

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHIELDALLOY METALLURGICAL CORPORATION)
Petitioner,)
)
v.)
)
UNITED STATES NUCLEAR REGULATORY)
COMMISSION and the)
)
UNITED STATES OF AMERICA)
Respondents.)
)
_____)

No. 09-1268

PETITIONER’S MOTION FOR STAY

INTRODUCTION

Pursuant to the D.C. Circuit Rules 18 and 27, Petitioner Shieldalloy Metallurgical Corporation (“Shieldalloy”) respectfully moves the Court for an order staying the effectiveness of the transfer of regulatory authority over Shieldalloy’s Newfield, New Jersey facility (“Newfield Facility”) from the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) 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 NRC and the

State (“the Agreement”). See Exhibit A hereto, 74 Fed. Reg. 51,882 (October 8, 2009).

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, and the transfer of regulatory authority over the Newfield Facility should be stayed pending review by this Court.

Shieldalloy filed a motion with the NRC seeking a stay of the effectiveness of the transfer of regulatory authority over the Newfield Facility (“NRC Motion to Stay”). See Exhibit B hereto. As of the date of this filing, the NRC has not ruled on the NRC Motion to Stay.

FACTUAL BACKGROUND

A. Status of Newfield Facility

Shieldalloy is the holder of License No. SMB-743, first issued by the Atomic Energy Commission (“AEC”) in 1963 and subsequently renewed and

amended on a number of occasions by the AEC and its successor agency the NRC, most recently on November 26, 2002. See Exhibit C hereto. The current amendment authorizes Shieldalloy to possess at the site, pending decommissioning, up to 303,050 kg (334 tons) of thorium in any chemical/physical form, and up to 45,000 kg (50 tons) of uranium in any chemical or physical form. These materials are classified as “source material” by Section 11.z of the AEA.¹ No operations other than storage and activities associated with authorized decommissioning are permitted.

Shieldalloy prepared and submitted in August 2009 to the NRC Staff (“Staff”) a decommissioning plan (“DP”) for the Newfield Facility under which it plans to consolidate all radioactively-contaminated materials present at the 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. Affidavit of Hoy E. Frakes, Jr. (“Frakes Aff.”), attached as Exhibit A to the NRC Motion to

¹ Section 11.z of the AEA states: “The term ‘source material’ means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 61 to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.” 42 U.S.C. §2014(z).

Stay (Exhibit B hereto), at ¶ 3. This decommissioning approach, known as the Long Term Control or “LTC” Alternative, is based on and satisfies the applicable NRC guidance. Id. The NRC Staff has declined to review the DP due to the transfer of regulatory authority over the Newfield Facility to New Jersey.

B. Transfer of NRC Regulatory Authority to New Jersey

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, such as those currently present at the Newfield Facility. Id.

On October 16, 2008, the Governor of New Jersey submitted a formal Agreement State application, certifying that “the State of New Jersey has an adequate program for the control of radiation hazards covered by this proposed agreement.”² Previously, New Jersey had issued for comment, and then

² Exhibit A hereto, 74 Fed. Reg. at 51,883.

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").

Shieldalloy submitted comments on the decommissioning aspects of 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) (Exhibit D hereto) at 4-8.

On the recommendation of the Staff 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) (Exhibit E hereto), the Commission 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 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. See Exhibit F hereto.

On August 18, 2009 the Staff submitted to the Commission SECY-09-0114, "Section 274B Agreement with the State of New Jersey," (Exhibit G hereto) 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.

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) (Exhibit A hereto). The Agreement became effective on September 30, 2009, and transferred to New Jersey regulatory authority over, *inter alia*, source materials such as those at the Newfield Facility. 74 Fed. Reg. at 51,883.³

³ 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

ARGUMENT

D.C. Circuit Rule 18(a)(1) requires that a motion to stay agency action address with specificity each of the following factors: (1) the likelihood that the moving party will prevail on the merits; (2) the prospect of irreparable injury to the moving party if relief is withheld; (3) the possibility of harm to other parties if relief is granted; and (4) the public interest. All of these factors militate towards the granting of a stay in this case.

