

BAS 2-7

COPY

DOCKETED
USNRC

October 13, 2009

October 13, 2009 (3:15pm)

OFFICE OF SECRETARY
RIII FMAKINGS AND
ADJUDICATIONS STAFF

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

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 MOTION FOR STAY PENDING JUDICIAL REVIEW OF
COMMISSION ACTION TRANSFERRING REGULATORY AUTHORITY OVER
NEWFIELD, NEW JERSEY FACILITY TO THE STATE OF NEW JERSEY**

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(a), Shieldalloy Metallurgical Corporation ("Shieldalloy"), holder of Source Materials License No. SMB-743 for a facility in Newfield, New Jersey ("Newfield Facility"), respectfully moves the Commission to stay, pending judicial review, the effectiveness of the transfer of regulatory authority over the Newfield Facility to the State of New Jersey ("New Jersey" or "State"). Regulatory authority over the Newfield Facility and certain other NRC-licensed facilities in New Jersey was transferred to the State effective September 30, 2009 pursuant to an agreement between the Commission and the State ("the Agreement").¹

¹ Counsel for the NRC Staff ("Staff") advised Shieldalloy and the Atomic Safety and Licensing Board of the transfer of regulatory authority on October 1, 2009. Staff's Fifteenth Status Report (October 1, 2009) at 1. The Staff's filing also stated that the Staff had discontinued its review of a decommissioning plan for the Newfield Facility submitted by Shieldalloy and had forwarded files associated with its review to New Jersey. *Id.* at 2. The Agreement between the NRC and New Jersey, as executed, was published in the Federal Register on October 8, 2009. 74 Fed. Reg. 51882.

TEMPLATE = SECY-041

DS03

As grounds for this motion, Shieldalloy states that the NRC failed to meet the requirements of Section 274b of the Atomic Energy Act (“AEA”), 42 U.S.C. § 2021(b), by finding that the New Jersey radiation control program is compatible with the NRC’s regulatory program when in reality it is not. Accordingly, New Jersey’s application to become an Agreement State, at least with respect to the Newfield Facility, should have been denied as a matter of law.

Shieldalloy intends to seek judicial review of the NRC’s decision to enter into the Agreement with New Jersey to the extent that it transfers regulatory authority over the Newfield Facility to the State. That review will be based on the Administrative Orders Review Act, better known as the Hobbs Act, 28 U.S.C. § 2342(4). As discussed below, the relevant criteria to decide whether to grant a stay pending judicial review of the effectiveness of the transfer of regulatory authority are satisfied and a stay should accordingly be issued.

DISCUSSION

A. FACTUAL BACKGROUND

Section 274b of the AEA authorizes the NRC to enter into agreements that transfer regulatory authority over certain radioactive materials to the States. The NRC is permitted to enter into such an agreement with a State if the NRC “finds that the State program is ... compatible with the Commission’s program for regulation of such materials, and that the State program is adequate to protect the public health and safety with respect to the materials covered by the proposed agreement.” 42 U.S.C. § 2021(b). The AEA defines the categories of materials that NRC may transfer as including, *inter alia*, source materials (as defined by AEA § 11.z), such as those currently present at the Newfield Facility. *Id.*

New Jersey submitted a draft application to become an Agreement State to the NRC in 2006,² seeking the transfer of regulatory authority from the NRC to New Jersey over several categories of materials, including source materials. The Staff conducted a completeness review of the draft application, and provided several rounds of comments to the New Jersey Department of Environmental Protection (“NJDEP”).³ On October 16, 2008, the Governor of New Jersey submitted a formal agreement application, certifying that “the State of New Jersey has an adequate program for the control of radiation hazards covered by this proposed agreement.”⁴ This submittal initiated the final phase of the NRC’s review of New Jersey’s application.

Previously, New Jersey had issued for comment, and then promulgated in final form on September 15, 2008, a set of regulations, “Radiation Protection Program Rules” (N.J.A.C. 7:28-1.1 et seq.), intended to support New Jersey’s application to become an Agreement State (“NJDEP Regulations”). SMC submitted comments on the proposed regulations on July 17, 2008, identifying a number of deficiencies in New Jersey’s Radiation Protection Program (“the New Jersey Program”). New Jersey rejected SMC’s comments. 40 N.J.R. 5196(b) (September 15, 2008).

On the recommendation of the Staff, the Commission, through Staff Requirements Memorandum “SECY-09-0065, Proposed Agreement between the State of New Jersey and the Commission Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended” (May 18, 2009), published notices of the proposed Agreement between the NRC and New Jersey in the *Federal Register*, requesting comments from the public. Four such notices were published. In

² NJDEP letter to NRC dated September 17, 2007.

