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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'99 MAR -1 P5:49

ATOMIC SAFETY AND LICENSING BOARD PANEL

OFFICE OF GENERAL COUNSEL
NRC
ADMINISTRATIVE JUDGE

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

REPLY OF SHIELDALLOY METALLURGICAL CORPORATION
TO "UNNAMED CITIZENS" JOINT REPLY TO ANSWERS TO
REQUEST FOR HEARING FILED BY MICHAEL BRUCE GARDNER

The "unnamed citizens" of Guernsey County ("Unnamed Citizens") have failed to demonstrate standing to participate by hearing in the above-captioned license amendment proceeding. To have standing, a party must satisfy both constitutional and prudential standing tests. Hazardous Waste Treatment Council v. United States Environmental Protection Agency, 861 F.2d 277, 281-82 (D.C. Cir. 1988), cert. denied, 490 U.S. 1106 (1989). Because Unnamed Citizens do not satisfy the constitutional standing test, the Atomic Safety and Licensing Board Panel ("ASLBP") of the Nuclear Regulatory Commission ("NRC") need look no further. The ASLBP must deny Unnamed Citizens' request to participate in this proceeding on constitutional standing grounds.

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I. UNNAMED CITIZENS FAIL THE CONSTITUTIONAL STANDING TEST

To meet the constitutional standing test, a 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). If a petitioner fails to satisfy any one of these prongs of the test, the petitioner lacks standing. Id. In this case, Unnamed Citizens fail to satisfy the test. Therefore, their request for hearing must be denied.

Unnamed Citizens attempt to identify three non-economic “injuries” and one economic “injury” they allegedly have suffered because of Shieldalloy’s Material License Amendment (“MLA”) request for receipt and placement of certain slag and associated soil on Shieldalloy’s pre-existing West Slag Pile. First, Unnamed Citizens allege that “their aesthetic values may be adversely affected by looking from state or township roads upon additional slag/soil.” See Unnamed Citizens Joint Reply, at 13. Second, Unnamed Citizens suggest that unspecified “recreational interests” may be affected because the slag and soil will be placed “adjacent to open fields, wetlands” and nearby waterbodies. Id. Third, Unnamed Citizens allege that unspecified “conservational interests” will be affected by the soil and slag placement.^{1/} Finally, two of the Unnamed Citizens who allege to have slag on their property allege that their “economic interests”

^{1/} Unnamed Citizens allege that these injuries spring from a “violation of Ohio and federal law,” which “will result in additional radioactive waste being disposed of on the West Slag Pile” at the Shieldalloy facility. Unnamed Citizens Joint Reply, at 11. It is unclear whether Unnamed Citizens are suggesting the alleged “violation” is itself an “injury.” Such an allegation cannot support standing because such a “injury” would be nothing more than a generalized grievance. See Asarco v. Kadish, 490 U.S. 605, 616 (1989) (a “generalized grievance,” here, concern about the quality of education, it is not concrete or particularized to the complainant so as to confer constitutional standing).

will be adversely affected because the MLA only addresses receipt by Shieldalloy of certain slag, but does not address receipt of their slag, such that they might have to find a disposition option for their slag that is more expensive than placement on the Shieldalloy facility.^{2/} As discussed in detail below, these interests are insufficient to confer standing.

A. Unnamed Citizens' Alleged Non-Economic Interests Are Insufficient to Confer Standing Because They Do Not Constitute an "Injury in Fact"

None of the putative non-economic interests alleged by Unnamed Citizens constitutes a cognizable "injury in fact." To have such an injury, a petitioner must have suffered "an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.'" Lujan v. Defenders of Wildlife, 504 U.S. at 560 (citations omitted). The petitioner must show that he or she "has sustained or is immediately in danger of sustaining some direct injury' in fact as a result of [the] conduct" involved. Branton v. Federal Communications Comm'n, 993 F.2d 906, 908 (D.C. Cir. 1993) (citation omitted), cert. denied, 511 U.S. 1052 (1994). Unnamed Citizens have not done so in this case.

