

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alan S. Rosenthal, Chairman
Dr. Richard E. Wardwell
Dr. William H. Reed

In the Matter of

SHIELDALLOY METALLURGICAL CORP.

(Licensing Amendment Request for
Decommissioning of the Newfield, New Jersey
Facility)

Docket No. 40-7102-MLA
ASLBP No. 07-852-01-MLA-BD01
January 5, 2011

MEMORANDUM

1. On September 30, 2009, the NRC Staff transferred jurisdiction over the Newfield, New Jersey facility owned by Shieldalloy Metallurgical Corporation (Shieldalloy) to the State of New Jersey pursuant to Section 274 of the Atomic Energy Act.¹ Responding to Shieldalloy's appeal of that transfer of jurisdiction, in November 2010 the United States Court of Appeals for the District of Columbia Circuit vacated that transfer of jurisdiction and remanded the matter to the NRC for further proceedings.²

Following the remand, this Licensing Board held a teleconference with the parties on November 22 to discuss the status of the proceeding.³ During the teleconference, counsel for the NRC Staff emphasized that he is "not personally advising the Commission . . . [because] another office within the Office of General Counsel . . . is

¹ See Licensing Board Order (Oct. 21, 2009) at 1 (unpublished).

² Shieldalloy Metallurgical Corp. v. NRC, No. 09-1268, slip op. at 2, 14 (D.C. Cir. Nov. 9, 2010).

³ See Tr. at 54.

doing that”⁴ and that ultimately “[t]he Commission . . . will be the body of the NRC that decides how to respond to the” court’s decision once the mandate issues in late December 2010.⁵ Yet, NRC Staff counsel surmised that the Commission’s decision would come down to either retaining jurisdiction and moving forward with consideration of Shieldalloy’s decommissioning plan or, alternatively, finding some basis for transferring jurisdiction back to the State of New Jersey consistent with the court’s decision.⁶ In response to the Board’s inquiry, Staff counsel stressed that the Staff would not resume review of Shieldalloy’s decommissioning plan before issuance of the court’s mandate. The Staff nonetheless would not wait until issuance of that mandate before considering its own options for complying with the court’s decision.⁷

In the wake of the teleconference, the Board issued an order on November 23, 2010 in which it reinstated the NRC Staff’s obligation to file periodic status reports. The first of those reports will be due January 25, 2011.⁸

2. On January 3, 2011, the Secretary of the Commission issued an order requesting “Shieldalloy and the State of New Jersey to submit views, no later than February 4, 2011, on whether NRC should reinstate the transfer of regulatory authority to New Jersey or retain regulatory authority over the Shieldalloy site.”⁹

⁴ Tr. at 60.

⁵ Id. at 57-58.

⁶ Id. at 58-60.

⁷ Id. at 57-58, 60.

⁸ See Licensing Board Order (Reinstating Status Report Requirement) (Nov. 23, 2010) at 2 (unpublished).

⁹ Secretary Order (Jan. 3, 2011) at 1 (unpublished). At the November 22, 2010 teleconference, counsel for the NRC Staff listed this as a potential option for the Commission to undertake for compliance with the court’s decision. See Tr. at 59.

A review of the transcript of the November 22 telephone conference leaves the Board in some doubt as to whether individuals in the Office of the General Counsel (presumably not the attorneys representing the Staff in this adjudicatory proceeding) would be making a recommendation to the Commission respecting the course that should now be followed in light of the judicial remand. A matter of concern to the Board is presented if such be the case and the Secretary's January 3 order was therefore issued at the behest of the Staff lawyers charged with formulating that recommendation rather than by the Commission itself. In such circumstances, waiting until January 3 to seek the views of the parties would appear inconsistent with what the Board took to be a representation at the conference that the Staff would move forward expeditiously with regard to the options now to be considered as a consequence of the judicial decision.

In its January 25 status report, the NRC Staff should provide clarification on this matter. Specifically, the Board wishes to be informed whether, despite it being issued in the name of the "Commission," the Secretary's January 3 order was, in fact, prompted by NRC Staff counsel as an incident of the formulation of a recommendation to the Commission respecting the options now available to it in responding to the judicial remand. If so, the Board wishes to be further advised as to the reasons why the views of Shieldalloy and the State of New Jersey on the matter were not solicited at a considerably earlier date. As counsel representing the Staff at the conference appeared to acknowledge, it was not necessary for the Staff to await the late December issuance of the court's mandate before moving forward.¹⁰

¹⁰ See Tr. at 58 ("Your Honor, the Staff has undertaken the task of weighing its options if that was the question that you asked. I can say with certainty that the staff has undertaken the task of considering its options.").

FOR THE ATOMIC SAFETY
AND LICENSING BOARD¹¹

/RA/

Alan S. Rosenthal, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 5, 2011

¹¹ Copies of this order were sent this date by Internet e-mail to the counsel/representatives for (1) Shieldalloy Metallurgical Corp.; (2) State of New Jersey; and (3) NRC Staff.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM have been served upon the following persons by U.S. mail, first class, and NRC internal mail.

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MEMORANDUM

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[Original signed by Christine M. Pierpoint]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 5th day of January, 2011