³ NRC letter to the NJDEP dated August 9, 2006; NRC letter to the NJDEP dated August 3, 2007; NRC letter to the NJDEP dated January 11, 2008; NRC letter to the NJDEP of March 27, 2008; NRC letter to the NJDEP dated September 17, 2008.

⁴ Letter from Gov. Jon S. Corzine to NRC Chairman dated October 16, 2008.

response to the *Federal Register* notices, Shieldalloy submitted comments asserting that the New Jersey Program was incompatible in a number of respects with the NRC's program for the regulation of radioactive materials. Letter dated June 11, 2009 from Hoy Frakes (Shieldalloy) to Michael T. Lesar (Staff) and attachments ("Shieldalloy Comments on Agreement").

On August 18, 2009 the Staff submitted to the Commissioners SECY-09-0114, "Section 274B Agreement with the State of New Jersey," in which the Staff requested Commission approval of the proposed Agreement with New Jersey. SECY-09-0114 referenced the comments it had received in response to the *Federal Register* notices. The Staff advised the Commission that the comments it had received "did not provide any new information that would change the conclusions in the staff assessment of the New Jersey program" and that the Staff "has not changed the assessment in response to the comments." SECY-09-0114 at 2. Accordingly, the Staff recommended approval of the Agreement with New Jersey.

Enclosure 2 to SECY-09-0114 contained the Staff's response to the comments it had received. The Staff rejected, on various grounds, the comments submitted by Shieldalloy. As further discussed below, such rejection was erroneous.

Acting on the Staff recommendations in SECY-09-0114, on September 2, 2009, Gregory B. Jaczko, NRC Chairman, signed the Agreement, and on September 23, Jon S. Corzine, Governor of New Jersey, signed it. 74 Fed. Reg. 51,882 (October 8, 2009). The Agreement became effective on September 30, 2009, and transferred to New Jersey regulatory authority over, *inter alia*, source materials including those at the Newfield Facility. 74 Fed. Reg. at 51,883. This transfer is confirmed in SECY-09-0114: "New Jersey has requested regulatory authority over source material. As a result, the regulatory authority for the Shieldalloy Metallurgical Corporation (SMC) site in Newfield, New Jersey, will transfer to the State on the

effective date of the Agreement. SMC is a source material licensee and currently has a decommissioning plan under review by NRC.” SECY-09-0114 at 3-4.

B. ARGUMENT

1. Factors to be Considered in Evaluating a Motion for Stay Pending Judicial Review of a Commission Decision

In evaluating a motion for a stay, the Commission will consider four factors:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

10 C.F.R. § 2.342(e); *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994). When ruling on a motion for a stay, irreparable injury to the moving party is the crucial factor. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79, 83 (2000); *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981). Here the irreparable injury factor compels a stay pending judicial review of the Commission’s decision to transfer regulatory authority over the Newfield Facility to New Jersey, and the other factors also militate in favor of issuance of a stay pending judicial review of the Commission’s action.

2. Shieldalloy will Sustain Irreparable Injury if Regulatory Authority over the Newfield Facility is Transferred to New Jersey

Shieldalloy has submitted to the Staff a decommissioning plan for the Newfield Facility under which Shieldalloy plans to consolidate all radioactively-contaminated materials present at the Newfield Facility into an isolated, access-restricted area of the site. There, the consolidated materials will be shaped, graded, and covered with a seven-layer engineered barrier that provides

a substantial and highly durable resistance to rainwater infiltration that will last for at least 1,000 years, even without any maintenance or repair. *See* Affidavit of Hoy E. Frakes, Jr. (“Frakes Aff.”), attached hereto as Exhibit A, at ¶ 3. This decommissioning approach, known as the Long Term Control or “LTC” Alternative, is based on and satisfies the NRC guidance in NUREG-1757, “Consolidated Decommissioning Guidance.” Id.

New Jersey has repeatedly announced that, upon acquiring regulatory authority over the Newfield Facility, it will order Shieldalloy to remove the radioactive materials currently present at the site and ship them offsite. Id. at ¶¶ 5, 6. In addition, the regulations issued by New Jersey to govern its program for the control of radiation hazards are calculated to preclude, and would in fact preclude, the decommissioning of the Newfield Facility by any means other than the removal of the radioactive materials from the Newfield Facility and their shipment to the EnergySolutions, Inc. site in Clive, Utah, the only facility currently licensed to receive them. Id. at ¶ 9.

