UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 04/26/99

COMMISSIONERS:

SERVED 04/26/99

Shirley Ann Jackson, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

Docket No. 40-8948-MLA

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

CLI-99-12
MEMORANDUM AND ORDER

Four citizens of Guernsey County, Ohio, ("Citizens") have sought intervention and a 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. On February 23, 1999, the Nuclear Regulatory Commission's Presiding Officer issued a Memorandum and Order, LBP-99-12, denying Citizens' intervention petition and hearing request for failure to demonstrate standing. On March 5, Citizens appealed LBP-99-12 to the Commission pursuant to 10 C.F.R. § 2.1205(o). Both SMC and the NRC staff oppose Citizens' appeal. We deny the appeal, affirm LBP-99-12 and terminate the proceeding.

BACKGROUND

This proceeding stems from SMC's application to amend its Source Material License No. SMB-1507 which currently authorizes SMC to possess radioactive slag (currently totaling about 7 million cubic feet) that resulted from alloy production processes previously conducted at SMC's Cambridge facility. If approved, the license amendment would allow SMC to take possession of an additional 81,000 cubic feet of slag and associated soil that was gathered from offsite residential properties in 1997[(1)] and is currently owned and held by another company in roll-off boxes (containers) at a temporary staging area which that company rents from SMC within the Cambridge facility grounds. The amendment would also permit SMC to move this offsite slag/soil from the containers to a nearby slag pile that is also within the SMC facility.[(2)]

Citizens ask this agency to deny the application on the grounds that it would (1) violate various state statutory and regulatory provisions, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9657, and NRC requirements in 10 C.F.R. Part 61; (2) increase the costs of proper disposal of offsite radioactive slag from the Cambridge facility that was not accounted for in the amendment; (3) increase the public health and safety risk from needless handling of radioactive material; and (4) adversely affect Citizens' aesthetic, recreational, environmental/conservational, and economic interests, including visual blight and contaminated runoff into nearby streams.

Regarding their fourth ground, Citizens argue that (a) their aesthetic values will be adversely affected by looking from state or township roads upon additional slag/soil commingled with the solid wastes in the slag pile, (b) their recreational interests will be adversely affected by this commingling adjacent to open fields, wetlands and Chapman's Run that drain into nearby Will's Creek, (c) their environmental/conservational interests will be adversely affected by the commingling being in violation of federal and Ohio laws enacted to protect the public health, safety, welfare and environmental resources, and (d) their economic interests (also addressed in the second ground) are adversely affected by the amendment's failure to permit two of the four petitioners to place the slag now on their property onto the SMC slag pile, thereby requiring them to dispose of their slag elsewhere at a substantially greater cost.

The Presiding Officer concluded that the only specific factual assertion Citizens made in support of their various claims of injury was that two of the petitioners own real property (within a mile of the SMC facility) known to contain radioactive slag from the SMC facility -- a fact relevant only to two petitioners' claim of economic injury. The Presiding Officer concluded that this claim of economic injury was unsupported by the requisite sworn statement affirming the factual assertions upon which the claim rests, lacked the requisite concreteness to establish an injury in fact, and was unlikely to

yield a favorable decision which would redress the alleged injurious effects to the interest in question. Regarding the redressability of the injuries, the Presiding Officer further ruled that, because his authority extended only to determining whether to permit the material now on site to be moved from the containers to the slag pile, he lacked the authority to grant Citizens the relief they sought -- removal of slag and soil from their property -- to redress their alleged economic injury.(3) Finally, regarding the remaining allegations of aesthetic, recreational, and environmental/conservational injury, the Presiding Officer ruled that the petition contained no verified claim to these injuries from any individual who had indicated an intent to become a party to this proceeding. Based on these rulings, the Presiding Officer dismissed the intervention petition and terminated the proceeding.

On appeal, Citizens proffer five grounds for reversing the Board's order denying them standing, all of which are opposed by the staff and SMC. As we have recently reiterated, any individual seeking standing to participate in a Commission adjudication 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, (2) the injury is fairly traceable to the challenged action, and (3) the injury is likely to be redressed by a decision in the petitioning individual's favor. See Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998).

