

June 8, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO COMMISSION'S MAY 30, 2007
ORDER AND REQUEST FOR RULING ON PROPOSED CONTENTIONS

INTRODUCTION

On May 30, 2007, the Commission issued a Memorandum and Order affirming the Board's denial of a petition for leave to intervene filed by Ms. Loretta Williams, one of seven petitioners. The Commission also addressed, *sua sponte*, the Board's decision to defer ruling on sixteen of seventeen contentions proposed in a separate petition filed by the New Jersey Department of Environmental Protection (NJDEP). The Commission stated that it generally disagreed with the practice of ruling on a hearing request without considering all contentions: "In general we do not endorse deferring the consideration of proposed contentions because, in our view, prompt consideration of contentions promotes the efficient and complete development of the record while conserving resources." *Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC __ (May 30, 2007) (slip op. at 2). The Commission stated that although it would not disturb the Board's view for now, its acquiescence in the Board's approach was conditional. Noting that the Board had already directed the Staff to file a status report by

June 8, 2007, the Commission asked the parties and the Staff to “weigh in on the Board’s approach by June 8, 2007, in a filing before the Board[.]” *Id.* (slip op. at 2–3). The NRC Staff’s views follow.

BACKGROUND

On March 28, 2007, the Board issued a Memorandum and Order ruling on the seven hearing requests filed in this proceeding.¹ The Board granted the hearing request of the New Jersey Department of Environmental Protection (NJDEP), while denying the hearing requests of the six other petitioners. In granting NJDEP’s hearing request, the Board ruled on only one of NJDEP’s seventeen proposed contentions. The Board concluded that it made sense to withhold action on NJDEP’s remaining contentions, and also defer all further action in this proceeding, pending the Staff’s completion of its safety and environmental review. The Board invited motions for reconsideration in the event any party perceived that deferral might prejudice its interests in this proceeding, but neither the Staff nor any other party moved for reconsideration.²

One petitioner, Loretta Williams, appealed the Board’s denial of her hearing request.³ As noted above, on May 30, 2007 the Commission issued a Memorandum and Order affirming the Board’s denial of Ms. Williams’ hearing request. The Commission also addressed the Board’s ruling on NJDEP’s petition, stating that it generally disagreed with the practice of ruling on a hearing request without considering all contentions. CLI-07-20, 65 NRC at ___ (slip op. at 2). Nonetheless, the Commission acknowledged that “deferral may be appropriate in some very

¹ *Shieldalloy Metallurgical Corp.* (Licensing Amendment Request for Decommissioning of the Newfield, New Jersey Facility), LBP-07-05, 65 NRC ___ (March 28, 2007) (slip op.).

² Given the Board’s deferral of all proceedings, the Staff has not yet notified the presiding officer and parties, pursuant to 10 C.F.R. § 2.1202(b)(2), whether the Staff desires to participate as a party in this matter. The Staff does intend to participate as a party, at least with respect to NJDEP’s Contention 5, the contention the Board admitted.

³ “Appeal of Loretta Williams,” (April 5, 2007) (ADAMS ML071010138).

limited and exceptional circumstances.” *Id.* (slip op. at 3). The Commission noted that the Board deferred ruling on NJDEP’s remaining contentions in part because this proceeding involves a complex decommissioning case and, in the Board’s view, “there is at least a considerable measure of uncertainty as to whether, at the end of the day, the decommissioning of the Licensee’s site will take the form that is contemplated by the [decommissioning plan] now in hand.” *Id.*

Because a ruling on NJDEP’s remaining proposed contentions will promote an efficient adjudicatory process, the Staff respectfully requests that the Board rule on those contentions. In the alternative, the Staff recommends that the Board certify to the Commission the question of whether deferral is appropriate. 10 C.F.R. §§ 2.319(l) and 2.323(f)(1) and (f)(2).

DISCUSSION

As the Board noted in its March 28, 2007 Order, the express terms of the Commission’s Rule of Practice state that within forty-five days after the filing of answers and replies the presiding officer shall “issue a decision on each request for hearing/petition to intervene. . . .” 10 C.F.R. § 2.309(i). A hearing request will be granted if the Board determines that the petitioner has proposed “at least one admissible contention that meets the requirements of paragraph (f) of [section 2.309].” 10 C.F.R. § 2.309(a). To the extent the Board determines at least one of the petitioner’s contentions is admissible—as the Board did here in the case of NJDEP—the Rules of Practice do not explicitly require the Board to rule on the petitioner’s remaining contentions at the time it grants the hearing request.