With respect to the asserted non-economic interests -- aesthetics, recreation and conservation -- Unnamed Citizens have failed to demonstrate a "concrete and particularized" injury that is "actual or imminent." In fact, although they baldly assert that their aesthetic, recreation and conservation interests could be affected, they provide no support for these

^{2/} Interestingly, the economic interests asserted by these two Unnamed Citizens appear to be directly at odds with the non-economic interests asserted by other Unnamed Citizens. For alleged economic reasons, the two Unnamed Citizens appear to want to place slag on the Shieldalloy facility. Apparently, the remaining Unnamed Citizens would object to such placement, as they allege that placement of slag on existing slag piles at the facility harms non-economic (e.g., aesthetic) interests. Shieldalloy questions whether Unnamed Citizens can properly jointly participate in a proceeding in which they hold such divergent interests, and whether the same legal Counsel can represent individuals with such divergent interests.

allegations, as is necessary to demonstrate standing. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (barebones allegation, absent fleshing out of injury, cannot pass muster where standing is concerned). Specifically, Unnamed Citizens make no specific allegations as to how the addition of slag and soil addressed in the MLA, which would amount to less than one percent of the total slag pile volume at the Shieldalloy facility, will adversely affect their view from “state or township roads,” their recreational opportunities, or their putative interests in conservation.

Nor have Unnamed Citizens shown that they “personally and individually” will be subject to any such injuries, as is 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 are so affected for standing purposes, Unnamed Citizens must show either that they would be injured personally, or, to the extent that their alleged interest is in natural resources, Unnamed Citizens must show not only that those resources will, in fact, be injured (which they have not done), but also that they use the very resources that would be directly subject to injury. See Lujan v. National Wildlife Federation, 497 U.S. 871, 883-889 (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 have made no such showing of use of the resources allegedly at issue. Thus, Unnamed Citizens’ non-economic interests are not a basis for standing in this matter.

B. Unnamed Citizens' Putative Economic Interest Is Also Insufficient to Support Standing in This Proceeding

The putative economic interest raised by two Unnamed Citizens also fails to satisfy the constitutional standing requirements. First, Unnamed Citizens have suffered no injury in fact. These Unnamed Citizens assert that because the MLA does not address slag that they might have on their properties, they will 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 do not allege that they are compelled to do anything with the alleged slag at all, nor do they identify with any specificity how costs may be greater under one slag disposition option versus another. Thus, they fail to demonstrate that there is an actual or imminent injury to them, as is necessary to demonstrate “injury in fact.” See Lujan v. Defenders of Wildlife, 504 U.S. at 560.

The two Unnamed Citizens also lack standing because they do not satisfy the remaining two prongs of the constitutional standing test. In addition to suffering an injury in fact, petitioners must demonstrate that there is a causal connection between the alleged injury and the conduct complained of, and that the injury is redressable by the reviewing tribunal. Id. In this case, no causal connection exists. The fact that Shieldalloy has proposed a license amendment 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 alleged to be on Unnamed Citizens' properties. Nor have Unnamed Citizens even alleged that Shieldalloy has any obligation with respect to (or even relationship with respect to) Unnamed Citizens' slag or the disposition thereof. Therefore, Shieldalloy's MLA request in no way causes any injuries to Unnamed Citizens.

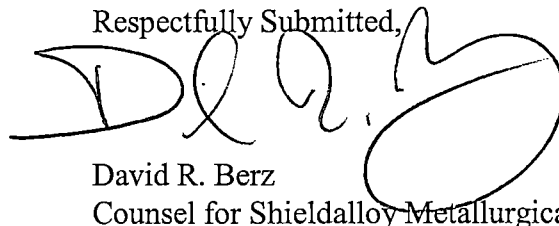
Moreover, Unnamed Citizens' putative economic injury is not redressable by the ASLBP.

Unnamed Citizens appear to want the opportunity to place any slag they may have at the Shieldalloy facility. See Unnamed Citizens Joint Reply, at 14. However, the current MLA 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. 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, the alleged economic injury of higher costs would not be redressed. Because Unnamed Citizens' putative economic injury is not redressable in this proceeding, they do not have standing in this matter.

II. CONCLUSION

For the foregoing reasons, Unnamed Citizens do not have standing in this proceeding. Thus, Shieldalloy respectfully requests that the ASLBP deny Unnamed Citizens' request for hearing.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'D. R. Berz', is written over the typed name and title.

David R. Berz
Counsel for Shieldalloy Metallurgical Corporation

Submission Date: February 22, 1999

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CERTIFICATE OF SERVICE

I hereby certify that I served copies of "Reply of Shieldalloy Metallurgical Corporation to 'Unnamed Citizens' Joint Reply to Answers to Request for Hearing Filed by Michael Bruce Gardner" in the above-captioned proceeding on the following on this 22nd day of February 1999 by the means indicated below:

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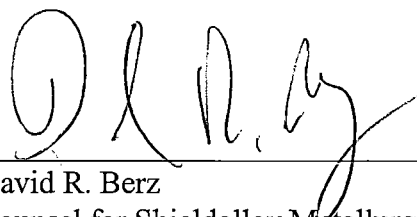
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