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**NUCLEAR REGULATORY COMMISSION**

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Pre-hearing Conference

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RULEMAKINGS AND  
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ASLBP Number: 07-852-01-MLA-BD01

Location: (telephone conference)

Date: Monday, November 22, 2010

Work Order No.: NRC-583

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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PRE-HEARING CONFERENCE

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IN THE MATTER OF :  
SHIELDALLOY METALURGICAL : Docket No. 40-7102-MLA  
CORPORATION : ASLBP No. 07-852-01-  
(License Amendment : MLA-BD01  
Request for :  
Decommissioning the :  
Newfield Facility :

-----x

Monday, November 22, 2010

Teleconference

BEFORE:

ALAN S. ROSENTHAL, Chairman  
DR. RICHARD E. WARDWELL, Administrative Judge  
DR. WILLIAM H. REED, Administrative Judge

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PAGE

Opening Remarks	5
Introductions	6
Discussion	6
Adjourn	22

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## P R O C E E D I N G S

(10:21 a.m.)

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3 CHAIRMAN ROSENTHAL: This teleconference  
4 in the Matter of Shieldalloy Metalurgical Corporation  
5 is being held pursuant to a November 15, 2010 order  
6 issued by the Atomic Safety and Licensing Board  
7 assigned to this proceeding.

8 As stated in that order, the principle  
9 purpose of the conference is to discuss the current  
10 status of the proceeding in light of the November 9,  
11 2010 decision of the United States Court of Appeals  
12 for the District of Columbia Circuit and Shieldalloy  
13 Metalurgical Corporation versus NRC et al.

14 In that decision, the Court overturned the  
15 September 30, 2009 transfer of regulatory jurisdiction  
16 over the decommissioning of the Shieldalloy's  
17 Newfield, New Jersey site from the NRC to the State of  
18 New Jersey.

19 I am Alan S. Rosenthal, the Chairman of  
20 this Licensing Board. Participating in the conference  
21 with me are the other two members of the Board, Judges  
22 Richard E. Wardwell and William H. Reed.

23 Before calling on counsel to identify  
24 themselves for the record, I have a request. The  
25 conference is being stenographically recorded. And

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1 for the benefit of the court reporter, I ask that  
2 every participant identify himself each time that he  
3 speaks.

4 With that, I will now turn to the  
5 identification of counsel. And I will start with  
6 Counsel for the Staff.

7 MR. CLARK: Good morning. For the staff,  
8 this is Michael Clark. With me from OGC is -- from  
9 the NRC's Office of the General Counsel is Brett  
10 Klukan.

11 CHAIRMAN ROSENTHAL: Thank you, Mr. Clark.  
12 For the Licensee?

13 MR. TRAVIESO-DIAZ: Yes, Your Honor. This  
14 is Mat Travieso-Diaz, Counsel for ShieldAlloy from  
15 Pillsbury Winthrop Shaw Pittman.

16 CHAIRMAN ROSENTHAL: Thank you.

17 And now for the State of New Jersey.

18 MR. REESE: This is Andrew Reese, Deputy  
19 Attorney General for the State of New Jersey.

20 CHAIRMAN ROSENTHAL: Thank you.

21 Okay. I think the starting point is that  
22 I will ask Mr. Clark to provide a report as to where  
23 the staff now stands in light of the Court of Appeals  
24 decision. I think we can probably agree that the one  
25 thing that is not going to happen is Supreme Court

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1 review of that decision. At least it seems to me that  
2 there is no possible issue in the Court's decision  
3 that might be of the slightest interest to the Supreme  
4 Court.

5 So the ball seems to be back in the  
6 Staff's corner. And, Mr. Clark, you might illuminate  
7 us as to what the staff currently has in mind.

8 MR. CLARK: Certainly, Your Honor. I'd  
9 want to emphasize at the beginning that I am not the  
10 counsel involved in the Federal Court litigation. I  
11 am also not personally advising the Commission in  
12 response to the remand. Thus, I don't want to say  
13 anything that would be viewed as a statement of the  
14 Commission's views or the views of other Agency  
15 counsel on this matter.

16 CHAIRMAN ROSENTHAL: Understood.

17 MR. CLARK: But second I would say that my  
18 understanding is that although the decision issued on  
19 November 9th, the Circuit Court's mandate does not  
20 become effective until I believe it is December 27th.  
21 And certainly I'd appreciate if the other counsel for  
22 New Jersey and Shieldalloy would weigh in if that  
23 information is incorrect.

