

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

STATE OF NEW JERSEY, )  
 )  
 ) Petitioner, )  
 )  
 ) v. )  
 ) DOCKET NO. 06-5140  
 )  
 ) UNITED STATES NUCLEAR )  
 ) REGULATORY COMMISSION )  
 ) and UNITED STATES OF )  
 ) AMERICA, )  
 )  
 ) Respondents. )

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RESPONSE OF PETITIONER  
TO COURT'S DECEMBER 22, 2006  
ORDER TO ADDRESS ISSUES

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This will respond to the Order entered by the Court on December 22, 2006 that the parties address the four issues specified therein. The time for the parties to respond was extended to January 31, 2007 by Order entered January 10, 2007.

#### The Petition

The State of New Jersey (State) on December 22, 2006 petitioned the Court pursuant to Rule 15 of the Federal Rules of Appellate Procedure, the Hobbs Act, 28 U.S.C. §2342 et seq., and §2239(b) of the Atomic Energy Act, 42 U.S.C. §2011 et seq. to review the determination of the United States Nuclear Regulatory Commission (NRC) to finalize revisions of NUREG-1757 guidance. The finalized guidance was published by the NRC on October 27, 2006.

The NRC on November 17, 2006 determined to accept for technical and environmental review a decommissioning plan filed by Shieldalloy Metallurgical Corporation, Inc., located in Newfield, New Jersey. 71 Fed. Reg. 66986. That decommissioning plan was drafted in accordance with and will be reviewed by the NRC in accordance with the NUREG-1757 guidance. The decommissioning plan proposes to permanently dispose of radioactive waste at the Shieldalloy facility located in a residential area of Newfield, New Jersey, under authority of a new type of license created by the NRC in NUREG-1757. This will create a risk to public health, safety and the environment.

Since the Shieldalloy wastes are long-lived nuclides, this risk will persist for billions of years.

The State's petition to this Court raises the following claims:

1. The NUREG-1757 guidance establishes the terms and conditions of a new license, a Long Term Control License (LTC), in violation of the Atomic Energy Act, which requires that the NRC utilize rules and regulations when establishing a new license. 42 U.S.C. §§2232(a); 2233;

2. The LTC license created in NUREG-1757 continues in perpetuity and therefore conflicts with existing NRC decommissioning regulations which contemplate that once a site is decommissioned, the NRC license is terminated. 10 C.F.R. §20.1003;

3. The NUREG-1757 guidance fails to require adequate controls for disposal of long-lived radionuclides, in violation of the mandate of the Atomic Energy Act to protect public health and safety. 42 U.S.C. §§2012(a), 2013(d), 2022(f)(3), 2099, 2111(b)(1)(A), 2113(b)(1)(A), 2114(a)(1), 2201(b);

4. The NUREG-1757 guidance mandate that modeling of institutional controls beyond 1,000 years is not required conflicts with the regulatory requirement that residual radioactivity at a decommissioned site be reduced to levels that

are as low as reasonably achievable. 10 C.F.R. §§20.1402, 20.1403(A);

5. The NUREG-1757 guidance underestimates the amount of financial assurance required by a licensee and that shortfall violates the mandate of the Atomic Energy Act to protect public health and safety; and

6. The NUREG-1757 guidance, which establishes a new form of license which would allow permanent disposal of radioactive wastes and increase the number of permanent radioactive waste disposal sites throughout the United States, was finished without conducting an EIS, in violation of the National Environmental Policy Act, 42 U.S.C. §4321 et seq.

I. This Court's Authority to Review this Petition

The Court has authority to review this petition. Jurisdiction to review actions of the NRC is established in the Circuit Courts by the Hobbs Act.

The Court of Appeals ... has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of -

(H) all final orders of the Atomic Energy Commission made reviewable by Section 2239 of Title 42; 28 U.S.C. §2342.

Section 2239 of the Atomic Energy Act, 42 U.S.C. §2239(b) states that

The following Commission actions shall be subject to judicial review in the manner prescribed in chapter 158 of Title 28 and chapter 7 of Title 5:

- (1) Any final order entered in any proceeding of the kind specified in subsection (a) of this section. 42 U.S.C. §2239(b).

Section 2239(a) specifies the following proceedings

... any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license ... and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licenses. 42 U.S.C. §2239(a).

The courts have found that §2239(a) review in the circuit courts is triggered by a policy shift by the NRC involving an interpretation of its regulation and also by a determination by the NRC to adopt a non-binding policy statement when a regulation is arguably required. Citizens Awareness Network, Inc. v. United States Nuclear Regulatory Commission, 58 F.3d 284, 291-92 (1st Cir. 1995), involved a Commission Staff memorandum which set forth a change in decommissioning practice from prior agency precedents and positions. The court found

While the NRC's policy shift involved an interpretation of its regulation, not the regulation itself, it was an interpretive policy that provided a great deal of substantive guidance on the rather ambiguous language of the regulation, by specifically delineating the permissible activities of licensees. We think that the statute's

phrase "modification of rules and regulations" encompasses substantive interpretive policy changes like the one involved here.

Id.

