

October 23, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
Shieldalloy Metallurgical Corporation)	Docket No. 40-7102-MLA
)	
(License Amendment Request for)	ASLBP No. 07-852-01-MLA
Decommissioning the Newfield Facility))	

NRC STAFF'S RESPONSE TO SHIELDALLOY'S MOTION FOR A STAY

INTRODUCTION

The NRC Staff responds to Shieldalloy Metallurgical Corporation's "Motion for Stay Pending Judicial Review of Commission Action Transferring Regulatory Authority over Newfield, New Jersey Facility to the State of New Jersey," which Shieldalloy filed with the Commission on October 13, 2009.¹ The Commission should deny Shieldalloy's motion because the NRC has relinquished its regulatory authority over the Newfield Facility and the statutory requirements for reinstating regulatory authority have not been met. Therefore, the relief Shieldalloy seeks may not be granted.

BACKGROUND

On May 27, 2009, the Staff placed notice in the *Federal Register* of New Jersey's request to enter into an agreement as authorized by Section 274 of the Atomic Energy Act (AEA) of 1954.² The Staff explained that under the proposed agreement the NRC

¹ Shieldalloy filed an amended motion on October 14, 2009 that makes reference to a letter from a New Jersey State official that Shieldalloy received shortly after it filed its original motion. Shieldalloy's amended motion makes changes to pages 6 and 15 of its initial motion. Although the differences between Shieldalloy's motions are immaterial to the Staff's arguments in this response, the Staff will focus its response on Shieldalloy's amended motion, and all citations to page numbers refer to the amended motion.

² *State of New Jersey: NRC Staff Assessment of a Proposed Agreement Between the Nuclear Regulatory Commission and the State of New Jersey*, 74 Fed. Reg. 25,283 (May 27, 2009). This

would relinquish, and New Jersey would assume, portions of the NRC's regulatory authority exercised within New Jersey. The regulatory authority to be relinquished by the NRC included the authority over persons issued source material licenses under 10 C.F.R. Part 40. The Staff explained that it had found New Jersey's proposed agreement satisfied the criteria in the Commission's policy statement on agreement state proposals³ and met the requirements of Section 274 of the AEA. The Staff also invited public comments on the proposed agreement, stating that the comment period would extend through June 26, 2009.

The Staff received a number of comments on the proposed agreement, including comments from Shieldalloy.⁴ Shieldalloy objected to the proposed agreement as it related to its Newfield facility. Shieldalloy argued that the NRC could, and should, exempt the Newfield facility from the proposed agreement and thereby retain authority over the facility. The Staff concluded that Shieldalloy's comments did not give the Staff reason to change its prior conclusions that the proposed agreement was both consistent with Commission policy and met the requirements of Section 274 of the AEA.⁵

notice appeared weekly in the Federal Register through June 17, 2009. 74 Fed. Reg. 26,739 (June 3, 2009); 74 Fed. Reg. 27,572 (June 10, 2009); 74 Fed. Reg. 28,728 (June 17, 2009).

³ *Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement*, 46 Fed. Reg. 7540 (January 23, 1981) (revised 48 Fed. Reg. 33,376 (July 21, 1983)). See also *Statement of Principles and Policy for the Agreement State Programs*, 62 Fed. Reg. 46,517 (Sept. 3, 1997) and *Policy Statement on Adequacy and Compatibility of Agreement State Programs*, 62 Fed. Reg. 46,517 (Sept. 3, 1997).

⁴ Comments received on the proposed agreement can found at ADAMS Accession Nos. ML091680374, ML091680375, ML091700392 (package that includes ML091700382 and ML091680491), ML091680387, ML091810997 and ML091900370.

⁵ SECY-09-0114, "Section 274B Agreement with the State of New Jersey" (ADAMS Accession No. ML091940381) (August 18, 2009). Enclosure 2 of SECY-09-0114 (ADAMS Accession No. ML091950400) contains the Staff's responses to comments it received on the proposed agreement.