Shieldalloy will sustain irreparable injury if New Jersey is able to exercise regulatory authority over the Newfield Facility. The cost of implementing the removal option would be over \$70 million, as opposed to the less than \$15 million cost to implement the LTC Alternative. Id. Shieldalloy cannot defray a \$70 million cost of removal of the materials from the site. Were Shieldalloy required to implement the removal alternative, as New Jersey has announced it intends to require, Shieldalloy would be forced to seek protection under the bankruptcy laws, as it had done once before, and potentially liquidate. Id. at ¶ 10. Thus, this is not a case in which a party would merely incur additional costs if the stay request were denied, *compare Sequoyah Fuels Corp.*, 40 NRC at 6. Here, the very survival of the company is at stake. It is hard to conceive a more substantial, irreparable injury: potential bankruptcy or business failure has been

held by the courts to be irreparable injury for stay purposes. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Goldstein v. Miller*, 488 F. Supp. 156, 175 (D. Md. 1980).

The removal of radioactive materials from the Newfield site, if ordered by New Jersey, would also result in other forms of injury. Were the removal alternative implemented, radiological conditions associated with the processing and packaging the radioactivity currently at the Newfield site for shipment to the disposal site in Utah would result in direct radiation exposure and inhalation of airborne radioactivity by SMC employees, contractors, decommissioning workers, and members of the public. Frakes Aff. at ¶ 11. In addition, members of the public would incur direct exposure during and after the transportation of the residual radioactivity to the Utah disposal site. *Id.* While the exposures from the removal process would be expected to be within NRC regulatory limits, unnecessary exposure to radiation contravenes the principle of keeping radiation doses to the public resulting from the decommissioning process as low as is reasonably achievable (“ALARA”). *See, e.g.*, 10 C.F.R. § 20.1402. Indeed, the total doses to workers and the public resulting from the removal process would be larger than those that would result from implementation of the LTC Alternative. Frakes Aff. at ¶ 11.

3. No Harm will be Sustained by Other Parties by the Granting of the Stay

Were the stay to be granted, the Newfield Facility would remain under the regulatory oversight of the NRC. There is no doubt that NRC oversight is adequate to protect public health and safety; indeed, the Commission has found that “[b]ased upon the information provided to us, we have no reason to conclude that there are ongoing violations of NRC health and safety standards at the Newfield site.” Memorandum and Order, CLI-09-01, 69 NRC 1, 3 (2009).

Therefore, issuance of a stay pending judicial review would not be detrimental to any other parties.

4. The Public Interest Warrants Issuance of Stay

As discussed above, transfer of regulatory authority over the Newfield Facility to New Jersey and the State's announced determination to force the removal the radioactive materials from the site would have adverse consequences affecting not only Shieldalloy but the public at large. The public interest would clearly be served by maintaining the *status quo* until the appropriateness of the transfer of regulatory authority over the Newfield Facility to New Jersey is adjudicated. Since the radioactive materials at the Newfield site have been in their current location and status for decades without adverse radiological or other consequences, a continuation of that status for the limited period of time necessary to seek judicial review will not cause any adverse health or environmental consequences. In addition, the public interest would be served by the opportunity to establish, through judicial review, decommissioning standards for facilities in New Jersey that are compatible with those developed by the NRC for the protection of public health and safety.

5. There is a Strong Likelihood that Shieldalloy will Prevail Before the Courts

The processing of an application for Agreement State status between the Commission and a requesting State is conducted largely between the staffs of the NRC and the State. While comments by the public are solicited (as required by Section 274e(1) of the AEA), there is no opportunity for an interested party to address the potential resolution of its comments by the Staff. As a result, the Commission may take favorable action on an Agreement State application based on faulty advice by the Staff, without the full benefit of the views of outside parties.

The potential risks involved in this procedure are evident in this case. While Shieldalloy provided comments pointing out the inconsistencies between the New Jersey regulatory program and that of the NRC, the resolutions given by the Staff to those comments were erroneous. The discussion that follows summarizes some of the deficiencies in the Staff's disposition of Shieldalloy's comments.

Before the NRC can approve an Agreement State application, the State must have a program for the control of radiation hazards that is "compatible" with the Commission's program for the regulation of the materials over which the State seeks to assume authority. 42 U.S.C. § 2021(d)(2). The State program must also be adequate to protect public health and safety with respect to the categories of materials for which Agreement State status is sought.

