

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

Before Administrative Judges:

Alan S. Rosenthal, Chairman
Dr. Richard E. Wardwell
Dr. Gary S. Arnold

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

June 18, 2013

MEMORANDUM

(Concerning Site Decommissioning)

For many years up to June 1998, the Shieldalloy Metallurgical Corporation (Shieldalloy) was engaged in an activity on its Newfield, New Jersey site that, because it involved the use of a radioactive source material, was carried out under the aegis of an NRC license.¹ When that activity terminated exactly 15 years ago, there remained on the site a substantial pile of slag and baghouse dust containing a quantity of radioactive material.²

In accordance with Commission regulations, Shieldalloy put before the NRC Staff a decommissioning plan that called for the retention of the slag pile on site to be covered with an engineering barrier consisting principally of native soil and rocks.³ In response to a November 17, 2006 Federal Register notice providing an opportunity to do so,⁴ the State of New Jersey (among

¹ See LBP-07-5, 65 NRC 341, 344 (2007).

² See generally Revision 1 to the Decommissioning Plan for Newfield Facility (License No. SMB-0743, Control No. 132074) (October 2005) (ADAMS No. ML053190212).

³ Id.

⁴ 71 Fed. Reg. 66,986 (Nov. 17, 2006).

others) filed hearing requests challenging the adequacy of the decommissioning plan.⁵ In March 2007, this Licensing Board granted the New Jersey request and denied those of the other petitioners.⁶

More than six years have now elapsed since the Licensing Board determined that New Jersey was entitled to a hearing on its claim that the continued presence of the slag pile on the Newfield site presented serious environmental concerns.⁷ Yet, no such hearing has taken place and, insofar as we have been informed, the slag pile remains without a cover beyond, perhaps, that proposed by Shieldalloy and challenged as inadequate by New Jersey.

The reasons for this unhappy state of affairs may be briefly summarized. To begin with, it was early decided that the hearing appropriately should await the completion of the Staff's technical review.⁸ In that regard, the Staff was required to file bi-monthly status reports with this Board respecting the progress of the technical review.⁹ Up to June 2008, the Staff filed six such reports,¹⁰ three announcing slippages in the forecasted schedule.¹¹ When the April 2008 report

⁵ See, e.g., State of New Jersey Department of Environmental Protection Petition for Hearing the Shieldalloy Metallurgical Corporation (License No. SMB-743) Decommissioning Plan (Jan. 16, 2007).

⁶ See LBP-07-5, 65 NRC at 362-63. The Board granted the hearing request on a determination that, as required by the Commission's regulations, New Jersey had demonstrated its standing and had tendered an admissible contention. A ruling on the admissibility of the remainder of New Jersey's contentions was deferred. See id. at 361.

⁷ See id. at 363.

⁸ Id.

⁹ Licensing Board Order (Directing the Filing of Status Reports) at 2 (May 8, 2007) (unpublished).

¹⁰ See NRC Staff's First Status Report (June 8, 2007); NRC Staff's Second Status Report (Aug. 8, 2007); NRC Staff's Third Status Report (Oct. 5, 2007); NRC Staff's Fourth Status Report (Dec. 7, 2007); NRC Staff's Fifth Status Report (Feb. 8, 2008); NRC Staff's Sixth Status Report (Apr. 11, 2008) [hereinafter Sixth Status Report].

¹¹ See, e.g., Sixth Status Report at 2 ("The estimates for all Staff actions are three months later than those in the Staff's Fifth Status Report.").

indicated that the final environmental impact statement would not be issued before August 2009,¹² in a June 2, 2008 memorandum to the Commission, we expressed our concern about the delay.¹³

Nothing of note transpired for the next 15 months. Then, on October 8, 2009, the NRC published a notice in the Federal Register to the effect that it had transferred regulatory jurisdiction over the Newfield site to New Jersey on September 30, 2009.¹⁴ Shieldalloy sought judicial review of this action and, on November 9, 2010, the United States Court of Appeals for the District of Columbia Circuit remanded the matter to the Commission for a further explanation of the basis for the jurisdictional transfer.¹⁵

In an order entered on October 12, 2011, the Commission once again transferred jurisdiction over the Newfield site to New Jersey.¹⁶ This prompted another Shieldalloy petition for judicial review and, on February 19, 2013, for a second time the District of Columbia Circuit vacated the transfer and remanded the matter to the agency for further proceedings consistent with its opinion.¹⁷

That is where the matter of the decommissioning of the Newfield site now stands.

During the entire period since granting the New Jersey hearing request in March 2007, this Board has explicitly retained jurisdiction over the NRC adjudicatory proceeding generated by

¹² See id.

¹³ See LBP-08-8, 67 NRC 409 (2008).

¹⁴ See 74 Fed. Reg. 51,882 (Oct. 8, 2009).

¹⁵ See Shieldalloy Metallurgical Corp. v. Nuclear Regulatory Com'n, 624 F.3d 489 (D.C. Cir. 2010).