On September 23, 2009, the NRC and the State of New Jersey finalized an agreement pursuant to Section 274 of the AEA.⁶ Under the agreement the NRC relinquished, and New Jersey assumed, certain portions of the NRC's regulatory authority effective September 30, 2009. The regulatory authority transferred to New Jersey under this agreement includes authority over source materials.⁷ New Jersey's regulatory authority therefore extends to Shieldalloy's Newfield Facility, for which Shieldalloy held an NRC-issued source material license. Based on the NRC's transfer of regulatory authority over the Newfield facility to New Jersey, the Staff discontinued its review of Shieldalloy's decommissioning plan (DP)—the subject of the administrative hearing in which Shieldalloy has filed its motion⁸—and forwarded files associated with its DP review to New Jersey.⁹

On October 13, 2009, Shieldalloy filed its motion for a stay, and the next day Shieldalloy filed its amended motion. Shieldalloy states that “it 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.” Motion at 2. Shieldalloy explains that the basis for its request for judicial review will be that “the NRC failed to meet the requirements of Section 274b of the Atomic Energy Act ('AEA'), 42

⁶ *Agreement between the United States Nuclear Regulatory Commission and the State of New Jersey for the Discontinuance of Certain Commission Regulatory Authority and Responsibility within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended*, 74 Fed. Reg. 51,882 (October 8, 2009).

⁷ Agreement at Article I.4.

⁸ Although Shieldalloy filed its motion in the context of the administrative hearing concerning its DP for the Newfield Facility, Shieldalloy's motion is more appropriately viewed as an appeal of the NRC's decision to not exempt the Newfield Facility from the NRC-New Jersey Agreement. Shieldalloy's requested relief, a stay of the transfer of *all* regulatory authority over the Newfield Facility, clearly exceeds the scope of the hearing, which concerns only whether the Staff should approve Shieldalloy's DP.

⁹ See NRC Staff's Fifteenth Status Report (ADAMS Accession No. ML092750052) (October 1, 2009) (notifying the Board that the Staff has discontinued its review of Shieldalloy's DP).

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." Motion at 2.

Shieldalloy argues that, pending judicial review, the Commission should stay the effectiveness of the NRC's transfer of regulatory authority over the Newfield Facility to New Jersey. Shieldalloy argues that a stay is warranted under 10 C.F.R. § 2.342, which states that "[w]ithin ten (10) days after service of a decision of a presiding officer, any party to the proceeding may file an application for a stay of the effectiveness of the decision or action[.]" 10 C.F.R. § 2.342(a). Without explaining how the NRC's transfer of authority to New Jersey can be considered a "decision or action" of the presiding officer in this proceeding,¹⁰ Shieldalloy turns to 10 C.F.R. § 2.342(e), which states that in evaluating a motion for a stay the Commission will consider the following 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.

Motion at 5.

Focusing on the second factor, Shieldalloy argues that it will suffer irreparable injury if a stay is not granted because New Jersey will not allow Shieldalloy to decommission its Newfield Facility under the Long Term Control (LTC) approach outlined in NUREG-1757, "Consolidated Decommissioning Guidance." Motion at 6. According to Shieldalloy, New Jersey will instead order Shieldalloy to remove radioactive materials from the Newfield Facility and ship them offsite. Motion at 6–8. Shieldalloy states that it will be harmed because the "cost of implementing the removal option would

¹⁰ See *Shieldalloy Metallurgical Corp.*, Establishment of Licensing Board, (January 23, 2007) (ADAMS Accession No. ML070230228) (establishing a three-judge panel to preside over the proceeding).

be over \$70 million, as opposed to the less than \$15 million cost to implement the LTC Alternative,” and because “Shieldalloy cannot defray a \$70 million cost of removal of the materials from the site.” Motion at 6–7. Shieldalloy also argues that removal of radioactive materials from the Newfield Facility would result in other injuries in the form of radiation exposure and inhalation of airborne radioactivity by Shieldalloy employees, contractors, decommissioning workers, and members of the public. Motion at 7–8.

