

January 25, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
SHIELDALLOY METALLURGICAL CORP.) Docket No. 40-7102-MLA
)
(Licensing Amendment Request for)
Decommissioning of the)
Newfield, New Jersey Facility))

NRC STAFF'S STATUS REPORT

As directed by the Atomic Safety and Licensing Board in its November 23, 2010 order,¹ the Nuclear Regulatory Commission (NRC) Staff hereby resumes filing bimonthly status reports in this proceeding. The Staff will begin by briefly summarizing the course of this proceeding since 2006.

On June 30, 2006, Shieldalloy Metallurgical Corp. (Shieldalloy) submitted a license amendment request for decommissioning its Newfield, New Jersey Facility. The Nuclear Regulatory Commission Staff accepted Shieldalloy's amendment request for detailed technical review and thereafter began safety and environmental reviews of Shieldalloy's proposed decommissioning plan (DP).²

On January 16, 2007, the New Jersey Department of Environmental Protection (NJDEP) requested a hearing on Shieldalloy's license amendment request. This Board granted NJDEP's hearing request in a March 28, 2007 memorandum and order.

¹ Order (Reinstating Status Report Requirement) (November 23, 2010).

² The version of Shieldalloy's DP that the Staff accepted for technical review, Rev. 1a, followed Rev. 0 (2002) and Rev. 1 (2005), neither of which was accepted. Shieldalloy submitted a further revision to its DP, Rev. 1b, on August 28, 2009.

On September 23, 2009, the NRC and the State of New Jersey finalized an agreement under Section 274 of the Atomic Energy Act of 1954.³ Under the agreement, on September 30, 2009 New Jersey assumed, and the NRC relinquished, regulatory authority over Shieldalloy's Newfield Facility. Once regulatory authority transferred to New Jersey, the NRC Staff discontinued its review of Shieldalloy's DP.

Shieldalloy thereafter filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit, asking that the Court direct the NRC to revoke its transfer of regulatory authority over the Newfield Facility. In a November 9, 2010 decision, the Court vacated the NRC's transfer of authority over the Newfield Facility and remanded for further proceedings before the NRC.⁴ The Court's mandate, which gave legal effect to its decision, issued on January 3, 2011.

On November 22, 2010, the Board held a telephone conference with the parties to discuss the status of the administrative hearing in light of the impending restoration of NRC jurisdiction over the Newfield Facility. During the telephone conference the Board stated that it was hopeful the Staff would "move forward with [as] much alacrity as possible" with respect to Shieldalloy's DP and "without waiting for the [D.C. Circuit's] mandate to come down at the end of December."⁵

After the telephone conference, the Board issued its order reinstating the requirement that the Staff file bimonthly status reports.⁶ Also after the telephone conference, the NRC's Office of the Secretary issued an order asking Shieldalloy and the State of New Jersey "to

³ *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* (ADAMS Accession No. ML092450290) (September 29, 2009).

⁴ *Shieldalloy Metallurgical Corp. v. Nuclear Regulatory Commission*, 624 F.3d 489 (D.C. Cir. 2010).

⁵ Tr. at 70.

⁶ Prior to New Jersey becoming an Agreement State, the Staff filed bimonthly reports on the status of its safety and environmental reviews. After New Jersey became an Agreement State, the Staff filed reports on an as-needed basis informing the Board of significant developments potentially relevant to this administrative proceeding.

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.” The Secretary issued this order on January 3, 2011.

On January 5, 2011, the Board issued a memorandum raising a question of whether the Secretary’s January 3 order, rather than being issued by the Commission itself, was issued at the behest of Staff lawyers charged with formulating a recommendation on how the NRC should proceed in light of the judicial remand.⁷ The Board stated, “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.”⁸ The Board asked the Staff to clarify in its January 25, 2011 status report “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.”⁹

To clarify, counsel representing the Staff in this administrative proceeding did not prompt the Secretary to issue the January 3 order, nor did they advise the Secretary regarding the matters addressed in that order. As the Board is aware, in the appeal before the United States Court of Appeals for the D.C. Circuit in *Shieldalloy v. NRC*, the agency was represented by attorneys assigned to the NRC Solicitor. The General Counsel, the Solicitor and their assigned legal staff routinely advise the Secretary and the Commission on various legal matters associated with litigation in the federal courts. Communications between and among the General Counsel, the Solicitor, their assigned legal staff, and the Secretary or the Commission regarding the January 3 order are beyond the scope of this proceeding before the Board. This

⁷ Memorandum at 3.

⁸ *Id.*

⁹ *Id.*

is because the Commission's determination of the appropriate response to the court's remand of the section 274 agreement with New Jersey—and the timing of that response—are beyond the scope of this proceeding. Nonetheless, regarding the Board's question as to why the Secretary's order was issued on January 3, it would seem significant that January 3 was the effective date of the D.C. Circuit's mandate returning regulatory authority over Shieldalloy's Newfield Facility to the NRC.¹⁰

Regarding Shieldalloy's DP, at this time the Staff has not resumed its review of the DP. Rather, the Staff's expectation is that it will not commence further review of the DP until the NRC resolves the remanded matter involving the transfer of regulatory authority over Shieldalloy's Newfield Facility.¹¹

Consistent with the Board's November 23, 2010 order, the Staff will file an updated status report no later than Friday, March 25, 2011.

Respectfully submitted,

/RA/

Michael J. Clark
Counsel for the NRC Staff

Dated at Rockville, Maryland
This 25th day of January, 2011

¹⁰ During the November 22, 2010 telephone conference, there was some uncertainty over when the D.C. Circuit's mandate would issue. Staff counsel stated that he thought the mandate would issue on December 27, but asked "if the other counsel for New Jersey and Shieldalloy would weigh in if that information is incorrect." (Tr. at 56.) Counsel for Shieldalloy stated that he thought the mandate would issue December 31, although he too acknowledged that he might be incorrect. (Tr. at 57.) Although the Court's mandate would have issued on December 31, because that day was a federal holiday, and because it was followed by a weekend, the Court's mandate did not issue until Monday, January 3, 2011.

¹¹ The Staff informed Shieldalloy of its position in a December 22, 2010 letter (ADAMS Accession No. ML103400351) (December 22, 2010). The Staff has placed Board members on the distribution list for Shieldalloy's docket number so that in the future the Board will receive copies of public correspondence relating to Shieldalloy's license.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S STATUS REPORT" 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 (*); or by electronic mail as indicated by a double asterisk (**) on this 25th day of January, 2011.

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