The Staff evaluates the State's program as described in the State's application and prepares a written assessment of whether the program is compatible with the NRC regulatory program as defined in an NRC policy statement on State Agreements.⁵ For determining compatibility, NRC guidance groups the NRC regulations into "Compatibility Categories." Compatibility is determined by comparing the State regulations against the corresponding NRC regulations for compliance with the standards for the applicable Compatibility Category.⁶

⁵ *Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement*, 46 Fed. Reg. 7,540, 7,543 (1981), as amended by 46 Fed. Reg. 36,969 (1981) and 48 Fed. Reg. 33,376 (1983) ("Criteria Policy Statement").

⁶ NRC guidance defines Compatibility Categories with the symbols "A," "B," "C," "D," "NRC" or "H&S." The standards for each category are:

A = Basic radiation protection standard or related definitions, signs, labels or terms necessary for a common understanding of radiation protection principles. The State program elements falling in this category should be essentially identical to those of the NRC;

B = Program element with significant direct transboundary implications. The State program elements falling in this category should be essentially identical to those of the NRC;

C = Program element, the essential objectives of which should be adopted by the State to avoid conflicts, duplications or gaps. The manner in which the essential objectives are addressed need not be the same as NRC, provided the essential objectives are met;

The NRC will approve the State's application if it finds the program compatible or contains only minor discrepancies, but not if the State program disrupts a coherent nation-wide program. "If the NRC determines that a State has a program that disrupts the orderly pattern of regulation among the collective regulatory efforts of the NRC and other Agreement States, i.e., creates conflicts, gaps, or duplication in regulation, the program would be found not compatible."⁷

The New Jersey Program fails to satisfy the NRC compatibility standards in several important respects. The Staff, however, failed to recognize these failures and erroneously recommended that the Commission approve the Agreement with New Jersey. The discussion below summarizes some of the errors in the Staff's determination that will warrant overturning by a reviewing court.

- a. The New Jersey Program fails to implement the ALARA principle, as required by NRC regulations

NRC Compatibility Criterion 9 states, in relevant part: "Waste Disposal. The standards for the disposal of radioactive materials into the air, water, and sewers, and burial in the soil shall be in accordance with Part 20." The NJDEP Regulations, however, do not implement the "as low as reasonably achievable" ("ALARA") principle set forth in, inter alia, 10 C.F.R. § 20.1402, and do not include adherence to ALARA as one of the radiological criteria for license termination. This is contrary to 10 C.F.R. Part 20 and in violation of Compatibility Criterion 9.

D = Not required for purposes of compatibility;

NRC = Not subject to transfer of authority. These are NRC program elements that address areas of regulation that cannot be relinquished to Agreement States pursuant to the AEA or the NRC regulations;

H&S = Program elements identified by H&S ("health and safety"). These are not required for purposes of compatibility; however, they do have particular health and safety significance. *Compatibility Categories and Health and Safety Identification for NRC Regulations and Other Program Elements*, NRC FSME Procedure SA-200 at 6-7.

⁷ *Statement of Principles and Policy for the Agreement State Program; Policy Statement on Adequacy and Compatibility of Agreement State Programs*, 62 Fed. Reg. 46, 517, 46,521 (1997).

In response to a Shieldalloy comment on the draft regulations that pointed out the New Jersey Program's failure to implement the ALARA principle, New Jersey stated that the New Jersey Brownfield statute precludes compliance with ALARA in New Jersey. 40 N.J.R. 5196b at 7, 8 (2008).

Shieldalloy pointed out the New Jersey Program's failure to include ALARA compliance in the comments it submitted to the Staff with regard to the proposed Agreement between the NRC and New Jersey. Shieldalloy Comments on Agreement at 3. The Staff's response to this comment was that New Jersey is allowed to implement regulations that are stricter than the requirements of the license termination rule ("LTR") in 10 C.F.R. Part 20 because the LTR is classified as "compatibility category C". SECY-09-0114, Enclosure 2 at 5. This resolution is erroneous. NRC radiation protection regulations are "basic radiation protection standards." New Jersey's failure to implement the ALARA requirements in 10 C.F.R. Part 20 renders the New Jersey Program incompatible with the NRC's regulatory program.⁸ Failure to observe the ALARA principle will also result, if the NJDEP Regulations are applied to the Newfield Facility, in higher doses to workers and the public and a lower level of protection of public health and safety than that provided by the NRC regulations. Frakes Aff., ¶ 11.