ANALYSIS

1. **Adequate Level of Specificity**. Citizens argue that the Presiding Officer erred in concluding that they must establish the factual predicates for the various elements of a request for hearing. According to Citizens, their request for hearing need only allege that they will suffer a distinct and palpable injury, fairly traceable to the proposed action that is likely to redressed by a favorable decision.

Citizens' argument reflects a basic misunderstanding of the Commission's rules of practice. We differ from Article III courts in that we do not permit the kind of "notice pleadings" to which Citizens allude. North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC ___, ___, slip op. at 14 (March 2, 1999). Rather, we insist on detailed descriptions of the petitioner's positions on issues going to both standing and the merits. 10 C.F.R. § 2.1205(e) (petitioner "must describe in detail" these positions). Cf. 10 C.F.R. §§ 2.1211(b) (requiring governmental participants in Subpart L proceedings to state their areas of concern "with reasonable specificity"), 2.714(a)(2) (requiring petitioners in Subpart G proceedings to set forth their positions "with particularity").

2. **Higher Standard; Economic Injury**. Citizens assert that the Presiding Officer improperly held them to a higher standard merely because they were represented by counsel. Specifically, they challenge the Presiding Officer's ruling that petitioners who are represented by counsel must generally set forth any factual claims in a sworn affidavit. Citizens do not deny that their request for hearing was unverified by affidavit. Rather, they allege that an affidavit verifying the factual basis of their request for hearing is not a necessary element of the request.

This line of argument is flawed in several respects. Citizens misconstrue the overall thrust of the Presiding Officer's ruling. Although the Presiding Officer does refer to "the requisite sworn statement" (49 NRC at __, slip op. at 7), this reference follows a correct statement on the immediately preceding page that, "in order to establish the factual predicates for these various elements [of standing], when legal representation is present, it generally is necessary for the individual to set forth any factual claims in a sworn affidavit."(4) We construe the Presiding Officer's perhaps-inartful later reference to "the requisite sworn statement" as merely a shorthand reference to his earlier accurate description of the law. Consequently, we do not interpret his order as stating that an affidavit was absolutely required, for indeed it is not.

We also agree with the Presiding Officer that petitioners represented by counsel are generally held to a higher standard than pro se litigants. See, e.g., Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 546 (1980), and cited cases.

More to the point, however, section 2.1205(e) of our procedural regulations requires petitioners seeking a hearing to provide a detailed description as to why they have standing. We agree with the Presiding Officer that Citizens have made no such showing. Citizens' dual assertions that two petitioners own land within a mile of the SMC facility and that their property contains radioactive slag from the SMC facility may well be true, but they are cursory at best, do not constitute the requisite detailed description, and are unsupported by evidence -- affidavit or otherwise -- that would help to provide the requisite detail. Nor do Citizens even allege that they are required to do anything at all with the slag and soil, or state how much greater their costs would be compared with the expense of returning the slag and soil to the Cambridge facility grounds. These omissions render Citizens' economic injury argument woefully deficient.

Finally, because Citizens' dual economic assertions do not go to the question whether the proffered amendment should be granted, they fall outside the scope of this proceeding. As the Presiding Officer correctly indicated, the scope of this case extends only to the issue whether the Commission should permit both the transfer of responsibility for material now on site and the movement of that material from the on-site containers to the on-site slag pile. See "Notice of Consideration of Amendment Request for Shieldalloy Metallurgical Corp.," 63 Fed. Reg. 64,976 (Nov. 24, 1998). By their own admission, Citizens' radioactive slag is located off-site and is "unaccounted for in the license amendment request." Citizens' Hearing Request, dated Dec. 21, 1998, at 1. Consequently, Citizens' claims of economic injury fall outside the scope of this proceeding, their specific claims of both causation of economic harm and redressability of economic injury fail, and their overarching claim to economic standing must be rejected.(5)

3. **Non-Economic Injuries**. Citizens assert that the Presiding Officer erred in addressing only the specific factual assertions (regarding economic injury to the two owners of real estate near the SMC facility) and ignoring the remaining claims of injury (i.e., those non-economic injuries to Citizens' health-and-safety, aesthetic, recreational, and environmental/conservation interests). The Presiding Officer did not ignore the remaining claims of injury. He expressly noted that they lacked evidentiary support (49 NRC at ___ n.2, slip op. at 5 n.2) -- a conclusion with which Citizens have not taken issue and with which we agree. As discussed above, petitioners to intervene are required under our rules of practice to provide some form of substantiating evidence for their factual assertions regarding standing. Citizens' failure to offer such support for its claims of non-economic injury (despite their having been served with a copy of the relevant Environmental Report, supra note 1) rendered those claims deficient and absolved the Presiding Officer of any need to discuss them in detail.

