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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATION STAFF

Before Presiding Officer:
G. Paul Bollwerk, III, Administrative Judge

Special Assistant:
Thomas D. Murphy, Administrative Judge

_____)
In the Matter of)
)
SHIELDALLOY METALLURGICAL CORP.)
)
(Cambridge, Ohio Facility))
_____)

Docket No. 40-8948-MLA
ASLBP No. 99-760-03-MLA

**COUNTER-STATEMENT OF SHIELDALLOY METALLURGICAL
CORPORATION IN OPPOSITION TO UNNAMED CITIZENS
OF GUERNSEY COUNTY'S APPEAL STATEMENT**

To prevail on appeal, a petitioner before the Atomic Safety and Licensing Board Panel ("ASLBP") must show that the Presiding Officer erred in his or her findings, and that such error was harmful to the petitioner. See In the Matter of Consumers Power Company (Midland Plant, Units 1 and 2), 2 NRC 11, 16 (1975) (appeal cannot be sustained absent error harmfully affecting party's interest in case). Unnamed Citizens of Guernsey County ("Unnamed Citizens") have shown neither in this case. Unnamed Citizens simply do not have standing to intervene in the matter before the United States Nuclear Regulatory Commission ("NRC").

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I. THE PRESIDING OFFICER DID NOT ERR IN DETERMINING THAT UNNAMED CITIZENS FAILED TO DEMONSTRATE STANDING

Unnamed Citizens sought to intervene in the request of Shieldalloy Metallurgical Corporation ("Shieldalloy") for a Material License Amendment to provide for the receipt and placement of certain slag and associated material on an existing slag pile at the Shieldalloy facility. See 63 Fed. Reg. 64,976 (1998); Letter from Michael Bruce Gardener to the Secretary of the NRC (Dec. 30, 1998). In its February 23, 1999 decision and as explained in his Memorandum and Order, the Presiding Officer appropriately determined that Unnamed Citizens do not have standing to intervene in this matter.

Unnamed Citizens allege five "errors" in the Presiding Officer's Memorandum and Order. As discussed below, the Presiding Officer did not err as Unnamed Citizens allege.

A. The Presiding Officer Properly Determined that Unnamed Citizens Must Establish an "Injury in Fact" that Is Traceable to the Proposed Action and Is Likely to Be Redressed by a Favorable Decision

Unnamed Citizens suggest that the Presiding Officer erred in determining that Unnamed Citizens must demonstrate that they will suffer an "injury in fact" that is traceable to the proposed action and is likely to be redressed by a favorable decision. Appeal Statement, at 2. Instead, Unnamed Citizens erroneously assert that they must only allege that they will suffer some injury that is so traceable and redressable. Id. Unnamed Citizens are wrong.

A petitioner seeking to intervene in a matter before the NRC bears the burden to demonstrate that it has constitutional standing to do so. See City of Cleveland, Ohio v. Nuclear Regulatory Com'n, 17 F.3d 1515, 1517 (D.C. Cir. 1994) (intervenor in an NRC proceeding must demonstrate constitutional standing); In the Matter of Atlas Corp. (Moab, Utah Facility), 45 NRC 414, 424 (1997) ("petitioner bears the burden of establishing his or her standing"), aff'd, 46

NRC 21 (1997). To demonstrate standing as a constitutional matter, the petitioner must show that (1) it has suffered an injury in fact; (2) there is a causal connection between that injury and the conduct complained of; and (3) a favorable decision likely will redress the injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Although the NRC generally "construe[s] the petition in favor of the petitioner," In the Matter of Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), 42 NRC 111, 115 (1995), the petitioner is required to make a "specific showing" of injury in fact and to show that that injury is traceable and redressable. See In the Matter of Atlas Corporation (Moab, Utah Facility), 45 NRC at 424.

