

ARCHER & GREINER

A PROFESSIONAL CORPORATION

PRINCETON OFFICE
700 ALEXANDER PARK
SUITE 102
PRINCETON, NJ 08540
609-580-3700
FAX 609-580-0051

FLEMINGTON OFFICE
PLAZA ONE
1 STATE ROUTE 12, SUITE 201
FLEMINGTON, NJ 08822-1722
908-788-9700
FAX 908-788-7854

COUNSELLORS AT LAW

ONE CENTENNIAL SQUARE
HADDONFIELD, NJ 08033-0968
856-795-2121
FAX 856-795-0574

www.archerlaw.com

August 24, 2005

PHILADELPHIA OFFICE
ONE SOUTH BROAD STREET
SUITE 1620
PHILADELPHIA, PA 19107
215-963-3300
FAX 215-963-9999

WILMINGTON OFFICE
1300 NORTH MARKET STREET
SUITE 700
WILMINGTON, DE 19801
302-777-4350
FAX 302-777-4352

Email Address:
cgibson@archerlaw.com

Direct Dial:
(856) 354-3077

CHRISTOPHER R. GIBSON

Patricia Gardner, Manager
Bureau of Environmental Radiation
New Jersey Department of Environmental Protection
P.O. Box 415
Trenton, NJ 08625-0415

RE: **Shieldalloy Metallurgical Corporation**

Dear Ms. Gardner:

Shieldalloy Metallurgical Corporation (SMC) has sent us your July 18, 2005 letter stating that SMC is required to seek a New Jersey radioactive materials license under the May 16, 2005 amendments to the Radiation Protection Code (N.J.A.C. 7:28-1 et seq.) because materials on site contain concentrations of Radium-226 and Radium-228 in excess of 5 picocuries per gram (pCi/g) above background. Respectfully, we disagree with your conclusion.

We have carefully reviewed your letter, the amendments in question, the applicable case law, the Atomic Energy Act ("AEA") of 1954, the Federal Nuclear Regulatory Commission (NRC) regulations, and the Supremacy Clause of the U.S. Constitution.

This review leads us to conclude that because there is no Agreement between the State of New Jersey and the NRC under 42 U.S.C. § 2021, the NJDEP is without jurisdiction to require SMC, the holder of an NRC "source material" license, to obtain a license under N.J.A.C. 7:28-1 et seq. See, e.g., *People of State of Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571, 581 (7th Cir. 1982), cert. denied 459 U.S. 1049 (NRC has exclusive authority to regulate radiation hazards associated with the materials and activities covered by the Atomic Energy Act of 1954 Act unless the state has agreed to assume some of the responsibility for that regulation under 42 U.S.C §2021.) See also, *Jersey Central Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1112 (3d Cir. 1985), in which the Third Circuit held that a township ordinance prohibiting importation of nuclear waste was unconstitutional and the ordinance was preempted by Atomic Energy Act of 1954. The Third Circuit declared that Congress intended § 2021 to confirm "a general federal preemption of the regulation of nuclear activities. The purpose of § 2021 is to provide a framework within which, pursuant to an agreement with the NRC, states may assume the regulation of areas occupied by the NRC." *Id.* The Court further explained that the NRC can

agree to allow states to regulate, but that in making that agreement, the NRC does not give away its regulatory function.

Federal preemption of issues of radiological health and safety—the very areas the New Jersey amended regulations address—is spelled out in the NRC General Counsel's opinion found at 10 CFR § 8.4. He states that “[b]y virtue of the Atomic Energy Act of 1954, as amended, the individual States may not, in the absence of an agreement with the Atomic Energy Commission [now the NRC] regulate the materials described in the Act from the standpoint of radiological health and safety.” 10 CFR § 8.4 (a).

As support for this position, the General Counsel cited the comments of the Joint Committee on Atomic Energy on the section of the law that eventually became § 2021 of the Act. The Joint Committee noted the following:

It is not intended to leave any room for the exercise of dual or concurrent jurisdiction by States to control radiation hazards by regulating byproduct, source, or special nuclear materials. The intent is to have the material regulated and licensed either by the Commission, or by the State and local governments, but not by both.

As indicated elsewhere, the Commission has exclusive authority to regulate for protection against radiation hazards until such time as the State enters into an agreement with the Commission to assume such responsibility. (Emphasis supplied)

10 CFR at p. 209 (revised as of January 1, 2004)

The NJDEP's preamble to the BER regulation amendments leave no doubt that the amendments are intended to subject New Jersey entities holding NRC “source material” licenses to dual regulation. This is not permissible under the authorities cited above, all of which rest upon the Article IV of the United States Constitution, commonly known as the Supremacy Clause, which provides that the laws of the United States are “the supreme Law of the Land; . . . anything in the Constitution or the Laws of any State to the contrary notwithstanding.” (Emphasis supplied) Const. Art. VI cl. 2.

SMC holds NRC License No. SMB-743 for the possession and use of source material, which is defined by both the NRC and the NJDEP as “uranium or thorium, or any combination thereof, in any physical or chemical form...” 7 N.J.A.C. 28-1.4; 10 CFR §40.5. The radium isotopes referred to in your letter are progeny of natural uranium and thorium and are inextricably bound to the licensed material. The NRC license requires SMC to have in place radiological controls applicable to all of the isotopes SMC is authorized to possess, including of course, Radium-226 and -228. Furthermore, SMC is regularly inspected by the NRC to ensure that these controls remain effective. The NRC's review of SMC'S programmatic documents has never excluded consideration of any of the progeny in the uranium and thorium decay series.

Moreover, not only does SMC hold an NRC license for source material, but SMC is currently going through a decommissioning process under the supervision of the NRC. The BER is participating in this process. That fact alone makes the prohibition of dual regulation more

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compelling. In short, because New Jersey is not an "Agreement State," and because the NRC is actively regulating SMC's source material, of which Radium-226 and -228 are an integral part, the State's licensing regulations are preempted in this case.

Of course, without prejudice to the position stated herein, SMC will continue to cooperate with the State by filing the annual registration renewal provided for in N.J.A.C. 7:28-3.5. If after reviewing this letter with your legal advisors you have a different legal position from that set forth above, it would be helpful for you to articulate your position to me in writing so that SMC may better understand the BER's legal position. Once we receive your legal analysis, it might also be helpful to meet and discuss these issues further. Until we receive some written analysis that calls into question the legal analysis set forth above, however, we must respectfully regard the demand in your letter of July 18, 2005 as having no legal effect.

Thank you for your attention to this matter.

Very truly yours,



CHRISTOPHER R. GIBSON

CRG/CLH/pds/rlh

cc: Joseph T. Diegel, SMC
David Smith, SMC
M. Miller, NRC Region I
Kenneth Kalman -- USNRC NMSS-DWM
Dennis Solenberger--USNRC Office of State Programs
Carol D. Berger, CHP

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