DISCUSSION

The Commission should deny Shieldalloy’s motion because the NRC has relinquished regulatory authority over the Newfield facility and, for that reason, lacks the authority to grant the relief Shieldalloy requests. Further, although there are well-defined circumstances under which the NRC might terminate or suspend part of the NRC-New Jersey agreement and reinstate its authority over the Newfield Facility, Shieldalloy fails to show that any of those circumstances exist at this time.

I. The NRC Has Relinquished Regulatory Authority over the Newfield Facility

Section 274 of the AEA governs the NRC’s ability to enter into, suspend or terminate a State Agreement. Section 274b authorizes the NRC to enter into agreements to relinquish its regulatory authority and allows states to assume regulatory authority over specified radioactive materials and activities. Once the NRC has determined that a state’s regulatory program is adequate to protect public health and safety and compatible with the NRC’s regulatory program, and once an agreement has been signed and become effective, the NRC no longer has direct authority over formerly regulated materials and activities.¹¹

¹¹ See *In the Matter of State of Utah (Agreement Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended)*, DD-95-1, 41 NRC 43, 46 (January 26, 1995) (Decision of Richard L. Bangart, Director of the Office of State Programs) (explaining that because pursuant to section 274 of the AEA the NRC relinquished its regulatory authority over the licensing of low-level radioactive waste (LLRW) to Utah, the NRC has no direct authority over licensing of LLRW facilities in Utah).

On September 30, 2009, the effective date of the agreement between the NRC and New Jersey, the NRC's regulatory authority over sources materials—and with it the NRC's authority over Shieldalloy's Newfield Facility—transferred to New Jersey. This transfer of authority was twofold: New Jersey not only assumed regulatory authority over the Newfield Facility, but the NRC relinquished its authority over the facility. Because the NRC no longer has regulatory authority over the Newfield Facility, there is no basis upon which the NRC could at this time grant the relief Shieldalloy seeks. Further, although there are procedures in the AEA under which the NRC might reinstate its authority over the Newfield Facility, the mere existence of these procedures cannot justify granting a stay at this time. The Staff addresses this issue next.

II. Shieldalloy Has Not Demonstrated the Applicability of AEA Provisions Establishing Specific Procedures through which the NRC Might Reinstate Its Regulatory Authority over the Newfield Facility

Section 274j of the AEA defines the circumstances under which the NRC can terminate or suspend all or part of its agreement with a state and reinstate the NRC's regulatory authority.¹² The NRC may on its own initiative suspend or terminate all or part of its agreement with a state, but only after providing reasonable notice of its intention and the opportunity for a hearing. The NRC may also suspend or terminate all or part of its agreement with a state upon the request of a state governor. In both situations, however, the NRC can suspend or terminate an agreement only if it finds that (1) termination or suspension is required to protect the public health and safety, or (2) the State has not complied with one or more of the requirements of Section 274.

Section 274j also allows the NRC to temporarily suspend all or part of its agreement with a state *without* notice or hearing, but only if there is an emergency situation creating danger that requires immediate action to protect public health or

¹² See *also* DD-95-1, 41 NRC at 46–47 (explaining that under section 274j of the AEA the NRC has the authority to terminate or suspend an Agreement State's program).

safety. Further, the NRC can only take such action if the state has failed to contain or eliminate the cause of the danger within a reasonable period of time.