Standing cannot be inferred from mere averments, but must be demonstrated affirmatively by the petitioner seeking judicial relief. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990). Further, petitioners seeking judicial redress are required to make a detailed showing of the various factors necessary to demonstrate standing. Id. (barebones allegations, absent fleshing out of injury and other factors, cannot pass muster where standing is concerned). The Constitution demands as much so the judiciary and the ASLBP will not hear and decide upon matters that fail to present actual "cases" or "controversies," a fundamental constitutional directive for maintaining the proper separation and balance of powers. See Lujan v. Defenders of Wildlife, 504 U.S. at 559-60.¹ If, as Unnamed Citizens now suggest, no showing were required for standing, virtually any litigant could have its claims heard, by merely alleging bases for

¹ Unnamed Citizens recognized as much in their previous pleading. There, Unnamed Citizens stated that "Article III [of the Constitution] limits the exercise of judicial power to litigants who can show actual or threatened injury." Id. (emphasis added). See Unnamed Citizens of Guernsey County's Joint Reply to Answers of NRC Staff and Shieldalloy Metallurgical Corp. to Request for Hearing, at 3 (filed Feb. 5, 1999) ("Unnamed Citizens' Joint Reply"). Yet, in an effort to create standing where there is none, Unnamed Citizens apparently reverse their position on this issue.

standing, however farcical or unlikely. Such an approach would render the standing requirement meaningless and eviscerate the "cases or controversies" limitation on the exercise of judicial power. Thus, the Presiding Officer did not err in refusing Unnamed Citizens' claims of standing absent a sufficient demonstration of injury in fact and the causal link and redressability that must flow from that injury in fact.

B. The Presiding Officer Properly Determined that Unnamed Citizens' Allegations Required Support

Unnamed Citizens' second allegation of error is that the Presiding Officer improperly found "Citizens' request for hearing deficient in that it contained no verified claim of the injuries alleged." Appeal Statement, at 2. Again, the Presiding Officer made no error in his findings, nor were Unnamed Citizens harmed.

Not only must the petitioner provide sufficient detail in his or her pleadings to demonstrate standing, but must also provide sufficient support. See FW/PBS, Inc. v. City of Dallas, 493 U.S. at 234-35 (denying certain standing claims because they were not established with support on the record and others because necessary factual elements to demonstrate injury were not put forth); see also In the Matter of Atlas Corp. (Moab, Utah Facility), 45 NRC at 426-27 and n.4 (finding insufficient showing of standing but allowing lesser demonstration of support for claims given that petitioner appeared pro se). Unnamed Citizens have provided neither.

First, Unnamed Citizens admit that they did not verify or support their claims by affidavit or otherwise. See Appeal Statement, at 2. Thus, the Presiding Officer did not err in finding Unnamed Citizens' request for hearing deficient in this regard.² Moreover, even if Unnamed

² In this case, where Unnamed Citizens made bald assertions of standing through
(continued...)

Citizens had supported their allegations, those allegations were insufficient to demonstrate standing. Thus, Unnamed Citizens were not harmed by the Presiding Officer's determination that verified support was lacking.

In their pleadings below, Unnamed Citizens asserted three putative non-economic interests – aesthetics, recreation and conservation – and one economic interest, a desire to place any slag Unnamed Citizens might have onto the Shieldalloy facility because they believe that to be a less expensive disposition option. See Unnamed Citizens' Joint Reply, at 13-14. With respect to the non-economic interests, Unnamed Citizens failed to establish "injury in fact" because they failed to demonstrate a "concrete and particularized" injury that is "actual or imminent." See Lujan v. Defenders of Wildlife, 504 U.S. at 560 (setting forth standard for demonstrating injury in fact). Specifically, although they baldly asserted that their aesthetic, recreation and conservation interests could be affected, Unnamed Citizens made no specific allegations as to how the addition of slag and soil addressed in Shieldalloy's Material License Amendment would adversely affect these putative interests.³

(...continued)

legal counsel, the Presiding Officer determined that an affidavit would have been necessary to support the assertions. Memorandum and Order, at 7. Even if on appeal it is determined that an affidavit per se is not the only form of support sufficient to support standing (e.g., if on appeal the NRC were to determine that a proper declaration or other judicially recognized evidentiary mechanism can also support standing in certain cases), this would amount to harmless error in the current case because Unnamed Citizens have provided no support for their assertions. See In the Matter of Boston Edison Company (Pilgrim Nuclear Power Station), 22 NRC 461, 468 n. 28 (1985) (where record was devoid of bases to find for would-be intervenor, and appeal statement failed to show that absent alleged procedural error intervenor would have prevailed, it was appropriate to find alleged error harmless).

