

January 10, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
NEW JERSEY DEPARTMENT OF)	Docket No: SMB-743
ENVIRONMENTAL PROTECTION REQUEST)	
FOR A HEARING ON NUREG-1757)	

NRC STAFF'S RESPONSE TO THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL
PROTECTION'S PETITION FOR A HEARING ON NUREG-1757

INTRODUCTION

On December 22, 2006, the New Jersey Department of Environmental Protection (NJDEP) filed its Petition for a Hearing on NUREG-1757 (Petition), pursuant to 10 C.F.R. § 2.309. For reasons discussed below, the staff of the U.S. Nuclear Regulatory Commission (Staff) opposes the Petition and urges that it be denied.

BACKGROUND

On December 22, 2006, the New Jersey Department of Environmental Protection (NJDEP) filed, *inter alia*,¹ a Petition for a Hearing on NUREG-1757, "Consolidated Decommissioning Guidance," a generic document providing guidance on how the NRC Staff evaluates a licensee's decommissioning plan. NJDEP's Petition, filed pursuant to 10 C.F.R. § 2.309, asks the Commission "to rescind the portion of the finalized NUREG-1757, which sets forth the Long Term Control ('LTC') license, the legal agreement and restrictive covenant

¹ Filed together with the instant Petition, NJDEP filed a petition for rulemaking, in accordance with 10 C.F.R. § 2.802, requesting that the NRC rescind certain portions of NUREG-1757 and formally stay any action on the decommissioning plan of Shieldalloy Metallurgical Corporation until NJDEP's petitions are adjudged. That petition is being addressed as a separate matter in accordance with the applicable regulations. See Letter from Michael T. Lesar, Chief; Rulemaking, Directives, and Editing Branch in the NRC's Office of Administration; to Stuart Rabner, Attorney General of New Jersey, dated January 5, 2007 (copy attached).

(‘LA/RC’), the 1000 year dose modeling, the ALARA analysis, and the financial assurance.” Petition at pp. 1, 3–4. The NJDEP also relies on section 189 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a)(1)(A) (2006), citing language that “in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees . . . the Commission shall grant a hearing upon the request of any person. . . .” Petition at pp. 4, 9–11. The NJDEP argues that it is entitled to a hearing because numerous provisions in NUREG-1757 would have the effect of changing NRC regulations governing decommissioning. In addition, the NJDEP cites precedent holding that a person is entitled to a hearing on agency actions that have the effect of changing a regulation or other existing law. Petition at p. 3, *citing Citizens Awareness Network v. NRC*, 59 F.3d 284, 295-96 (1st Cir. 1995).

DISCUSSION

Neither the regulatory nor the statutory provision cited by NJDEP grants the right to a hearing in the present circumstances. As stated in 10 C.F.R. § 2.300, the provisions of Subpart C of the Commission’s Rules of Practice “apply to all adjudications conducted . . .”² Thus, 10 C.F.R. § 2.309 applies to “Hearing requests, petitions to intervene, requirements for standing, and contentions.” Under section 2.309(a), “Any person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing or petition for leave to intervene. . . .” Section 2.309 refers to numerous matters that are considered proceedings to which hearing rights attach. 10 C.F.R. § 2.309(b). However, the issuance of NUREGs is not listed among these matters, and nothing in section 2.309 suggests

² To the extent the NJDEP is seeking rulemaking with respect to the matters addressed in NUREG-1757, such proceedings are subject to the provisions of 10 C.F.R. § 2.800 et seq., not 10 C.F.R. 2.300 et seq. The NJDEP’s petition provides no basis for departing from the Commission’s well-established procedures for conducting notice-and-comment rulemaking, and for that reason alone should be denied.

that hearing rights extend to disputes over guidance documents prepared by the NRC Staff.

Likewise, there is no statutory basis for a hearing on a NUREG. Section 189 of the Atomic Energy Act, 42 U.S.C. § 2239(a)(1)(A), pertains to “Hearings and judicial review” and lists proceedings to which hearing rights attach. They include the following:

. . . any proceeding under this [Atomic Energy] Act . . . for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 153, 157, 186(c), or 188 [of the Act].

Again, the issuance of NUREGs is not listed among the proceedings for which persons may request a hearing. This is understandable given that the specified proceedings all concern actions that have specific, binding legal effect, actions that are markedly different from the NRC Staff’s issuance of guidance in the form of NUREGs.