24 MR. TRAVIESO-DIAZ: This is Mat Travieso-  
25 Diaz. The way I figure out, and I might be wrong, I

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1 think it is December 31st. The mandate is 45 days  
2 under Federal Rule 40, 45 days from November 9th plus  
3 seven days after that for the mandate to be effective.  
4 And I believe that is December 31st but I may be  
5 wrong.

6 CHAIRMAN ROSENTHAL: Well, am I to infer  
7 from that, Mr. Clark, that the staff doesn't intend to  
8 anything at all with respect to the next step until  
9 the mandate is handed down?

10 MR. CLARK: The staff is certainly  
11 weighing its options. And trying to determine how  
12 best to proceed. The staff is also aware that as of  
13 late December, December 31st or whatever date the  
14 mandate becomes effective, that jurisdiction will --  
15 for lack of a better word, jurisdiction will revert  
16 back to the NRC. And the staff is certainly aware of  
17 the responsibilities that come with the resumption of  
18 jurisdiction of Shieldalloy's Newfield site.

19 CHAIRMAN ROSENTHAL: Well, what I'm  
20 getting at is is the staff going to wait until the  
21 mandate issues before it undertakes to consider the  
22 various options before it? Or is it going to  
23 undertake that -- or has it already undertaken that  
24 task in recognition of the fact that as a matter of  
25 virtual certainty, this case -- or rather this

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1 jurisdiction is going to be back in the NRC's hands?

2 MR. CLARK: This is Mike Clark. Your  
3 Honor, the staff has undertaken the task of weighing  
4 its options if that was the question that you asked.  
5 I can say with certainty that the staff has undertaken  
6 the task of considering its options.

7 CHAIRMAN ROSENTHAL: And what are those  
8 options?

9 MR. CLARK: Let's say the three general  
10 options would be to -- one option, of course, would be  
11 to -- I guess for a lack of a better word again, to  
12 acquiesce to the Court's ruling and resume  
13 jurisdiction over the site in its entirety and proceed  
14 with review of the decommissioning plan, specifically  
15 Revision 1b, which was submitted on August 28th, 2009.

16 Another option would be to -- Your Honor,  
17 the staff's options will depend, in large part, on the  
18 Commission's direction. The Commission, as you are  
19 aware, will be the body of the NRC that decides how to  
20 respond to the District Court's mandate. The staff  
21 will be -- the staff's responsible depend in large  
22 part on the direction the Commission decides to take.

23 CHAIRMAN ROSENTHAL: Well, I understand  
24 that. But I'm just interested at this point in what  
25 the options are that the, as the staff sees it, that

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1 the Commission will consider and presumably select one  
2 of them.

3 So you've indicated one of the options is  
4 to, as you put it, acquiesce in the Court's decision  
5 and to resume considering the decommissioning plan  
6 that's now before -- that was before the staff.

7 Now what are the other options?

8 MR. CLARK: One other option would be to  
9 seek additional input and attempt to provide a --  
10 after receiving the input, to make a decision as to  
11 what course to take. Whether to attempt to reinstate  
12 the transfer of jurisdiction to New Jersey or based on  
13 that additional input, to not seek to do that.

14 CHAIRMAN ROSENTHAL: Input from whom?

15 MR. CLARK: Input could be from the  
16 general public. It could be from the parties that are  
17 involved in the administrative proceeding.

18 CHAIRMAN ROSENTHAL: Are there any other  
19 options?

20 MR. CLARK: Another option depending, the  
21 staff could decide to simply provide, in its view, a  
22 more thorough explanation of the reasons for the  
23 transfer and again reinstate the transfer of  
24 jurisdiction.

25 There are, of course, other options. And,

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1 again, Your Honor, I want to be careful here because,  
2 as I stated and you are aware, I'm not representing --  
3 I'm not personally advising the Commission. And  
4 there's another office within the Office of General  
5 Counsel that is doing that. So these are just the  
6 views of, you know, counsel who is advising the staff  
7 in the administrative proceeding.

8 Certainly there could be some sort of  
9 attempt to resolve the issues through other means.  
10 I'm certainly not -- it is not within my authority to  
11 suggest any settlement negotiations but I mean any  
12 type of settlement agreement, that would be one other  
13 possibility.

14 But broadly speaking, Your Honor, as it  
15 relates to this proceeding, the two basic options are  
16 to resume review of the decommissioning plan or to not  
17 resume review. The third option would be to postpone  
18 a decision until some future time.