- b. The New Jersey Program is also incompatible with other aspects of the 10 C.F.R. Part 20 regulations

Numerous other differences exist between the NJDEP Regulations and those of the NRC with respect to facility decommissioning. These differences notably include:

⁸ In addition, the failure of the New Jersey Program to incorporate the ALARA standard violates an essential element of the NRC radiation protection program, which is the consideration of the detrimental effects of radioactive materials transportation and disposal. Because many of these detrimental effects will occur outside of New Jersey's borders, they have significant environmental and public health impacts outside of New Jersey. The failure in the New Jersey Program to require that these impacts be considered and minimized violates an essential objective of the NRC regulations, and results in a Compatibility "B" non-compliance.

- The NRC regulations provide, in 10 C.F.R. §20.1403, for the implementation of license termination under restricted release criteria; the NJDEP Regulations do not allow such termination.
- The NRC regulations in 10 C.F.R. § 20.1401(d) limit dose calculations to 1000 years; the NJDEP Regulations requires decommissioning-related dose calculations to continue beyond 1000 years to the point of “peak dose.”

Shieldalloy identified these and other departures from the Part 20 regulatory requirements to the Staff. Shieldalloy Comments on Agreement at 3-5. The Staff, however, rejected the comments on the same impermissible basis as it had ignored New Jersey’s failure to incorporate ALARA standards. SECY-09-114, Enclosure 2 at 5. In addition, the Staff sought to justify its acceptance of the New Jersey Program by stating that “[s]ome of NJ’s license termination regulations are more stringent than NRC regulatory requirements. Using the above criteria, NRC’s assessment of NJ regulations found the State’s license termination and decommissioning regulations compatible since they meet the essential objectives of the NRC program elements and provide a level of protection of public health and safety that is at least equivalent to that afforded by NRC’s requirements.” *Id.* That “equivalency” does not in fact exist. For example, by not allowing the implementation of the restricted release criteria for license termination, application of the NJDEP Regulations would require Shieldalloy to remove the radioactive materials from the Newfield Facility, resulting in higher doses to workers and the public and a lower level of protection of public health and safety than that provided by the NRC regulations.

- c. The NJDEP Regulations do not allow appropriate exemptions to their provisions

Compatibility Criterion 12 states: "Additional Requirements and Exemptions. Consistent with the overall criteria here enumerated and to accommodate special cases and circumstances, the State regulatory authority shall be authorized in individual cases . . . to grant necessary exemptions which will not jeopardize health and safety." Contrary to this criterion, the NJDEP

Regulations do not provide the ability to grant exemptions to its requirements in the area of facility decommissioning. Shieldalloy identified to the Staff four examples of New Jersey's failure to provide for the possibility of granting necessary exceptions to the regulatory standards that satisfy the ALARA principle and do not jeopardize health and safety:

- (1) The NJDEP Regulations will not allow consideration of alternate remediation standards that would increase the allowed incremental dose criterion of 15 mrem/yr (itself significantly lower than the maximum allowable dose of 25 mrem/yr set by the NRC regulations in 10 C.F.R. § 20.1402), even if justified through an ALARA analysis.
- (2) The NJDEP Regulations do not allow for any alternative remediation standards if they would result in doses exceeding 100 mrem/yr for an "all controls fail" scenario.
- (3) The NJDEP Regulations require that the calculations of doses from radiological decommissioning use only tables of parameters based on specific exposure scenarios.
- (4) When modeling the "all controls fail" scenario, the NJDEP Regulations allow no credit for any engineering controls, such as a fence or cover, to be taken when performing the model to determine if the 100 mrem annual dose is exceeded. The NRC, however, allows the licensee to take credit for controls that may degrade but have not completely failed.

Shieldalloy Comments on Agreement at 5-6. In response to Shieldalloy's comments the Staff cited a provision in the NJDEP regulations that allow for exemptions of regulations:

The State regulation, N.J.A.C. 7:28-2.8, allows the Department, upon application and a showing of hardship or compelling need, with the approval of the NJDEP Commission, to grant an exemption from any requirement of the rules should it determine that such exemption will not result in any exposure to radiation in excess of the limits permitted by N.J.A.C. 7:28-6, "Standards for protection against radiation." This regulation fulfills Criterion 12.

SECY-09-114, Enclosure 2 at 6. However, the Staff ignored New Jersey's position that it is precluded by statute from providing such exceptions: "The Department and the Commission did not include a provision for ALARA in meeting these dose criteria because the Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1 et seq., does not allow such a

provision.” 40 N.J.R. 5196b at 8. Therefore, the Staff’s reference to a regulation whose application to the particular cases cited is precluded by statute is clearly erroneous.

d. The New Jersey Program disrupts ongoing licensed activities

Compatibility Criterion 25 states:

Existing NRC Licenses and Pending Applications. In effecting the discontinuance of jurisdiction, appropriate arrangements will be made by NRC and the State to ensure that there will be no interference with or interruption of licensed activities or the processing of license applications by reason of the transfer. For example, one approach might be that the State, in assuming jurisdiction, could recognize and continue in effect, for an appropriate period of time under State Law, existing NRC licenses, including licenses for which timely applications for renewal have been filed, except where good cause warrants the earlier reexamination or termination of the license.