The NJDEP cites *Citizens Awareness Network* for the proposition that a person is entitled to a hearing on agency actions that have the effect of changing a regulation or other existing law. Petition at p. 3, *citing* 59 F.3d at 295-96. However, just as the development or issuance of a NUREG is not a proceeding to which hearing rights attach, a finalized NUREG is neither a law nor a regulation subject to administrative or judicial appeal. Rather than effecting a change in the law, a NUREG is merely a guidance document developed by the NRC staff to assist licensees, applicants and the staff. As the Commission has explained:

NUREGs and Regulatory Guides, by their very nature, serve merely as guidance and cannot prescribe requirements. Although conformance with regulatory guides will likely result in compliance with specific regulatory requirements, nonconformance with such guides does not equate to noncompliance with the regulations.

The Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 98 (1995). Moreover, because a NUREG is merely a guidance document, it is exempted from the notice and

comment requirements that apply to substantive rulemaking. *La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1st Cir. 1992). Thus, the NRC is not required to hold a hearing before issuing a NUREG. As the particular NUREG for which the NJDEP seeks a hearing itself makes clear:

[A] NUREG is not a substitute for NRC regulations, and compliance with it is not required. The NUREG describes approaches that are acceptable to NRC staff. However, methods and solutions different than those in [the] NUREG will be acceptable, if they provide a basis for concluding that the decommissioning actions are in compliance with NRC regulations.

NUREG-1757, Vol. 1, Rev. 2 at p. xvii. Because NUREG-1757 does not set mandatory standards that licensees must follow, it does not have the effect of changing existing rules or regulations governing decommissioning. Indeed, if guidance documents are challenged in a particular proceeding they are to be regarded as representing the views of the staff regarding compliance with the regulations, although such views may be entitled to considerable prima facie weight. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 (2001). Accordingly, the NJDEP's petition for a hearing on NUREG-1757 has no legal basis.³

³ The Staff would additionally note that the NJDEP's Petition for a Hearing on NUREG-1757 is not responsive to any opportunity for hearing presented in the *Federal Register*. The NRC has not extended any invitation for persons to request a hearing on NUREG-1757 generally. Rather, the NRC has at times placed in the *Federal Register* notices giving interested persons the opportunity to request a hearing on the specific issue of whether the NRC should approve or reject a particular decommissioning plan pursuant to an application submitted by an NRC licensee.

CONCLUSION

NJDEP's petition for a hearing on NUREG-1757 asks for commencement of a proceeding not provided for under NRC regulations or statute. Accordingly, the NRC Staff requests that the Commission deny the NJDEP's Petition for a Hearing on NUREG-1757.

Respectfully submitted,

/RA by Michael J. Clark/

Michael J. Clark
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 10th day of January, 2007

January 5, 2007

Stuart Rabner
Attorney General of New Jersey
R. J. Hughes Justice Complex
25 Market Street
P. O. Box 093
Trenton, NJ 08625-0093

Dear Mr. Rabner:

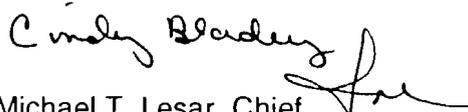
This letter acknowledges the Petition for Rulemaking on NUREG-1757, Petition for a Hearing on NUREG-1757, and Petition for a Stay of any Action on the Shieldalloy Metallurgical Corporation (License No. SMB-743) Decommissioning Plan (Docket No. 04007102), dated December 22, 2006, that you submitted to the U. S. Nuclear Regulatory Commission (NRC or Commission) on behalf of the New Jersey Department of Environmental Protection.

In your Petition for Rulemaking on NUREG-1757, you request that the NRC promulgate a rule which prohibits the onsite disposal of long-lived nuclides under the License Termination Rule. The NRC is in the process of evaluating your petition. We will inform you of the status of your petition as staff action on it progresses.

Our Office of the General Counsel has requested that we provide an update to you on the status of the State's other requests to the Commission. Your requests for a hearing on NUREG-1757 and the suspension of the hearing process on the Shieldalloy Decommissioning Plan are before the Commission for action. As a separate matter, the Commission published in the Federal Register (November 17, 2006; 71 FR 66986) a notice of opportunity to request a hearing on the proposed Shieldalloy Decommissioning Plan. You, or any other interested person, may request a hearing on that matter as provided in that notice; any such request must be filed with the Commission by January 16, 2007.

You may direct any questions you may have concerning the petition process to me on (301) 415-7163, e-mail MTL@nrc.gov or to Betty K. Golden on (301) 415-6863, e-mail BKG2@nrc.gov.

Sincerely,



Michael T. Lesar, Chief
Rulemaking, Directives, and Editing Branch
Division of Administrative Services
Office of Administration

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION'S PETITION FOR A HEARING ON NUREG-1757" in the above captioned proceeding have been served on the following persons by deposit in the United States Mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**) on this 10th day of January, 2007.

Adjudicatory File *
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
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Washington, D.C. 20555

Office of the Secretary * **
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/RA by Michael J. Clark/

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