19 And right now, my understanding is that  
20 the staff does not intend to resume review of the  
21 decommissioning plan at least until December 31st,  
22 until the mandate becomes effective. And right now I  
23 cannot speak to whether the staff will review -- begin  
24 review of the decommissioning plan after that date.

25 CHAIRMAN ROSENTHAL: Do you, Mr. Clark,

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1 have any idea as to what was the status of the  
2 technical review of the decommissioning plan at  
3 September the 30th, 2009, when jurisdiction was  
4 transferred? I ask that question because it is my  
5 impression that -- I might be wrong but it is my  
6 impression that the decommissioning plan had been  
7 under a staff technical review for a considerable  
8 period of time when jurisdiction was transferred.

9 MR. CLARK: You're correct, Your Honor.  
10 It was under staff review. However, as I stated  
11 previously, on August 28th, 2009, we received Revision  
12 1b to Shieldalloy's decommissioning plan. I  
13 understand that the revision involved some amount of  
14 duplication with prior submittals.

15 But by my count, the revision was  
16 approximately 3,500 pages. Much of that information  
17 the staff had not seen previously. And because of the  
18 time it was submitted, my understanding is that the  
19 staff did not have much opportunity to do more than  
20 simply conduct a brief review. And frankly, Your  
21 Honor, I don't even know if the staff had the  
22 opportunity to do that.

23 CHAIRMAN ROSENTHAL: So the staff has  
24 received shortly before it terminated jurisdiction a  
25 very extensive revised decommissioning plan, which

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1 presumably would -- assuming that the staff now  
2 resumes the technical review, would take a  
3 considerable period of time to review? Is that a  
4 reasonable assumption?

5 MR. CLARK: This is Mike Clark. You're  
6 correct -- that's correct, Your Honor.

7 CHAIRMAN ROSENTHAL: All right. I would  
8 like to ask, at this point, New Jersey, how this all  
9 sits with it. Specifically, if the staff resumes  
10 jurisdiction, it apparently is going to be a  
11 protracted period before -- or might be a protracted  
12 period before the staff concludes its technical review  
13 and the adjudicatory proceeding could move forward.

14 Is this a matter of concern to New Jersey?

15 MR. REESE: It's a matter of -- this is  
16 Andrew Reese. It is a matter of concern to us but if  
17 the NRC is going to decide to keep jurisdiction, I'm  
18 not sure if there is any way to do it but to allow  
19 them to, you know, do a review of the application,  
20 which is what they were doing before they granted us  
21 jurisdiction.

22 If I could also just add, you know, I  
23 agree with Mr. Clark. It makes sense to hear from the  
24 Commission to see what they are going to do in terms  
25 of whether they are going to hold jurisdiction or

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1 attempt to give the State of New Jersey jurisdiction  
2 again.

3 CHAIRMAN ROSENTHAL: Well, let me ask you  
4 this. My understanding is that from day one, the  
5 concern of New Jersey was largely in the rainwater  
6 percolating through the slag pile. And then the water  
7 getting into the aquifer and contaminating it.

8 Now my impression is that it rains in New  
9 Jersey on a fairly regular basis. And that for many  
10 years, and this proceeding, as we can all agree, has  
11 grown whiskers over the course of the numerous years  
12 that it has been on the docket, that the rainwater has  
13 percolated it. I mean hasn't any of the damage that  
14 New Jersey was concerned about already occurred?

15 MR. REESE: Well, you know, one of our  
16 main concerns was that Shieldalloys failed to  
17 adequately characterize the site. And we ask that  
18 they do more testing and install more wells to see if  
19 there is contamination to the groundwater or to the  
20 Hudson Creek Branch, which is nearby, or the soils.  
21 And I don't know if that was done pursuant to this  
22 last decommissioning plan.

23 And if it has, we'll have to take a look  
24 and see if there is ongoing contamination and, you  
25 know, there were discussions in the past about

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1 instituting some intermediate measures to stop any  
2 potential contamination to the Hudson Creek and to the  
3 groundwaters. And I don't recall there being any  
4 solutions in terms of implementing some interim  
5 measures.

6 CHAIRMAN ROSENTHAL: Well, I take it that  
7 during this lengthy period since the metalurgical  
8 operation ceased, and that was what -- 12 years or so  
9 ago? That rainwater has been passing through the slag  
10 pile without any kind of remedial measures. Is that  
11 true?