Shieldalloy argues that a stay is warranted because in reviewing the proposed agreement the NRC erroneously found that New Jersey's radiation control program is compatible with the NRC's regulatory program. Motion at 2. As stated above, Shieldalloy also argues that it would be irreparably harmed if a stay is not granted. Motion at 6–8. These claims, even if true, do not provide a sufficient basis for the Commission to grant a stay at this time. Any authority the Commission has to grant a stay would derive from the NRC's regulatory authority over the Newfield Facility. The NRC has relinquished that authority, however, and transferred its authority to New Jersey. In the event the NRC sought to reinstate the regulatory authority it formerly exercised over the Newfield Facility (and barring any request from New Jersey's Governor to terminate or suspend New Jersey's authority over the facility) the NRC would have to provide notice and the opportunity for a hearing before reasserting its authority.¹³

Although Section 274j allows the NRC to temporarily suspend all or part of its agreement with a state without notice or a hearing, the NRC can take such action only in certain emergency situations where the state has failed to take steps necessary to contain or eliminate the cause of danger within a reasonable period of time. Shieldalloy does not identify any such circumstance. Shieldalloy's claim that it will suffer financial

¹³ To the extent Shieldalloy's motion for a stay might be construed as a request for the Commission to initiate the procedures under which the NRC could reinstate its regulatory authority over the Newfield Facility, the Staff opposes such a request. Shieldalloy's arguments that New Jersey's radiation control program is incompatible with the NRC's regulatory program are not materially different than comments Shieldalloy submitted on July 17, 2009 regarding the proposed NRC-New Jersey Agreement. The Staff concluded that those comments did not provide a sufficient basis for the NRC to deny New Jersey's request to become an Agreement State or exclude transferring the Newfield Facility source material license to New Jersey upon the effective date of the Agreement. SECY-09-0114 (Enclosure 2) (ADAMS Accession No. ML091950400). For similar reasons, the Staff submits that Shieldalloy's present arguments do not provide a sufficient basis for the Commission to initiate the 274j process and seek to reinstate its authority over source materials in New Jersey and the Newfield Facility.

harm resulting from New Jersey's exercise of regulatory authority cannot be considered an "emergency situation" presenting danger to the public. Although Shieldalloy also argues that removal of waste from its Newfield Facility would lead to injuries in the form of radiation exposures by workers and members of the public, this claim is speculative. Measured by the standard in Section 274j, which requires a finding that the state has failed to take necessary action within a reasonable period of time, this claim is also entirely premature.

In sum, Shieldalloy's reliance upon 10 C.F.R. § 2.342(e), the NRC's regulation governing motions for a stay, is misplaced because § 2.342(e) cannot enlarge the NRC's statutory authority. To the extent there is no statutory basis for the NRC asserting regulatory authority over the Newfield Facility, § 2.342(e) alone cannot grant that authority to the NRC. Section 274 of the AEA specifically addresses the circumstances under which the NRC can reinstate the regulatory authority it has relinquished under an agreement with a state. Once the NRC has relinquished its authority over a designated class of radioactive materials under such an agreement, the NRC must follow the procedures in Section 274 before it can reassert regulatory authority over the class of radioactive materials and over persons possessing such materials.

CONCLUSION

Because the NRC relinquished regulatory authority over the Newfield Facility effective September 30, 2009, and because the NRC has not reinstated that authority through the procedures specified in Section 274 of the AEA, the Commission lacks the authority to grant Shieldalloy's requested relief. The Commission should therefore deny

Shieldalloy's motion to stay the transfer of the NRC's regulatory authority over the Newfield Facility to New Jersey.

Respectfully submitted,

/RA/

Michael J. Clark
Counsel for the NRC Staff

Dated at Rockville, Maryland
This 23rd day of October, 2009

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO SHIELDALLOY'S MOTION FOR A STAY" 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 23rd day of October, 2009.

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@verizon.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@embarqmail.com

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: richard.wardwell@nrc.gov

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

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

Office of the Secretary * **
Attn: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 G4
Washington, D.C. 20555
E-mail: hearingdocket@nrc.gov

David R. Smith, Radiation Safety Officer
Shieldalloy 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. **
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
E-mail: reeseand@dol.lps.state.nj.us
Kenneth.elwell@dol.lps.state.nj.us

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

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: sherverne.cloyd@nrc.gov

/RA/

Michael J. Clark
Counsel for the NRC Staff