

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DBK99-12
USNRC

ATOMIC SAFETY AND LICENSING BOARD PANEL

'99 FEB 23 P3:14

Before Presiding Officer:

G. Paul Bollwerk, III, Administrative Judge

Special Assistant:

Thomas D. Murphy, Administrative Judge

OFFICE OF SPECIAL
RULES AND
ADJUDICATION STAFF

SERVED FEB 23 1999

In the Matter of

SHIELDALLOY METALLURGICAL CORP.

(Cambridge, Ohio Facility)

Docket No. 40-8948-MLA

ASLBP No. 99-760-03-MLA

February 23, 1999

MEMORANDUM AND ORDER
(Denying Petition to Intervene)

By letter dated December 21, 1998, attorney Michael Bruce Gardner requests an informal adjudicatory hearing to contest a request by Shieldalloy Metallurgical Corporation (SMC) to amend the 10 C.F.R. Part 40 source materials license for its Cambridge, Ohio facility. In the petition, Mr. Gardner claims he is acting on behalf of unnamed persons residing in Guernsey County, Ohio, whose interests are affected by that amendment. Both SMC and the NRC staff oppose this hearing request, asserting there has been no demonstration of standing and a failure to show the areas of concern specified in the petition regarding the SMC amendment are germane to the subject matter of this proceeding.

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The Presiding Officer concludes the petition fails to establish standing to intervene. The hearing request thus is dismissed.

I. BACKGROUND

In a notice issued November 17, 1998, the NRC staff indicated it was considering issuing a license amendment to Source Material License No. SMB-1507, which authorizes licensee SMC to possess radioactive slag that resulted from previous alloy production processes conducted at its Cambridge facility. As described in the notice and SMC's September 14, 1998 amendment request, the license revision would (1) allow SMC to take possession of slag and associated soil that was gathered from offsite locations in 1997 and is currently kept in roll-off containers at a temporary staging area at SMC's Cambridge facility; and (2) permit SMC to remove this offsite slag/soil from the containers and transfer it to an existing slag pile on the SMC facility. See 63 Fed. Reg. 64,976, 64,976 (1998); NRC Staff Notice of Intent to Participate and NRC Staff Response to Request for Hearing Filed by Michael Bruce Gardner (Jan. 11, 1999) unnumbered Attachment 1, at unnumbered p. 7 (Auxlier & Associates, Inc., Environmental Report (July 24, 1998) at 3) [hereinafter Staff Answer]. Prior owners of the Cambridge facility apparently sold or gave away the offsite slag for use as fill material, primarily in the 1980's. See

Staff Answer, unnumbered Attachment 1, at unnumbered p. 5 (Environmental Report at 1).

By a timely hearing petition filed on December 21, 1998, purportedly acting on behalf of certain unnamed citizens of Guernsey County, Ohio, attorney Michael Bruce Gardner asserted that the requested amendment should be disallowed as (1) violating various Ohio state statutory and regulatory provisions and NRC requirements in 10 C.F.R. Part 61; (2) increasing the costs of proper disposal of offsite radioactive slag from the Cambridge facility that was not accounted for in the amendment; and (3) increasing the public health and safety risk from needless handling of radioactive material. See Dec. 21, 1998 Letter from Michael Bruce Gardner to NRC Secretary at 1-2 [hereinafter Petition]. On December 30, 1998, this Presiding Officer and the Special Assistant were appointed to consider the December 21, 1998 hearing request. See 64 Fed. Reg. 915 (1999).

In a December 31, 1998 answer to the petition, SMC declared that the unnamed Guernsey County citizens Mr. Gardner purported to represent lacked standing as of right and had failed to specify areas of concern that were germane to the subject matter of this materials license amendment proceeding. See Answer to Michael Bruce Gardner Request for Hearing Regarding Docket No. 40-8948, [SMC] License Number SMB-1507 (Dec. 31, 1998) at 1-3. In its January 11, 1999

answer, besides declaring it wished to be a party to this proceeding in accordance with 10 C.F.R. § 2.1213, the staff asserted the petition had failed to demonstrate standing or germane areas of concern. See Staff Answer at 12-15.