12 MR. REESE: Yes.

13 CHAIRMAN ROSENTHAL: And that's something  
14 that New Jersey has sat idly by -- I mean I didn't  
15 recall, frankly, during this lengthy proceeding that  
16 anyone other than the Licensing Board itself was at  
17 all concerned about the snail pace that this  
18 proceeding was moving at. Am I right about that?

19 MR. REESE: We were certainly concerned  
20 about the snail pace. And made that clear throughout  
21 all of our filings with the various courts. The  
22 problem is that we haven't had jurisdiction to do  
23 anything about it. And when we did finally get  
24 jurisdiction, we sent a letter out to Shieldalloy  
25 shortly thereafter informing them to submit a

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1 decommissioning plan and giving them a deadline to do  
2 it.

3 And, you know, they refused to comply with  
4 that because they wanted to file their legal  
5 challenges. So, you know, I don't know what else the  
6 state could have done without having jurisdiction over  
7 the site.

8 CHAIRMAN ROSENTHAL: Well, my question was  
9 at any point during the -- and this is before the  
10 transfer of jurisdiction to your state -- at any point  
11 during those lengthy administrative proceeding where  
12 nothing was happening of any significance, did the  
13 state endeavor to bring pressure to bear upon the  
14 staff to move along at a more rapid pace its technical  
15 review?

16 MR. REESE: I don't know, Your Honor.

17 CHAIRMAN ROSENTHAL: All right.

18 Does the licensee having anything that  
19 they wish to say with regard to this matter at this  
20 stage?

21 MR. TRAVIESO-DIAZ: Yes, Your Honor, we  
22 have a lot to say.

23 CHAIRMAN ROSENTHAL: I'm sure you do. Go  
24 ahead.

25 MR. TRAVIESO-DIAZ: But let me first just

1 make it clear to the Board and the parties,  
2 Shieldalloy has a great desire that this proceeding be  
3 completed as expeditiously as possible.

4 Now the reason we had to file Rev. 1b to  
5 the decommissioning plan proposed in 2009 was because  
6 we had received over 200 requests for additional  
7 information from the staff based on the former plan  
8 that was filed in 2006, I believe, or 2007 -- 2006.  
9 And the new revision to the plan doesn't change  
10 basically -- in fact it doesn't change at all the  
11 approach that Shieldalloy has taken to the disposition  
12 of the site but includes the results of numerous  
13 analyses, test, and other things that have been done  
14 to respond to the questions of the staff during that  
15 three-year period.

16 So the reason that we have filed a more  
17 robust or more extensive filing is simply that we're  
18 trying to document the responses to the questions  
19 which, by the way, all of which have been discussed  
20 with the staff during the review process. And the  
21 staff is aware of it.

22 So I cannot speak for what the staff will  
23 do but I can tell you that it shouldn't take the staff  
24 that much time to review Rev. 1b of the  
25 decommissioning plan because the information that is

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1 there that is different from the former version has  
2 been discussed with the technical people of the staff  
3 in these last three years. So that's the first point  
4 that I would like to make.

5 The second point that I would like to make  
6 is there has been no effort to delay the proceeding  
7 and as far as we're concerned, we could have gone  
8 ahead with Rev. 1a except for the fact that there were  
9 all these questions. I believe that both New Jersey  
10 and the NRC now have Rev. 1b. I think that once they  
11 decide to go ahead with a review, that review could  
12 and should move along expeditiously.

13 If there are new information that could be  
14 the basis for either dropping contentions by New  
15 Jersey or adding contentions, they should be able to  
16 do that without great delay. So it does seem to me  
17 that even though in reality nothing can be done until  
18 the end of the year because of the pendency or the  
19 potential position for rehearing by the NRC, once  
20 jurisdiction comes back to them, they could move ahead  
21 without great delay in reviewing what they have.

22 I will also make the point that  
23 Shieldalloy will oppose strenuously any effort by the  
24 staff or by the NRC to try to either return  
25 jurisdiction to New Jersey or poll the public or

1 whatever for that purpose. There is nothing we can do  
2 today. But I can assure you that we will not sit idly  
3 by and let the effort to try to get this jurisdiction  
4 over to New Jersey again be either undertaken or  
5 delayed for a number of months.

