on the part of at least one Commissioner of this agency that there is reason to explore possible alternatives to the onsite storage of the slag that has raised so many concerns on the part of New Jersey and others. And, presumably, the NRC Staff will conduct such an exploration in the technical review associated with this decommissioning case, including its activities in discharging its obligation under the National Environmental Policy Act. Thus, there is at least a considerable measure of current uncertainty as to whether, at the end of

³⁰ Letter from Jeffery S. Merrifield to Eric E. Jackson (Feb. 22, 2007), ADAMS Accession No. ML070530666. The text of the letter was provided by the Office of the NRC Secretary to all those on the service list for the proceeding including this Board.

³¹ Id. at 2.

the day, the decommissioning of the Licensee's site will take the form that is contemplated by the DP now in hand.³²

In short, all things considered, it seems to make good sense to follow here the course that was adopted in the Army proceeding. In addition to the withholding of action on the remainder of New Jersey's contentions, all further action in the proceeding would be deferred to await the Staff's completion of its safety and environmental review. (The deferral would embrace all obligations imposed by the Rules of Practice upon the grant of a hearing request such as that of New Jersey here). Once the Staff had released the SER and EIS reflecting the results of that review, an order would issue providing New Jersey a reasonable opportunity to withdraw, to amend, or to supplement its existing contentions based upon the disclosures in those documents and in conformity with the provisions of the Rules of Practice concerned with the submission of new contentions. Following a ruling on all remaining contentions, the proceeding would move forward.

³² The NRC Staff recently published a notice in the Federal Register to the effect that it has under consideration a decommissioning plan submitted by the Whittaker Corporation, a source material licensee, for its site in Pennsylvania. 72 Fed. Reg. 13,310 (Mar. 21, 2007). According to the notice, that licensee's operations on the site in the extraction of rare earth metals had resulted in the accumulation of "slag by products containing thorium and uranium." Id. at 13,311. The submitted DP calls for the release of the entire site for unrestricted use following "the excavation of the waste slag, [the] processing of the excavated material in order to separate the radioactive material from the soil, and [the] shipping [of] the radioactive material to a licensed disposal site." Ibid.

We do not know whether such an option might be available with regard to the Newfield slag of concern in this proceeding. It could well be that, because of composition differences or for some other reason, it might not be feasible. We refer to the Whittaker proposal only as further evidence that there well might be more than one way of dealing with a particular accumulation of radioactive wastes so as to assure the public health and safety and the protection of the environment. In the course of its technical review of any decommissioning plan associated with such waste, the Staff necessarily will be examining any and all feasible alternatives that might serve better the achievement of those objectives.

On this score, based upon the filings to date, a few words of caution appear appropriate with regard to any future contentions and the responses thereto. First, contrary to New Jersey's apparent belief (see p. 16, supra), it has long been the rule that Commission regulations are not open to challenge in NRC adjudicatory proceedings. See 10 C.F.R. § 2.335(a); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 & n.33, aff'd in part on other grounds, CLI-74-32, 8 AEC 217 (1974).

Second, New Jersey's reliance in several of its contentions upon the Low-Level Radioactive Waste Policy Act of 1985 (LLRWPA), 42 U.S.C. §§ 2021b, et seq., is misplaced. That Act does not broadly require, as New Jersey would have it, "the permanent isolation of low-level radioactive waste." Insofar as here relevant, it states simply that "[e]ach State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of – (A) low-level radioactive waste generated within the State." 42 U.S.C. § 2021c(a)(1)(emphasis added). "Disposal" is defined generally by the Act as meaning the "permanent isolation of low-level radioactive waste pursuant to the requirements established by the Nuclear Regulatory Commission under applicable laws." 42 U.S.C. § 2021b(7). As directed by the Act, the NRC has set forth regulatory requirements in 10 C.F.R. Part 61 that implement the LLRWPA's mandate and further define terms contained in the Act. Although New Jersey acknowledges Part 61's implementing regulations, it ignores the Commission's clear statement in that part limiting regulation to waste "received from other persons." 10 C.F.R. § 61.1(a). There is no question that this Licensee does not intend to become a facility for the permanent isolation of wastes received from other persons.

For its part, a substantial portion of the Licensee's response to New Jersey's contentions is not addressed to whether the contentions meet the admissibility standards set forth in 10 C.F.R. § 2.309(f)(1) but, rather, seeks to challenge them as lacking merit. Given that Licensee's

counsel have long been involved in NRC adjudicatory proceedings, they should be fully aware that such claims must await either motions for summary disposition under 10 C.F.R. § 2.1205 or an evidentiary hearing.³³ We trust that this fact will be given recognition in any future Licensee filings directed to contention admissibility.

D. We perceive no reason why a deferral of the consideration of the balance of New Jersey's contentions might prejudice the legitimate interests of New Jersey, the Licensee, or the Staff as parties going forward in this proceeding. Indeed, it appears to us that it should serve to further those interests, given the bearing that the fruits of the technical review indisputably might have on the issues to be litigated at an evidentiary hearing. Nonetheless, it is possible that we have overlooked some consideration that, in view of one or more of those parties, might cast doubt upon the acceptability of the course we propose to follow. Accordingly, the deferral that we are now ordering will be subject to the filing of a timely motion for reconsideration in accord with 10 C.F.R. § 2.323(e).

For the foregoing reasons, (1) the hearing request of the New Jersey Department of Environmental Protection is granted; and (2) all other hearing requests are denied. Notwithstanding the denial of their requests, in accordance with the provisions of 10 C.F.R. § 2.315(c), upon notifying the Board, Gloucester and Cumberland Counties and the Borough of Newfield may, if so inclined, participate in any further proceedings in this matter through a designated representative.

³³ Indeed, if anything, addressing the merits in an opposition to a hearing request can be counterproductive in that it serves to reinforce the requestor's insistence that a genuine dispute exists with respect to the substance of the contention in issue.

Moreover, subject to reconsideration at the behest of New Jersey, the Licensee and/or the NRC Staff, all additional proceedings (including but not limited to the submission of the hearing file, 10 C.F.R. § 2.1203, and mandatory disclosures, 10 C.F.R. § 2.336) are hereby deferred pending the completion of the Staff's safety and environmental review and further order of this Board.

Finally, as to those individuals and entities whose hearing requests have been denied, in accordance with 10 C.F.R. § 2.311(a), any appeal to the Commission must be taken within ten (10) days after service of this memorandum and order. In accordance with that same provision, the Licensee is entitled to appeal the grant of the New Jersey Hearing Request within a like time period.

It is so ORDERED

THE ATOMIC SAFETY
AND LICENSING BOARD*

/RA/

Alan S. Rosenthal, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

/RA/

Dr. William H. Reed
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 28, 2007

* Copies of this Memorandum and Order were sent this date by Internet electronic mail transmission to counsel or other representative for (1) the Licensee, (2) the NRC Staff, and (3) each hearing requestor that has provided for email service.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON HEARING REQUESTS) (LBP-07-05) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 28th day of March 2007