On the other hand, the Commission has previously stated that under § 2.309(i) a licensing board should issue a decision on both standing *and* the admissibility of contentions within forty-five days of the date the parties complete their filings, unless circumstances warrant additional time. CLI-07-20, 65 NRC __ (slip op. at 2), *citing Final Rule, Changes to Adjudicatory Process*, 69 Fed. Reg. 2182, 2203 (January 14, 2004). In its Order in this proceeding,

the Commission specifically noted that it is “normal practice” to rule on all contentions during the forty-five day period. *Id.* (slip op. at 2 n.6; emphasis added). There are numerous reasons supporting such a rule, including those identified in the Commission’s Order. Ruling on all proposed contentions within the time prescribed in § 2.309(i) helps narrow issues in the proceeding, conserves resources, and maintains the primary focus on the licensee’s application, rather than the Staff’s review of the application. Fundamentally, such rulings help determine the subject matter of the proceeding, help parties identify potential expert witnesses, and allow witnesses to begin preparing to support each party’s positions on the issues in dispute. The Commission has long emphasized the importance of identifying critical issues early in the proceeding: “In particular, rulings should be issued on crucial or potentially dispositive issues at the earliest practicable juncture in the proceeding.” *Statement of Policy on Conduct of Licensing Proceedings*, 46 Fed. Reg. 28,533, 28,535–36 (May 27, 1981). Ruling on proposed contentions also helps the parties identify relevant documents early in the adjudicatory process, allowing the parties to meet their document-disclosure and discovery obligations in an efficient and orderly manner.

The Commission has vested in the licensing boards considerable discretion in managing individual proceedings. However, the Commission has also indicated it may limit that discretion in order to ensure prompt and efficient proceedings.

“The Commission’s Rules of Practice provide the board with substantial authority to regulate hearing procedures. In the final analysis, the actions, consistent with applicable rules, which may be taken to conduct an efficient hearing are limited primarily by the good sense, judgment, and managerial skills of a presiding board which is dedicated to seeing that the process moves along at an expeditious pace, consistent with the demands of fairness.

Id. at p. 28,534. Further, although the Commission has stated that licensing boards may take more than forty-five days to rule on contentions if circumstances warrant, it has concluded that forty-five days is typically an “appropriate and reasonable period” for such rulings. *Final Rule, Changes to Adjudicatory Process*, 69 Fed. Reg. at 2204.

Although the Staff initially chose not to ask the Board to reconsider its decision to defer ruling on NJDEP's remaining proposed contentions, pursuant to the Commission's Order the staff has reexamined this issue focusing on the purposes underlying the Commission's Rules of Practice, rather than on the narrower question of whether the Staff would be significantly prejudiced under the circumstances of this case. Taking into account the overall goals underlying the regulations, the Staff is of the view that deferral is not appropriate.

The Staff's view is that, in general, deferral creates inefficiencies in the adjudicatory process because it prevents the parties from promptly ascertaining the matters truly at issue in a proceeding. For example, in the present case the Staff has argued that the Board should reject at least six of NJDEP's proposed contentions in their entirety because they impermissibly challenge either the NRC's regulations or the NRC's reasonable interpretation of regulatory language.⁴ In Contention 6, NJDEP argues that the 1000-year dose modeling period in 10 C.F.R. § 20.1401(d) does not apply to long-lived radionuclides such as uranium and thorium; in Contentions 12–13 and 15–17, NJDEP argues that the long-term control (LTC) license option is not a permissible interpretation of the license termination provisions at 10 C.F.R. § 20.1403. The Staff believes NJDEP is wrong on both counts, and the Staff is relying on its interpretations of sections 20.1401(d) and 20.1403 to guide its review of Shieldalloy's decommissioning plan. However, because the Board deferred ruling on these contentions, the Staff must now choose between either (1) anticipating that the Board will agree with its interpretation of the regulations, or (2) preparing for issues the Staff does not believe should be part of its review or part of the evidentiary hearing. The Staff's position is not dissimilar to that of the other parties, each of whom will have to take into account the uncertainty caused by not knowing whether the remaining proposed contentions will be admitted or

⁴ "NRC Staff's Response to Request for Hearing by the New Jersey Department of Environmental Protection" at pp. 13–15, 17–24.

rejected. While the Board's deferral of other obligations related to the proceeding certainly helps ameliorate the potential impact on party resources, as a practical matter, the identification and involvement of potential expert witnesses is impacted by having numerous contentions whose admissibility remains in question.