³ Notably, the slag and soil addressed in the Material License Amendment would

(continued...)

Nor did Unnamed Citizens show that they "personally and individually" would be subject to any such injuries, as required by the "injury in fact" prong of the standing test. Lujan v. Defenders of Wildlife, 504 U.S. at 561 and n.1. To demonstrate that they would be so affected for standing purposes, Unnamed Citizens would have had to show either that they would be injured personally, or, to the extent that their alleged interest is in natural resources, Unnamed Citizens would have to show not only that those resources would be injured (which they did not do), but also that they use those resources. See Lujan v. National Wildlife Federation, 497 U.S. 871, 883-89 (1990) (plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly "in the vicinity of it"); United States v. AVX Corp., 962 F.2d 108, 118 (1st Cir. 1992) (when alleged injury involves use and enjoyment of natural resources, for standing, party must show that he or she "uses the specific property in question."). Although Unnamed Citizens allegedly live in the county where the Shieldalloy facility is located (Guernsey County) and in the vicinity of the facility itself, they made no such showing of use of the resources allegedly at issue. Thus, Unnamed Citizens' alleged non-economic interests provided no basis for standing in this matter.

Unnamed Citizens' economic interest was similarly insufficient to demonstrate injury in fact. Unnamed Citizens asserted that because the Material License Amendment did not address slag that they might have on their properties, they would incur a "substantially greater cost" to send their slag to some other location for disposition. Unnamed Citizens' Joint Reply, at 14. And yet, Unnamed Citizens made no showing that they were compelled to do anything with their

³(...continued)

amount to less than one percent of the total slag pile volume at the Shieldalloy facility.

slag and did not identify with any specificity how costs may be greater under one slag disposition option versus another. Thus, they failed to demonstrate that there was an actual or imminent injury to them, a prerequisite to “injury in fact.” See Lujan v. Defenders of Wildlife, 504 U.S. at 560.

Moreover, Unnamed Citizens failed to demonstrate a causal connection between Shieldalloy’s Material License Amendment and the alleged economic injury to them. As Shieldalloy pointed out in its Reply Brief below, the fact that Shieldalloy proposed a license amendment that would allow it to receive and move slag from one place to another on its property in no way does or says anything about what can or will happen to slag on Unnamed Citizens’ properties. Nor did Unnamed Citizens even allege that Shieldalloy has any obligation with respect to (or even relationship with respect to) Unnamed Citizens’ slag or its disposition. There is simply no nexus between Shieldalloy’s Material License Amendment request and the putative economic injury to Unnamed Citizens.

Finally, as the Presiding Officer appropriately and properly found, Unnamed Citizens’ alleged economic injuries are not redressable. Unnamed Citizens appear to want the opportunity to place any slag they may have at the Shieldalloy facility, purportedly because this option would be less expensive than other options for disposition of their slag. See Unnamed Citizens’ Joint Reply, at 14. However, the current Material License Amendment request simply does not address slag that may be held by such parties. Thus, the questions of whether others could bring slag to the Shieldalloy facility and whether Shieldalloy would or could accept such slag for placement on the existing slag pile are outside the scope of this proceeding and, therefore, cannot be redressed, which the Presiding Officer so determined. Further, there is no basis for assuming

that bringing the slag to the Shieldalloy facility would be any less costly to Unnamed Citizens than other slag disposition options they might have. Thus, as the Presiding Officer found, the alleged economic injury of higher costs would not be redressed by a decision in Unnamed Citizens' favor.

C. The Presiding Officer Correctly Determined that Neither the Economic Nor the Other Injuries Asserted by Unnamed Citizens Constitute "Injuries in Fact"

As their third basis for appeal, Unnamed Citizens assert that the Presiding Officer did not apply the "same careful analysis" to their alleged non-economic injuries because the Presiding Officer found that only the economic injury alleged included a "factual assertion." Appeal Statement, at 2-3. Yet, there is no basis for Unnamed Citizens' conclusion that the Presiding Officer did not give careful consideration to the asserted non-economic injuries. To the contrary, as the Memorandum and Order reveal, the Presiding Officer did consider the various non-economic injuries alleged by Unnamed Citizens. See, e.g., Memorandum and Order, at 4 (noting that Unnamed Citizens assert that the proposed Material License Amendment would "affect the aesthetic, recreational, environmental, and economic interests" of Unnamed Citizens). The Presiding Officer specifically found that the Unnamed Citizens had failed to demonstrate injury in fact with respect to these non-economic injuries because they failed to make any showing of injury. Id. at 6, n.2 (Although the "petition also describes various purported injuries to aesthetic, recreational, and environmental interests," the "petition contains no verified claim to these injuries.").