The NJDEP has stated repeatedly that it opposes Shieldalloy’s proposed plan for the decommissioning of the Newfield Facility and that, upon assuming regulatory authority over the Newfield Facility, it will not continue review of the DP that Shieldalloy has submitted to the NRC. Shieldalloy pointed out this state of affairs in its comments to the NRC. Shieldalloy Comments on Agreement at 9-10. In response, the Staff cited the authority of NJDEP in its BER Procedure 3.08, under which “[u]pon completion of the Agreement, all active NRC licenses issued to facilities in NJ will be recognized as NJDEP licenses. This will ensure a smooth transition in authority from NRC to NJ so that licensees can continue to operate without interference with or interruption of licensed activities. NJ will continue any licensing actions that are in progress at the time of the Agreement and make the final decision on all pending licensing actions.” SECY-09-114, Enclosure 2 at 8.

The Staff’s resolution of this comment blatantly ignores New Jersey’s well publicized intentions with regard to the Newfield Facility and their inevitable consequences. The NRC has now stopped review of the DP proposed by Shieldalloy. New Jersey has not started its review of

the DP, and may reject it without review. Thus, licensed activities at the Newfield facility are on hold and have been disrupted. The New Jersey Program, as applied to Newfield, does not satisfy Compatibility Criterion 25.

In its comments, Shieldalloy also described the failure of the New Jersey Program to satisfy other Compatibility Criteria. However, the above discussion should suffice to demonstrate that Shieldalloy has a strong likelihood of success on the merits of its petition for judicial review of the NRC decision to enter into its Agreement with New Jersey. Therefore, this factor in the consideration of Shieldalloy's motion for a stay is also satisfied.

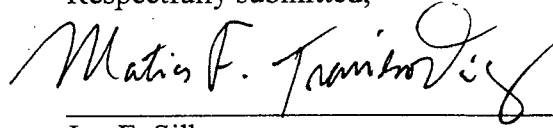
CONCLUSION

For the reasons stated above, Shieldalloy's motion should be granted and the Commission should stay the effectiveness of the transfer of its regulatory authority over the Newfield Facility to New Jersey pending judicial review.

CERTIFICATION

As required by 10 C.F.R. § 2.323(b), counsel for Shieldalloy certifies that he has consulted with the other parties in connection with this motion. The Staff has indicated that it "is in no position to consent to a stay of the agreement under which the Commission relinquished, and New Jersey assumed, regulatory authority over Shieldalloy's Newfield site." New Jersey has stated that it also opposes the granting of a stay.

Respectfully submitted,

A handwritten signature in black ink, reading "Matias F. Travieso-Diaz", written over a horizontal line.

Jay E. Silberg

Matias F. Travieso-Diaz

Robert B. Haemer

Ambrea Watts

PILLSBURY WINTHROP SHAW PITTMAN LLP

2300 N Street, N.W.

Washington, DC 20037-1128

Tel. (202) 663-8000

Counsel for Shieldalloy Metallurgical Corporation

Dated: October 13, 2009

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of)	
)	
SHIELDALLOY METALLURGICAL)	Docket No. 40-7102-MLA
CORPORATION)	ASLBP No. 07-852-01-MLA-BD01
(License Amendment Request for)	
Decommissioning the Newfield Facility))	
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Shieldalloy's Motion for Stay Pending Judicial Review of Commission Action Transferring Regulatory Authority Over Newfield, New Jersey Facility to the State of New Jersey" dated October 13, 2009 and "Affidavit of Hoy E. Frakes, Jr." 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 13th day of October, 2009.