In a January 14, 1999 issuance, the Presiding Officer provided Mr. Gardner with an opportunity to respond to the SMC and staff answers and allowed for SMC and staff replies to that response. See Presiding Officer Order (Schedule for Further Filings Regarding Hearing Request) (Jan. 14, 1999) at 1 (unpublished). Mr. Gardner did so on February 5, 1999, declaring the proposed amendment would (1) affect the aesthetic, recreational, environmental, and economic interests of certain unnamed Guernsey County citizens; and (2) violate various provisions of Ohio and federal law, including the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9657, and 10 C.F.R. Part 61. See Unnamed Citizens of Guernsey County's Joint Reply to Answers of NRC Staff and [SMC] to Request for Hearing (Feb. 5, 1999) at 6-18 [hereinafter Response]. Thereafter, in replies filed on February 12 and 22, 1999, respectively, both the staff and SMC again declared that the December 21, 1998 petition should be dismissed for failing either to establish the requisite standing or to specify germane areas of concern. See NRC Staff Response to "Unnamed Citizens of Guernsey County's Joint Reply to Answers of NRC Staff and [SMC] to

Request for Hearing" (Feb. 12, 1999) at 2 [hereinafter Staff Reply]; Reply of [SMC] to "Unnamed Citizens" Joint Reply to Request for Hearing Filed by Michael Bruce Gardner (Feb. 22, 1999) at 2-6.¹

II. ANALYSIS

Intervention in NRC licensing adjudications, whether formal or informal, generally arises in one of three ways: (1) an individual seeks to intervene on his or her own behalf; (2) an organization seeks to intervene to represent the interests of one or more of its members; or (3) an organization seeks to intervene on its own. In this instance, it is apparent that only the first type of intervention is at issue. See Response at 16 ("Organizational standing is not at issue here. Citizens are unorganized in that respect and assert only their own legal rights are adversely affected.")

When an individual seeks to intervene on his or her own behalf, that person must establish that (1) he or she will suffer a distinct and palpable injury in fact within the zone of interests arguably protected by the statutes governing the proceeding (e.g., the Atomic Energy Act, the

¹ On February 16, 1999, the staff notified the Presiding Officer and the other participants that, in accordance with 10 C.F.R. § 2.1205(m), notwithstanding the pendency of the December 21, 1998 hearing petition it had decided to issue the requested amendment. See Feb. 16, 1999 Letter from John W.N. Hickey, NRC Office of Nuclear Materials Safety and Safeguards to James Valenti, SMC.

National Environmental Policy Act of 1969); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. See Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 423, aff'd, CLI-97-8, 46 NRC 21 (1997). Further, in order to establish the factual predicates for these various elements, when legal representation is present, it generally is necessary for the individual to set forth any factual claims in a sworn affidavit. See id. at 427 n.4.

In connection with these standards, the intervention petition is deficient on several counts. Although the petition makes various claims about purported injuries, the only specific factual assertion it contains is that there are "two individuals who own real property within a mile of the SMC facility known to contain radioactive slag from the SMC facility."² Response at 14. Their injury, it asserts, relates to the failure of the amendment to permit these individuals to place the slag now on their property on the SMC slag pile, thereby injuring their economic interests by requiring them to dispose of their slag at a substantially greater cost. Putting aside the question of whether this

² The petition also describes various purported injuries to aesthetic, recreational, and environmental interests that will occur if the amendment is granted, including visual blight and contaminated runoff into nearby streams. See Response at 12-14. As we note below, however, the petition contains no verified claim to these injuries from any individual who had indicated an intent to become a party to this proceeding.