6 CHAIRMAN ROSENTHAL: Oh, I think we can  
7 take that as a give.

8 Well, thank you.

9 Judge Wardwell, do you have anything you  
10 want to inquire about or contribute to this matter?

11 ADMIN. JUDGE WARDWELL: I have nothing to  
12 inquire about and nothing to contribute.

13 CHAIRMAN ROSENTHAL: And Judge Reed?

14 ADMIN. JUDGE REED: Same for me.

15 CHAIRMAN ROSENTHAL: Same for you. All  
16 right.

17 Is there anything else that anyone might  
18 wish to say?

19 MR. CLARK: Your Honor, this is Mike Clark  
20 for the NRC staff.

21 I'd just like to point out that as a  
22 matter of reviewing Revision 1b, the staff that was  
23 originally reviewing the decommissioning plan is now  
24 involved in other reviews. Of course, the staff is  
25 not just sitting idly by awaiting for the return of

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1 the DP. So as a matter of resources, even if the  
2 staff decided that it should, once again, start  
3 reviewing the decommissioning plan, there may be some  
4 lag time because of the necessity of drawing up to 15  
5 to 20 staff from other cases they are presently  
6 involved in reviewing.

7 So frankly it is a matter of Agency  
8 resources and how those resources are best spent. And  
9 right now the Office of Federal and State Materials  
10 Environmental Management Programs, or FSMEME is pretty  
11 busy right now.

12 CHAIRMAN ROSENTHAL: All right.

13 MR. CLARK: So I'm certain they would make  
14 every effort to devote resources where they are needed  
15 and if the Agency did decide to begin reviewing  
16 Revision 1b, we would try to do it as expeditiously as  
17 possible. I just mention that because of one possible  
18 limitation.

19 CHAIRMAN ROSENTHAL: All right. Thank  
20 you, Mr. Clark.

21 MR. TRAVIESO-DIAZ: May I be heard on  
22 that?

23 CHAIRMAN ROSENTHAL: Yes.

24 MR. TRAVIESO-DIAZ: Two observations.  
25 First, much of the technical review -- I know this

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1 because I participated in a number of conference calls  
2 -- is conducted by contractors; National Laboratories  
3 and so on, of the staff. So I expect that those  
4 laboratories will be available.

5 And second, I would beseech the staff to  
6 start getting the wheels in motion now and don't wait  
7 until the NRC decides that they are going to keep  
8 jurisdiction next year so they can start getting the  
9 resources lined up in the event that we decide to  
10 proceed. I would think that it would not be prudent  
11 and core consistent with the Board's concerns that the  
12 staff do nothing to try to line up its reviewers until  
13 after they decide they are going to start a review.

14 CHAIRMAN ROSENTHAL: All right. Well, I  
15 am hopeful -- and I think I speak for the full Board  
16 in this regard -- that the staff move with much  
17 alacrity as possible. And I'm certainly hopeful that  
18 the staff moves forward without waiting for the  
19 mandate to come down at the end of December.

20 I mean at least it seems to me at this  
21 juncture that the staff can put before the Commission  
22 the various options that are available. And once  
23 again, I'm totally persuaded that one of the options  
24 that is not available is seeking Supreme Court review.  
25 So that it seems to me that the staff is clearly

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1 confronted with the fact that it has this decision and  
2 the options that are before it are in the context of  
3 the decision being accepted. And then the choices are  
4 to be made.

5 With that, I think we'll terminate the  
6 conference. The Board will probably enter some kind  
7 of order within the next few days. Once again, all  
8 that I can say and I hope that I -- I know I speak for  
9 my colleagues -- is that this thing should -- this  
10 proceeding has been around a very, very long time.  
11 And there is every reason for it to move forward with  
12 as much dispatch as possible.

13 So with that, the conference is  
14 terminated. And I will request my colleagues,  
15 however, to remain on their line.

16 Thank you all for your participation.

17 (Whereupon, the above-entitled pre-  
18 hearing conference was concluded at 10:47 a.m.)  
19  
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CERTIFICATE

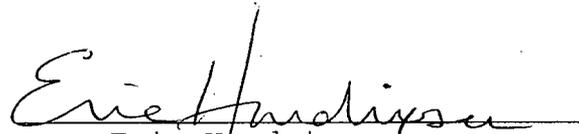
This is to certify that the attached proceedings  
before the United States Nuclear Regulatory Commission  
in the matter of:                   Shieldalloy Metalurgical Corp

Name of Proceeding: Pre-Hearing Conference

Docket Number:           40-7102-MLA

Location:                    (phone conference)

were held as herein appears, and that this is the  
original transcript thereof for the file of the United  
States Nuclear Regulatory Commission taken by me and,  
thereafter reduced to typewriting by me or under the  
direction of the court reporting company, and that the  
transcript is a true and accurate record of the  
foregoing proceedings.



Eric Hendrixson  
Official Reporter  
Neal R. Gross & Co., Inc.

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