Hon. Gregory B. Jaczko
Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Hon. Kristine L. Svinicki
Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Hon. Dale E. Klein
Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

*Administrative Judge
William Reed
Atomic Safety and Licensing Board
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
whrcville@embarqmail.com

*Office of the Secretary
Att'n: Rulemakings and Adjudications Staff
Mail Stop O-16 G4
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
secy@nrc.gov; hearingdocket@nrc.gov

Adjudicatory File
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Anne Milgram, Esq.
Attorney General of New Jersey
*Andrew W. Reese, Esq.
*Kenneth 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 08625-0093
reeseand@dol.lps.state.nj.us
kenneth.elwell@dol.lps.state.nj.us

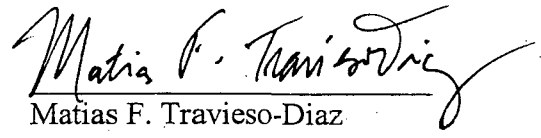
*SherVerne R. Cloyd
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
sherverne.cloyd@nrc.gov

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

Office of Commission Appellate
Adjudication
Mail Stop O-16 G4
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
OCAEmail@nrc.gov

*Michael J. Clark, Esq.
*Brett Klukan, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Michael.Clark@nrc.gov;
Brett.Klukan@nrc.gov

*Johanna Thibault, Law Clerk
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C.
20555-0001
E-mail: johanna.thibault@nrc.gov


Matias F. Travieso-Diaz

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of)	
)	
SHIELDALLOY METALLURGICAL)	Docket No. 40-7102-MLA
CORPORATION)	ASLBP No. 07-852-01-MLA-BD01
(License Amendment Request for)	
Decommissioning the Newfield Facility))	
)	

AFFIDAVIT OF HOY E. FRAKES, JR.

Guernsey County)
)
State of Ohio)

I, Hoy E. Frakes, Jr., being duly sworn according to law, depose and state the following:

1. I am President of Shieldalloy Metallurgical Corporation ("SMC"), whose principal place of business is in Newfield, New Jersey. I have personal knowledge of the matters asserted herein.

2. SMC is the holder of Source Materials License No. SMB-743 issued by the United States Nuclear Regulatory Commission ("NRC") for a facility in Newfield, New Jersey ("Newfield Facility") owned by SMC. SMC is seeking to decommission the Newfield Facility in accordance with NRC regulations and guidance, and submitted to the NRC on August 28, 2009 a revised decommissioning plan for the facility. Decommissioning Plan for Newfield Facility, Rev. 1b (August 2009) ("DP Rev. 1b").

3. As in previous revisions to its decommissioning plan for the Newfield Facility, SMC proposes in DP Rev. 1b to implement a decommissioning option, known as the Long Term

Control Alternative (LTC Alternative), which is based on and satisfies the NRC guidance in NUREG-1757, "Consolidated Decommissioning Guidance." Under its proposed decommissioning plan, SMC will consolidate all radioactively-contaminated materials present at the Newfield Facility into an isolated, access-restricted 11.7-acre portion of the site, known as the Storage Yard, located on the north eastern boundary of the site. There, the consolidated materials will be shaped, graded, and covered with a seven-layer engineered barrier that provides a substantial and highly durable resistance to rainwater infiltration that will last for at least 1,000 years, even without any maintenance or repair. The LTC Alternative also includes an NRC-supervised, fully funded long term management, maintenance, monitoring and reporting program for the next 1,000 years. The remaining 56 acres of the Newfield Facility will be released for unrestricted use and are expected to be redeveloped for industrial use.

4. The above captioned licensing proceeding was instituted in January 2007 before an NRC Atomic Safety and Licensing Board to rule on the potential approval of SMC's decommissioning plan for the Newfield Facility. 72 Federal Register 4048 (January 29, 2007). That proceeding ("ASLB proceeding") is still pending.

5. The State of New Jersey ("New Jersey"), by itself and through its Department of Environmental Protection ("NJDEP"), has vigorously opposed implementation of the LTC Alternative for the decommissioning of the Newfield Facility. The NJDEP is a party to the ASLB proceeding, and has tendered thirty-three safety, environmental and miscellaneous contentions opposing approval of SMC's decommissioning plan and alleging that "Shieldalloy's proposed decommissioning will not protect public health and safety and the LTC license sought by Shieldalloy will violate the law." NJDEP Petition for Hearing and to Intervene on Shieldalloy's Decommissioning Plan (January 16, 2007) at 189.

6. In addition, top officials of the NJDEP have asserted on a number of occasions, including at a meeting held on December 10, 2008 which I attended, that should New Jersey gain regulatory jurisdiction over the Newfield Facility, it will require that "the slag pile, as currently characterized, ... be removed." Letter dated December 23, 2008 from Nancy Wittenberg, New Jersey Assistant Commissioner of Environmental Protection, to Hoy Frakes (SMC) at 1.