Without rulings on the remaining proposed contentions, the parties will also have to ensure that key witnesses are available to support the party's positions on each issue in litigation. From the Staff's perspective, this means that the schedules of certain individuals will have to be kept open to accommodate prehearing preparations, as well as the hearing itself. By ruling on the remaining contentions, the Board might allow the Staff and the other parties to release individuals from this case, conserving resources and possibly expediting other, unrelated matters. For example, to the extent the Board rejects the contentions that the Staff opposes in their entirety (Contentions 4, 6, 8, and 12–17), the Staff estimates that several individuals presently involved in this case would no longer have significant roles in preparing for the hearing. While these considerations do not necessarily result in "prejudice" as the Staff understood the Board's original offer to reconsider its decisions, they do present resource implications that could have significance.

In its March 28, 2007 Order, the Board concluded that deferring a ruling on NJDEP's remaining contentions might further the interests of the parties, given that the Staff's technical review could illuminate issues to be litigated at the hearing. The Commission objected to this reasoning, stating that the Board was thereby shifting the focus of the hearing from the licensee's application to the Staff's review of the application.⁵ The Board also found that deferring a ruling on NJDEP's remaining contentions was appropriate because this is a complex

⁵ The Commission has made clear that the scope of contentions is based on the nature of the application, rather than the Staff's review of the application. *See Policy on Conduct of Adjudicatory Proceedings; Policy Statement*, 63 Fed. Reg. 41,872, 41,874 (August 5, 1998) ("The scope of a proceeding, and, as a consequence, the scope of contentions that may be admitted, is limited by the nature of the application and pertinent Commission regulations.")

decommissioning case and there is considerable uncertainty as to whether decommissioning will take the form set forth in the DP the Staff has accepted for technical review.

In its May 30, 2007 Order, the Commission stated that deferral may be appropriate “in some very limited and exceptional circumstances.” The Commission’s suggestion that the parties should address whether this case presents “exceptional circumstances” raises a different question than the Board’s original inquiry, which was whether its approach would prejudice any party. The Staff does not believe that Shieldalloy’s proposal to use the LTC license option, although representing the first application to rely on the LTC option, presents such an exceptional circumstance that it necessarily requires the Board to defer ruling on NJDEP’s remaining proposed contentions. In other words, the Staff believes the Board’s approach is not consistent with the intent of the Commission in establishing the Rules of Practice. The Staff would further note that, in the event Shieldalloy were to revise its DP while the Staff’s review is proceeding or new information were to arise that is relevant to the DP, the Commission’s late-filed contention rules provide NJDEP a means of seeking to expand the issues to be litigated at the hearing, obviating the need for the Board to develop an approach to address that concern based on the particular facts of this case. 10 C.F.R. § 2.309(f)(2).

The Staff therefore respectfully requests that the Board now rule on NJDEP’s remaining proposed contentions. In the alternative, in view of the Commission’s apparent interest in the approach adopted by the Board in this proceeding, the Staff respectfully recommends that the Board certify to the Commission under 10 C.F.R. §§ 2.319(l) and 2.323(f)(1) and (f)(2) the issue of whether deferring a ruling on NJDEP’s remaining contentions is appropriate.⁶

⁶ Counsel for the Staff has contacted counsel for both of the other parties in an attempt to resolve the issues raised in the Staff’s alternative request that the Board certify this matter to the Commission. The Staff has not been able to resolve the issues that form the basis for its alternative request.

In addition to deferring a ruling on NJDEP's remaining contentions, the Board also deferred all additional action in this case, including submission of the hearing file and mandatory disclosures. The Staff does not oppose this part of the Board's approach. To the contrary, this part of the Board's approach will enable the Staff to focus on completing the safety and environmental review expeditiously, and it will allow the Staff to produce the hearing file and mandatory disclosures in an efficient, orderly manner.

CONCLUSION

The Staff respectfully requests that the Board rule on the admissibility of NJDEP's remaining proposed contentions. In the alternative, the Staff recommends the Board certify to the Commission under 10 C.F.R. §§ 2.319(l) and 2.323(f)(1) and (f)(2), the question of whether deferring a ruling on NJDEP's remaining contentions is consistent with Commission policy.

Respectfully submitted,

/RA by Michael J. Clark/

Michael J. Clark
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 8th day of June, 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'S RESPONSE TO COMMISSION'S MAY 30, 2007 ORDER AND REQUEST FOR RULING ON PROPOSED CONTENTIONS" 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 8th day of June, 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

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

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

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

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

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

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 by Michael J. Clark/

Michael J. Clark
Counsel for the NRC Staff