purported interest falls within applicable zone of interests, but see, e.g., International Uranium (USA) Corp. (Receipt of Material from Tonawanda, New York), CLI-98-23, 48 NRC 259, 264-65 (1998) (economic interests, unlinked to any radiological harm, inadequate to provide basis for standing), this claim must also fail because (a) it is not supported by the requisite sworn statement affirming any of the factual assertions upon which it rests; (b) it lacks the requisite concreteness to establish an injury in fact; and (c) it is not likely that a favorable decision in this instance would redress the alleged injurious effects to the interest in question. On the latter point, the Presiding Officer's authority in this proceeding relative to the SMC amendment application is to determine whether to permit the material now on site to be moved from the containers to the slag pile. Consequently, action by the Presiding Officer to grant or deny the requested amendment simply will not afford the relief the petition purports to seek so as to redress the alleged injury.³

³ By the same token, the limited scope of the amendment request raises a serious question whether, in accordance with 10 C.F.R. § 2.1205(h), the areas of concern specified in the petition are indeed germane to the subject matter of this proceeding.

Having failed to establish the requisite standing as of right,⁴ the petition must be dismissed and this proceeding is terminated.

III. CONCLUSION

Because it fails to establish the requisite standing as of right, the December 21, 1998 petition filed by Michael Bruce Gardner, Esq., seeking to challenge the September 14,

⁴ Although there is some question whether consideration of discretionary standing under the standards in Portland General Electric Co. (Pebble Springs Nuclear Power Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614-17 (1976), is appropriate when there is no intervenor with standing as of right, see Envirocare of Utah, Inc., LBP-92-8, 35 NRC 167, 183 (1992), the petition is so woefully deficient relative to the various factors that must be considered for discretionary standing that it would not pass muster under that analysis either.

1998 SMC request for a license amendment authorizing the movement of onsite slag material is denied.⁵

For the foregoing reasons, it is this twenty-third day of February 1999, ORDERED, that:

1. The December 21, 1998 request for a hearing filed by Michael Bruce Gardner is denied and this proceeding is dismissed.

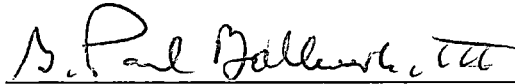
2. In accordance with the provisions of 10 C.F.R. § 2.1205(o), as it rules upon a hearing request, this memorandum and order may be appealed to the Commission by filing an appeal statement that succinctly sets out, with supporting arguments, the errors alleged. To be timely, an

⁵ Putting aside the standing deficiencies noted above, the petition here is also suspect because of the considerable uncertainty about Mr. Gardner's role relative to the petition. He has not claimed to be intervening on his own behalf, but rather on behalf of his "clients." Petition at 1. Yet, despite the Presiding Officer's explicit directive to enter a notice of appearance conforming with the requirements of 10 C.F.R. § 2.713(b), which would include a statement identifying exactly whom he is representing, see Presiding Officer Memorandum and Order (Initial Prehearing Order) (Jan. 4, 1999) at 2-3 (unpublished), up to this point Mr. Gardner has failed to do so.

If Mr. Gardner seeks to appeal this dismissal determination to the Commission, he should endeavor to clarify this matter of client authorization by entering an appropriate appearance with whatever additional explanation is needed.

appeal statement must be filed within ten days after this memorandum and order is served (i.e., on or before Wednesday, March 10, 1999).

BY THE PRESIDING OFFICER⁶



G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

February 23, 1999

⁶ Copies of this memorandum and order were sent this date to counsel for applicant SMC and to Michael Bruce Gardner, Esq., by Internet e-mail transmission; and to counsel for the staff by e-mail through the agency's wide area network system.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

SHIELDALLOY METALLURGICAL CORP.
Cambridge, Ohio
(Request for Materials License
Amendment)

Docket No.(s) 40-8948-MLA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LBP-99-12 - DENY'G PETITION... have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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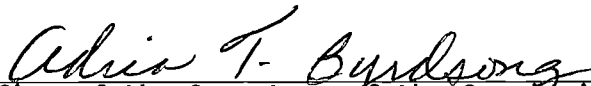
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Dated at Rockville, Md. this
23 day of February 1999


Office of the Secretary of the Commission