

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHIELDALLOY METALLURGICAL CORPORATION,)	
)	
Petitioner,)	
)	
v.)	
)	No. 13-1259
U.S. NUCLEAR REGULATORY COMMISSION)	
and the UNITED STATES OF AMERICA,)	
)	
Respondents,)	
)	
STATE OF NEW JERSEY,)	
)	
Intervenor.)	

**FEDERAL RESPONDENTS’ RESPONSE TO SHIELDALLOY’S
MOTION FOR LEAVE TO FILE SUPPLEMENTAL APPENDIX**

The United States Nuclear Regulatory Commission and the United States (the Federal Respondents) do not object to the motion of Shieldalloy Metallurgical Corporation (Shieldalloy) for leave to file a supplemental appendix in this case. However, the Federal Respondents object to the Court’s consideration of the items in the proposed supplemental appendix because they are neither part of the record, as agreed to by the parties, nor consistent with the agreement that the parties reached concerning the contents of the record.

This case is before this Court as a result of the Court's decision in *Shieldalloy Metallurgical Corp. v. NRC*, 707 F.3d 371 (D.C. Cir. 2013) (*Shieldalloy II*), in which the Court vacated the transfer of authority over a site owned by Petitioner back to New Jersey because of the NRC's failure to provide a textual "exegesis" supporting its conclusion that one of its regulations, 10 C.F.R. § 20.1403(a), was consistent with New Jersey's regulatory scheme. Specifically, the Court held that the Commission had failed to explain how § 20.1403(a) imposes an eligibility test for licensees seeking to decommission their sites using "restricted release" criteria. 707 F.3d at 379-83.

On remand, the NRC issued a written decision providing the textual basis for its conclusion, which decision Shieldalloy has appealed. Although the Federal Respondents believe that the only issue properly before the Court at this time is the question of whether the NRC has proffered a reasonable interpretation of its own regulation, Shieldalloy and the Federal Respondents agreed that, for the sake of completeness, the record in this case should include the materials that were previously before the Court in the joint or supplemental appendices. As reflected in the e-mail

exchange between counsel (attached as Exhibit A to this motion), this framework governed the parties' agreement upon certain designated documents for inclusion in the certified index of record.¹

Without notifying or seeking authorization from the Federal Respondents, Shieldalloy included references in its initial brief to several documents that were not included in the certified index of record. These documents are cited on pages 57 and 58 of Shieldalloy's initial brief (filed on February 4, 2014), along with internet addresses at which the materials can be located on the NRC's public website, but without reference to the appendices to be submitted to the Court. The Federal Respondents indicated in their brief that Shieldalloy's citations to extra-record materials was improper. (Br. at 67-68).

Apparently unbeknownst to Shieldalloy, two of the four documents for which Shieldalloy provided internet addresses as citations in its initial brief – a February 28, 2003, letter and a

¹ At the time that this agreement was reached and the certified index was due, New Jersey had not yet intervened as a party. However, consistent with the agreement reached between Shieldalloy and the Federal Respondents, all of the documents to which New Jersey has referred in its brief were previously before the Court, and the parties have agreed that these materials are therefore properly included in the Joint Appendix in this case.

January 26, 2006, letter from David Smith of the NRC, both cited on page 57 – were actually before the Court in *Shieldalloy II*. For this reason, and consistent with the criteria that the formed the basis for the parties' agreement concerning the record on appeal, the Federal Respondents withdraw their objection to the Court's consideration of these documents, and the parties have agreed that these materials should be included in the Joint Appendix.

However, the additional documents to which *Shieldalloy* cited in its initial brief (which are cited on page 58 and are included as items 1 and 4 in the proposed supplemental appendix) were not before the Court in prior proceedings, were not before the Commission when it issued the final decision currently being appealed, and do not bear upon the textual analysis that the NRC provided on remand. *See* 28 U.S.C. § 2112(b); Fed. R. App. P. 16(a). For this reason, the Federal Respondents object to the Court's consideration of the these materials, and the additional materials (items 2 and 3 in the supplemental appendix, consisting of a July 5, 2007, response by *Shieldalloy* to a request for additional information and a March 12, 2008 e-mail from Mr. Smith to *Shieldalloy*), that *Shieldalloy* proposes to include.

CONCLUSION

For the foregoing reasons, the Federal Respondents do not oppose Shieldalloy's motion for leave to file a supplemental appendix but object to the Court's consideration of the documents that Shieldalloy proposes to include.

Respectfully submitted,

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Dated: May 21, 2014

CERTIFICATE OF SERVICE

I certify that on May 21, 2014, I caused the foregoing FEDERAL RESPONDENTS' RESPONSE TO SHIELDALLOY'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL APPENDIX to be served on the attorneys for the parties, as listed below, by filing the same with the Court's CM/ECF system.

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