¹⁶ See CLI-11-12, 74 NRC 460 (2011).

¹⁷ See Shieldalloy Metallurgical Corp. v. Nuclear Regulatory Com'n, 707 F.3d 371 (D.C. Cir. 2013).

that grant.¹⁸ Should at some point New Jersey actually obtain regulatory authority over the Newfield site, our task will then be simple: the entry of an order terminating the pending proceeding for lack of continuing jurisdiction over the subject matter.

There remains the possibility, of course, that having been twice unsuccessful in its endeavor to justify the jurisdictional transfer to the satisfaction of the District of Columbia Circuit, the Commission might now decide to retain jurisdiction over the Newfield site. In that event, presumably the Staff would complete its technical review of Shieldalloy's decommissioning plan (one might hope with some dispatch) allowing this Board to move forward with a hearing on the contention, found admissible in 2007, that the plan is environmentally unacceptable.

Manifestly, the Board has no interest in what decision the Commission might reach regarding a third endeavor to give New Jersey regulatory authority over the slag pile. That is an administrative matter well beyond the bounds of what is of concern in an adjudicatory proceeding. That said, so long as its jurisdiction over the still pending adjudicatory proceeding has not terminated and there remains the possibility that, at the end of the day, it will be called upon to pass upon the viability of the decommissioning plan, the Board retains an interest in the course of the deliberations. In short, although neither the content nor the timing of the decision is within its control, especially given the long and tortuous history of this matter it is not inappropriate for the Board to express an interest how the deliberations are progressing.

It was that belief that undergirded our May 31, 2013 order calling upon the Staff to advise us as to the present state of the Staff's deliberations on the matter and to provide a best estimate as to when a decision will be reached.¹⁹ Implicit in that direction was the further belief that, although the decision might be issued in the name of the Commission, both the relevant Staff

¹⁸ See Licensing Board Order (Retaining Jurisdiction over the Proceeding) (Feb. 25, 2013) (unpublished).

¹⁹ See Licensing Board Order (Order Directing Staff Filing) (May 31, 2013) (unpublished).

office and the Office of the General Counsel would play a substantial role in the decision whether to make a third endeavor to persuade the District of Columbia Circuit of the legality of the proposed transfer of jurisdiction. Indeed, given the basis that the court assigned for the second remand, such involvement appeared to be inevitably the case.

In these circumstances, we found most disappointing the June 7 Staff response to the May 31 order.²⁰ Although acknowledging that the Staff is “available to advise the Commission on issues related to the remand order,”²¹ the response stressed that the decision was for the Commission to make and left it at that.²² In other words, our inquiry received the back of the Staff’s hand.

Thus, the Board remains in the dark as to whether, nearly four months after the judicial remand, the Staff has yet to undertake its seeming crucial role in the decisional process on the transfer of jurisdiction issue. We need not speculate, however, on what might have prompted its disingenuous response to our inquiry. What is important is this: Even were the response to the judicial remand to be made tomorrow, no matter its content at least another year or two will likely pass before a remedial plan for the Newfield site might be finalized. Indeed, should the Commission decide upon yet another jurisdictional transfer, it is a virtual certainty that Shieldalloy will once again challenge it in court, leading to additional years of litigation. This is hardly consistent with the contemplation of the Commission regulation governing the decommissioning of sites on which radioactive material is present.²³

²⁰ See NRC Staff’s Response to Board’s May 31, 2013 Order (June 7, 2013).

²¹ Id. at 2.

²² See id.

²³ See 10 C.F.R. § 40.42.

Thus, it is to be hoped that, if not already reached, the decision regarding a third attempt to transfer regulatory jurisdiction to New Jersey will be given priority.²⁴

FOR THE ATOMIC SAFETY
AND LICENSING BOARD²⁵

/RA/

Alan S. Rosenthal, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 18, 2013.

²⁴ The public interest asserted by New Jersey as the basis of its concern respecting the Newfield site has hardly been served by allowing so many years to elapse with the decommissioning of the radioactive slag pile still entirely unresolved. We would think that the extreme delay might also be found unacceptable by Shieldalloy. It is quite possible that it is disadvantaged by the continuing uncertainty as to the extent of the financial undertaking that will be associated with whatever it is eventually required to do by either this agency or New Jersey.

We need add only that it is puzzling that two and a half years elapsed between the March 2007 grant of the New Jersey hearing request and the September 2009 initial attempt to transfer regulatory jurisdiction to New Jersey--during which period (according to its bi-monthly status reports) the Staff was engaged in the technical review of Shieldalloy's decommissioning plan. Suffice it to say, no matter the reason for that interval, the Staff's change of direction has turned out to have had the unfortunate effect outlined in this Memorandum.

²⁵ Copies of this order were sent this date by e-mail to the counsel 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 (Concerning Site Decommissioning)** have been served upon the following persons by U.S. mail, first class, and NRC internal mail.

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[Original signed by Clara I. Sola]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 18th day of June 2013.