A. Likelihood of Success on the Merits

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

Agreement. SMC is a source material licensee and currently has a decommissioning plan under review by NRC.” SECY-09-0114, Exhibit G hereto, at 3-4.

statement on State Agreements.⁴ 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.

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.”⁵

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

⁴ *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*”) (Exhibit H hereto).

⁵ *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), Exhibit I hereto.

New Jersey. The discussion below summarizes some of the errors in the Staff's determination that will warrant overturning by the 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." Exhibit H at 4.

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. 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 acknowledged the discrepancy but stated that the New Jersey Brownfield statute precludes compliance with ALARA in New Jersey. Exhibit D at 8.

Shieldalloy pointed out the New Jersey Program's failure to include ALARA compliance in the comments it submitted to the NRC Staff with regard to the proposed Agreement between the NRC and New Jersey. Exhibit F at 3-5. The Staff's response to this comment was that New Jersey is allowed to implement

regulations that are “stricter” than the requirements of 10 C.F.R. Part 20. SECY-09-0114, Enclosure 2 at 5. This resolution is erroneous because a State cannot implement standards that are different from, and inconsistent with, those in the NRC radiation protection regulations, which are “basic radiation protection standards.” Regulations that do not apply the ALARA principle are also not “stricter” than the NRC regulations. In this case the NJDEP Regulations, if applied to the Newfield Facility, would result 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. at ¶ 11. 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.

- 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 include:

- 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. See Exhibit F at 3-5. The Staff, however, 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.” SECY-09-114, Exhibit G hereto, Enclosure 2 at 5. That “equivalency” does not in fact exist. 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." Exhibit H at 4. 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 several examples of New Jersey's failure to provide for the possibility of granting necessary exceptions to the regulatory standards that do not jeopardize health and safety. Exhibit F hereto at 5-7. In response to Shieldalloy's comments the Staff cited a provision in the NJDEP regulations that ostensibly allow for exemptions of regulations. Exhibit G, 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." Exhibit D hereto, 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

NRC 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.

Exhibit H at 7.

The NJDEP had stated repeatedly that it opposes Shieldalloy's proposed plan for the decommissioning of the Newfield Facility under the LTC Alternative and that, upon assuming regulatory authority over the Newfield Facility, it would not continue review of the DP that Shieldalloy intended to submit to the NRC. Shieldalloy pointed out this state of affairs in its comments to the NRC. In response, the Staff indicated that upon the transfer of regulatory authority

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. As predicted, New Jersey rejected the DP, barely a week after the transfer of regulatory authority, and required the filing of a new DP that complies with the New Jersey requirements. See Exhibit B to NRC Motion to Stay, Exhibit B hereto. Thus, licensed activities at the Newfield facility have been disrupted and remain on hold. The New Jersey Program, as applied to Newfield, does not satisfy Compatibility Criterion 25.

The above discussion demonstrates 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 satisfied.

B. Irreparable Injury to Petitioner if NRC Transfer of Regulatory Authority to New Jersey is not Stayed

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. Frakes Aff. at ¶ 9. In fact, New Jersey has already rejected

Shieldalloy's proposed LTC Alternative and directed that Shieldalloy submit a decommissioning plan based on the NJDEP regulations requiring such removal. See Exhibit B to NRC Motion to Stay, Exhibit B hereto.

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. Frakes Aff. at ¶ 9. 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 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. Here, the very survival of the company is at stake. It is hard to conceive a more substantial, irreparable injury: potential bankruptcy or destruction of one's business has been held by this Court 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).

C. Harm to the Other Parties if Stay is Granted

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

D. The Public Interest is Furthered by the Granting of a Stay

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. 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.* 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. *See, e.g.*, 10 C.F.R.

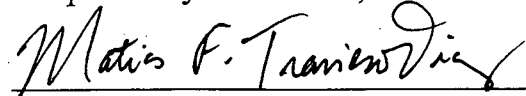
§ 20.1402. Indeed, the total doses to workers and the public resulting from the removal process would be larger than those that would result from implementation of the LTC Alternative. Frakes Aff. at ¶ 11.