In addition to failing to offer any supporting evidence, Citizens never assert that they actually use the geographical areas which they claim to be associated with their purported aesthetic, recreational, and environmental/conservation interests. See Citizens' Reply Brief, dated Feb. 5, 1999, at 13. In this respect, Citizens fail to show that they would be "personally and individually" injured, as required under the Supreme Court's decision in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n.1, 561-62 (1992). See also United States v. AVX Corp., 962 F.2d 108, 118 (1st Cir. 1992) ("a plaintiff, to secure standing, must show that he or she uses the specific property in question" (citation and internal quotation marks omitted)). Compare Private Fuels Storage (ISFSI), CLI-98-13, 48 NRC 26, 31-32 (1998) (sworn affidavits showing regular and frequent visits to a home near the facility are sufficient to establish standing)

4. **Redressability of Injuries**. Citizens argue that the Presiding Officer erred in concluding that denial of the license amendment application would not redress the alleged economic injury. They claim that the Presiding Officer is reaching a conclusion on the merits of their request for hearing without giving them an opportunity to present evidence or to discover how denial of the application might redress all of their alleged injuries (not just the economic injury).

We disagree with both prongs of this argument. First, as explained above, the scope of this proceeding encompasses only radioactive material currently on-site, not material located on the two petitioners' own property. Consequently, as a matter of law, Citizens' claim of economic injury falls outside the scope of this proceeding and thus cannot be redressed herein. This conclusion of law renders irrelevant any evidence Citizens would present on redressability of economic injury.[(6)] Second, Citizens' complaint regarding a denial of opportunity for discovery ignores the fact that Subpart L proceedings such as this one offer no right to discovery. See 10 C.F.R. § 2.1231(d). Citizens' argument again reflects their failure to recognize that they had, but failed to take advantage of, their opportunity to present a minimal level of evidence supporting their claims of injury. Moreover, their claim that a decision on redressability constitutes a merits decision is legally unsupportable. It is well established in both federal and Commission case law that redressability is an essential element of standing. See, e.g., Yankee Atomic, supra; Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995); Bennett v. Spear, 520 U.S. 154, 162, 167 (1997).

5. **Need to Identify Clients**. Citizens object to the Presiding Officer's instruction that their counsel, in any appeal he might file, must enter an appearance that includes a statement identifying his clients in terms much more specific than "unnamed citizens," the only phrase used by counsel to identify his clients while the proceeding was pending before the Presiding Officer. Citizens apparently consider the instruction to be one of the grounds on which the Presiding Officer based his adverse ruling regarding Citizens' standing.

This argument is flawed in several respects. Initially, counsel's March 5 submittal of the required notice of appearance -- which identified his clients by name -- renders much of this argument moot. As to the remaining portion, we disagree with Citizens' apparent conclusion that the Presiding Officer in any way based his rejection of Citizens' standing on their counsel's prior failure to enter an appearance identifying his clients. The Presiding Officer's discussion of the entry of appearance and identification of clients is found not in the "Analysis" section of LBP-99-12 but rather in a footnote attached to the "Conclusion" section. Thus, it does not form a basis for the Presiding Officer's ruling on standing.

However, we would be remiss if we did not note that the Presiding Officer correctly enunciated the Commission's general rule that, to establish individual standing, the individuals seeking to intervene must identify themselves.[(7)] The general need for such identification should be obvious. If the Commission does not know who the petitioners are, it is usually difficult or impossible for the licensee to effectively question, and for us to ultimately determine, whether petitioners as individuals have "personally" suffered or will suffer a "distinct and palpable" harm that constitutes injury in fact[(8)] -- a determination required for a finding of standing.

CONCLUSION

For the reasons set forth above, Citizens' appeal is denied, LBP-99-12 is affirmed, and this proceeding is terminated.

IT IS SO ORDERED.

For the Commission
Original signed by
Annette L. Vietti-Cook

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Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of April, 1999.