7. On October 16, 2008, the Governor of New Jersey submitted a formal application to the NRC for New Jersey to become an Agreement State pursuant to Section 274b of the Atomic Energy Act, certifying that "the State of New Jersey has an adequate program for the control of radiation hazards covered by this proposed agreement." Letter from Jon S. Corzine to NRC Chairman dated October 16, 2008. Previously, New Jersey had issued for comment, and then promulgated in final form on September 15, 2008 a set of regulations, "Radiation Protection Program Rules" (N.J.A.C. 7:28-1.1 et seq.) intended to support New Jersey's application to become an Agreement State. SMC submitted comments on the proposed regulations on July 17, 2008, identifying a number of deficiencies in New Jersey's Radiation Protection Program ("the New Jersey Program"). New Jersey rejected SMC's comments. 40 N.J.R. 5196(b) (September 15, 2008).

8. On the recommendation of the NRC Staff, the Commission, through Staff Requirements Memorandum "SECY-09-0065, Proposed Agreement between the State of New Jersey and the Commission Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended" (May 18, 2009), agreed to publish a notice of the proposed Agreement between the NRC and New Jersey in the Federal Register, requesting comments from the public. On June 11, 2009 SMC submitted comments asserting that the New Jersey Program is incompatible in a number of respects with the NRC's program for the regulation of radioactive materials.

9. One aspect of the New Jersey Program that is incompatible with the NRC's program for the regulation of radioactive materials is that, in the area of facility decommissioning, the New Jersey Program is aimed specifically and uniquely at the SMC Newfield Facility. This runs directly contrary to NRC Compatibility Criterion 23, which requires that the State implement "practices for assuring the fair and impartial administration of regulatory law." New Jersey has acknowledged that some of its regulations affect only "one facility in the State." 40 N.J.R. 5196(b) at 7. The combined effect of the regulations enacted by New Jersey, if implemented, would be to preclude the possibility that SMC's Newfield site could be decommissioned in situ in accordance with the permissible standards in 10 C.F.R. Part 20 and to require SMC to remove the radioactive materials presently at the Newfield site to a disposal site in Utah.

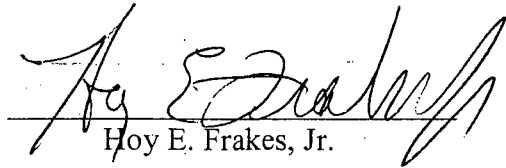
10. In Tables 17.2 and 17.3 of DP Rev. 1b, SMC estimated the costs of implementing its proposed LTC Alternative and those of removing of the radioactive materials from the Newfield site and shipping them cross-country for disposal. The total cost of implementing the LTC Alternative would be on the order of \$14.7 million. By contrast, the total cost of removing the radioactive materials from the site and disposing of them in Utah (the only available site for disposing of the materials) would be in excess of \$70 million. SMC is financially able to absorb the cost of implementing the LTC Alternative, but cannot defray a \$70 million cost of removal of the materials from the site. Were SMC required to implement the removal alternative, as New Jersey has announced it intends to require, SMC would suffer irreparable injury because it would most likely have to seek protection under the bankruptcy laws and potentially liquidate. SMC was already been bankrupt once and emerged from bankruptcy based, in part, on the agreement

by all parties -- including the NRC and New Jersey -- that funds would be set aside to decommission the Newfield Facility by in situ remediation.


11. In addition, Chapter 7 of DP Rev. 1b assesses that, were the removal alternative implemented, radiological conditions associated with the processing and packaging of the radioactivity currently at the Newfield site for shipment to the disposal site in Utah would result in direct radiation exposure and inhalation of airborne radioactivity by SMC employees, contractors, decommissioning workers, and members of the public. In addition, members of the public would incur direct exposure during the transportation of the residual radioactivity to the Utah disposal site. Such exposure would not take place if the LTC Alternative were implemented. While the exposures from the removal process would be expected to be within NRC regulatory limits, unnecessary exposure to radiation doses contravenes the ALARA principle. Indeed, as discussed in Chapter 7 of the DP, the total doses to workers and the public resulting from the removal process would be larger than those that would result from implementation of the LTC Alternative. Thus, SMC and the public would suffer injury as a result of the health and environmental impacts from the removal alternative.

12. By contrast, the LTC Alternative proposed by SMC is consistent with all applicable regulations. It will result in no measurable radiation doses to any member of the public, and is safer and has fewer health and environmental impacts than any other option for the decommissioning of the Newfield Facility.

Further, the affiant sayeth not.


Hoy E. Frakes, Jr.

Subscribed and sworn to before me
this 09 day of October, 2009.


Notary Public

My commission expires 6/24/2013

SALLY A. TODT
NOTARY PUBLIC • STATE OF OHIO
Recorded in Cuyahoga County
My commission expires June 24, 2013