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 complete the Court's review will not cause any adverse health or environmental consequences. In addition, the public interest will 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.

CONCLUSION

For the reasons stated above, Shieldalloy's motion should be granted and the Court should stay the effectiveness of the transfer of the NRC's regulatory authority over the Newfield Facility to New Jersey pending a decision on the merits on Shieldalloy's Petition.

Respectfully submitted,



Jay E. Silberg

Matias F. Travieso-Diaz

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Counsel for Shieldalloy Metallurgical
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Dated: December 2, 2009

ADDENDUM

Pursuant to Circuit Rule 27, following are (1) A certificate of parties and amici, in accordance with Circuit Rule 28(a)(1)(A); and (2) a disclosure statement, in accordance with Circuit Rule 26.1.

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PETITIONER'S CERTIFICATE OF PARTIES AND AMICI

In accordance with Circuit Rule 28(a)(1)(A), Petitioner Shieldalloy
Metallurgical Corporation ("Shieldalloy") certifies as follows:

1. **Parties:** In addition to Petitioner, parties to this action are Respondents U.S. Nuclear Regulatory Commission ("NRC") and the United States of America.
2. **Intervenors and Amici:** Petitioner is not aware of any intervenors or amici in this action.

Respectfully submitted,

Matias F. Travieso-Diaz

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Counsel for Shieldalloy Metallurgical
Corporation

Dated: December 2, 2009

UNITED STATES COURT OF APPEALS
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PETITIONER’S CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Petitioner Shieldalloy Metallurgical Corporation (“Shieldalloy”) by and through its undersigned counsel, hereby certifies that:

Shieldalloy is a Delaware Corporation and is a direct, wholly-owned subsidiary of Metallurg, Inc., a Delaware corporation, and an indirect subsidiary of Metallurg Holdings, Inc., a Delaware Corporation. It is also an indirect subsidiary of Metallurg Delaware Holdings Corporation, a privately-owned holding company, and of AMG Advanced Metallurgical Group N.V. (“AMG”), a publicly-owned company.

Shieldalloy is an industrial company that manufactured for a number of years metal alloys from ores containing small amounts of uranium and thorium. Shieldalloy has held for many years materials license No. SMB-743 issued by the U.S. Nuclear Regulatory Commission ("NRC") authorizing it to possess the uranium and thorium at its facility in Newfield, New Jersey. Such license has been transferred to the State of New Jersey by order of the NRC.

Respectfully submitted,



Jay E. Silberg
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Counsel for Shieldalloy Metallurgical
Corporation

Dated: December 2, 2009

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petitioner's Motion to Stay and Addendum, and Exhibits thereto, were filed with the Clerk of the Court using the CM/ECF System this 2nd day of December, 2009. An original and four paper copies were also filed with the Clerk of the Court by overnight mail on this date. In addition, the following participants in the case who are registered users will be served through the CM/ECF System:

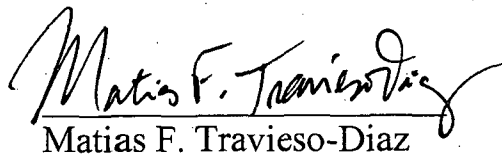
John Cordes, Jr., Solicitor
Grace H. Kim, Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission

In addition, a copy of the foregoing Petitioner's Motion to Stay and Addendum, and Exhibits thereto, was served by overnight mail on the following participant in the case who is not known to be a registered CM/ECF System user:

Eric Holder
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

In addition, courtesy copies of the foregoing Petitioner's Motion to Stay and Addendum, and Exhibits thereto, were served by overnight mail on the following non-parties:

Anne Milgram, Esq.
Attorney General of New Jersey
Andrew W. Reese, Esq.
Deputy Attorney General
Kenneth Elwell, Esq.
Deputy Attorney General
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Matias F. Travieso-Diaz