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1. Apparently, some of the slag from the plant was sold or given away for off-site use as fill material, primarily in the 1980s. Environmental Report, July 24, 1998, at 1, attached to NRC Staff's Response, dated Jan. 11, 1999.

2. On February 16, the NRC staff granted the license amendment application. The staff also concluded that the existing license already authorized movement of the material from its on-site containers to the slag pile. Letter of John W. N. Hickey to James Valenti, dated Feb. 16, 1999, at 1.

3. The Presiding Officer raised, but did not rule on, the questions whether this purported economic interest falls within applicable zone of interests arguably protected by the statutes governing the proceeding and whether any of the areas of concern specified in the petition are germane to the subject matter of this proceeding.

4. LBP-99-12, slip op. at 6 (emphasis added), citing Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 427 n.4, aff'd, CLI-97-8, 46 NRC 21 (1997). The Commission's Subpart L procedures governing this proceeding do not now contain, nor have they ever contained, such a requirement. Although our Subpart G procedural rules once contained such a requirement (see 10 C.F.R. § 2.714(a) (1977)), we rescinded that provision more than twenty years ago. See 43 Fed. Reg. 17,798, 17,799 (April 26, 1978). See also Washington Public Power Supply System (WPPSS Nuclear Project 1), LBP-83-59, 18 NRC 667, 669 (1983).

5. In any event, the grant or denial of the instant amendment in no way precludes Citizens from reaching an agreement with SMC for the latter to take their slag and soil. It currently appears that Citizens have no contractual grounds for insisting that SMC take their slag and soil. See SMC's Reply Brief, dated Feb. 22, 1999, at 5. However, there is nothing in SMC's license or the instant license amendment which would preclude Citizens and SMC from entering into such a contract. Indeed, the staff's Safety Evaluation Report specifically states that

> This action [i.e., the grant of the license amendment] does not preclude return of additional material to the site at some future time. In fact, we have increased the amount authorized for transfer to Shieldalloy from approximately 1% ... to 3% (or 10,000 cubic yards).... Shieldalloy could request that even greater amounts of material be permitted to return to the site, but would have to submit another amendment request to do so.

Safety Evaluation Report at 3, attached to the NRC staff's Feb. 16, 1999 letter granting the amendment, supra note 2. Given that the current material totals only 3000 cubic meters, plenty of volume appears still to be available, within the parameters of the instant license amendment, to accommodate Citizens' own slag and soil, assuming Citizens were to reach an agreement with SMC. Id. at 4.

6. Although Citizens may be correct that its claims of non-economic injury could theoretically be redressed through the denial of SMC's license amendment application, those claims are nevertheless flawed for the reasons set forth elsewhere in this order.

7. See generally Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389-400 (1979) (a petitioning organization must disclose the name and address of at least one member with standing to intervene so as to afford the other litigants the means to verify that standing exists). Although this agency has never gone so far as to admit an anonymous party into a proceeding, we have repeatedly shown in other contexts our willingness to make the necessary accommodations to protect the privacy of individuals who show us that such protection is appropriate -- something Citizens have not done. See International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-97-14, 46 NRC 55, 57 n.3 (1997) (noting that fear for the safety of the people whom an organization purports to represent could justify the omission of those people's names from a petition opposing the licensing action at issue in an NRC proceeding), aff'd, CLI-98-6, 47 NRC 116 (1998); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 17 n.8 (1985) (using protective orders and expurgated copies of affidavits to protect affiants' anonymity); Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1367 n.18 (1984) ("in camera filings and requests for protective orders are available in appropriate circumstances to protect the legitimate interests of a party or other person"), aff'd sub nom. Deukmejian v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), reh'g granted and opin. vacated, 760 F.2d 1320 (D.C. Cir. 1985), Commission decision reaff'd on reh'g sub nom. San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26 (D.C. Cir.) (en banc), cert. denied, 479 U.S. 923 (1986).

8. Dellums v. NRC, supra, 863 F.2d at 971. See generally Atomic Energy Act, § 189a, 42 U.S.C. § 2239(a) (requiring that a person's "interest ... be affected by the proceeding"); 10 C.F.R. § 2.1205(e)(1), (2) (requiring a detailed showing of the petitioner's interest and how it would be affected by the result of the proceeding).