When one examines the Memorandum and Order and Unnamed Citizens' Appeal Statement on this issue, it is apparent that what Unnamed Citizens complain of is the extra

attention in the Memorandum and Order that the Presiding Officer gives to the economic injuries alleged by Unnamed Citizens. Greater attention to one deficient basis for standing versus another does not provide a basis for appeal. Notably, Unnamed Citizens do not show why or how – if the appeal were granted on this point – the outcome would be any different. That is because it would not. None of Unnamed Citizens’ putative non-economic interests constitutes a cognizable "injury in fact." See supra, 5-6.

D. The Presiding Officer Correctly Determined that Unnamed Citizens Alleged Economic Injury Is Not Redressable

As their fourth assertion of error, Unnamed Citizens suggest that the Presiding Officers’ determination that Unnamed Citizens’ alleged economic injury is not redressable was "a conclusion on the merits" and baldly assert that their injury is redressable. Appeal Statement, at 3.⁴ To the contrary, a determination on redressability is not a conclusion on the merits; it is a determination on one of fundamental prerequisites for standing. More importantly, as discussed above, the Presiding Officer appropriately and properly found that Unnamed Citizens’ alleged economic injuries are not redressable. See supra, 7-8. Therefore, Unnamed Citizens’ appeal cannot be sustained.

⁴ In addition, Unnamed Citizens erroneously assert that the Presiding Officer "brushed aside one of Citizens [sic] allegation [sic] of economic injury, ostensibly because the claim was unlinked to the radiologic harm." Appeal Statement, at 3. Unnamed Citizens’ assertion in this regard could not be farther from the truth. To the contrary, although the Presiding Officer noted that the lack of an allegation of radiological harm raised prudential standing concerns, which could provide a separate basis for determining that Unnamed Citizens lack standing, the Presiding Officer specifically put that question aside, arguably to the benefit of Unnamed Citizens. See Memorandum and Order, at 6-7.

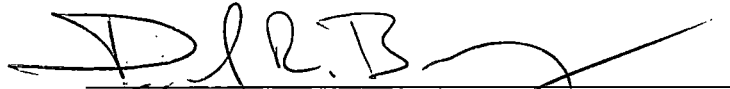
E. The Presiding Officer Did Not Err in Finding Deficiencies in Unnamed Citizens' Request for Hearing

Finally, Unnamed Citizens complain that the Presiding Officer unfairly reprimanded them and denied their intervention because their counsel filed an untimely notice of appearance. See Appeal Statement, at 3-6. The record demonstrates that this is not so. The Presiding Officer made clear that he denied Unnamed Citizens' petition for intervention for lack of standing. See Memorandum and Order, at 8 ("Having failed to establish the requisite standing as of right, the petition must be dismissed and this proceeding is terminated.") (footnote omitted). Despite the fact that Unnamed Citizens had not satisfied the procedural requirement for a notice of appearance, the Presiding Officer nonetheless clearly considered Unnamed Citizens' claims.

II CONCLUSION

In sum, the Presiding Officer did not err as Unnamed Citizens allege. Unnamed Citizens simply do not have standing to participate in this proceeding. Thus, Shieldalloy respectfully requests that Unnamed Citizens' request for appeal be denied.

Respectfully Submitted,



David R. Berz
Counsel for Shieldalloy Metallurgical Corporation

Submission Date: March 22, 1999

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CERTIFICATE OF SERVICE

I hereby certify that I served copies of "Counter-Statement of Shieldalloy Metallurgical Corporation in Opposition to Unnamed Citizens of Guernsey County's Appeal Statement" in the above-captioned proceeding on the following on this the 22nd day of March 1999 by the means indicated below:

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