Although the court went on to remand the matter to the NRC for a notice and hearing, Citizens Awareness Network demonstrates that the courts view substantive interpretive policy changes by the NRC as falling within the actions described in §2239(a) and therefore subject to appeal.

In Public Citizen v. Nuclear Regulatory Commission, 845 F.2d 1105 (D.C. Cir. 1988), the NRC issued a non-binding policy statement on an issue, but petitioners contended that the Nuclear Waste Policy Act of 1988, 42 U.S.C. §10226 (1982), required adoption of regulations. When petitioners reached the Circuit Court, the Court found that petitioners could seek court review of the policy statement. Describing the policy statement the court said, "The agency has acted. The Policy Statement is a formal product of the Commission ..." and therefore reviewable under the Hobbs Act and §2239(a). Public Citizen v. Nuclear Regulatory Commission, 845 F.2d at 1108. The court went on to find that petitioners had not filed within the 60-day time limit of the Hobbs Act, 28 U.S.C. §2344, and dismissed the appeal.

The NUREG-1757 guidance document at issue in this petition is an NRC action which the courts have found falls

within §2239. NUREG-1757 has the effect of changing the rules and regulations by conflicting with the AEA and current NRC regulations. For example, the Long Term Control ("LTC") license proposed by NUREG-1757 is a completely new license that was not previously provided by NRC regulations. NRC violated the AEA by providing the LTC license without promulgating formal regulations. See 42 U.S.C. §§ 2022(f)(3), 2232(a), 2233. NUREG-1757 provides for 1000 year modeling, NUREG-1757 vol. 1 pages 17-87 to 17-88. This conflicts with the regulations' modeling requirements regarding long lived nuclides. 10 C.F.R. §20.1401(d); 62 Fed. Reg. at 39083 (Response F.7.3). NUREG-1757 conflicts with the regulations that require residual radioactivity to be reduced to a level that permits termination of the license. 10 C.F.R. §20.1003 (definition of decommissioning). However, under NUREG-1757, the license would not be terminated but would instead be modified into a LTC license. NRC Response to Comments on NUREG-1757 Supplement 1, Response to Comment 8.5.2. NUREG-1757 conflicts with the regulations' requirement that residual radioactivity be reduced to levels that are as low as reasonably achievable ("ALARA"). 10 C.F.R. §§ 20.1402, 20.1403(A), 20.1404(a)(3). However, NUREG-1757 conflicts by only requiring institutional controls to last for 1000 years. NUREG-1757 vol. 1 page M-23. When the NRC finalized

the guidance on October 27, 2006, the State filed this petition to protect its interests.

The State of New Jersey is a "party aggrieved" under 28 U.S.C. §2344 by the NRC's action. The State participated as a party in the proceeding before the NRC by submitting timely comments dated December 28, 2005 on NUREG-1757. The NRC confers standing on a state to participate as a party in proceedings concerning a facility created within that state's boundaries. 10 C.F.R. §2.309. By publishing final revisions to NUREG-1757 on October 27, 2006, the NRC has acted in a manner reviewable by this Court. 42 U.S.C. §2239; 28 U.S.C. §2342. Additionally, as described above, the NRC on November 17, 2006 determined to accept for technical and environmental review a decommissioning plan filed by the Shieldalloy Metallurgical Corporation, Inc., located in Newfield, New Jersey. 71 Fed. Reg. 66986. That decommissioning plan was drafted in accordance with, and will be reviewed by the NRC in accordance with the NUREG-1757 guidance. The decommissioning plan proposes to dispose permanently of radioactive waste at the Shieldalloy facility located in a residential area of Newfield, New Jersey, under authority of a new type of license created by the NRC in the NUREG-1757 guidance. This disposal will create a risk to public health, safety and the environment. Since the Shieldalloy wastes are

long-lived nuclides, this risk will persist for billions of years. The State of New Jersey is "aggrieved" by the NRC's actions. The State's petition asks that the court invalidate portions of NUREG-1757 concerning disposal of radioactive waste pursuant to the long term control license as contrary to the Atomic Energy Act, 42 U.S.C. §2011 et seq., the National Environmental Policy Act, 42 U.S.C. §4321 et seq., and the NRC regulations. The relief sought will redress the State's grievance.

Nor can it be said that the NRC's action on NUREG-1757 lacks finality. The NRC revisions to NUREG-1757 which appeared on the NRC website in October 2006 were published after comments were submitted by interested persons, including the State of New Jersey. The text of the site ([www.nrc.gov/reading-rm/doc-collections/nuregs/staff/1757](http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/1757)) refers to each of the three volumes of the NUREG-1757 Consolidated Decommissioning Guidance as a "Final Report." The agency's position is most certainly definitive and the guidance was being offered to licensees such as Shieldalloy to utilize in decommissioning. Under the analysis in FTC v. Standard Oil Co., 449 U.S. 232, 239 (1980), it is "definitive" and affects the State. This is a final NRC action preliminary to or incidental to licensing and thus appealable to

the Court under the Hobbs Act. Florida Power & Light Co v. Lorion, 470 U.S. 729 (1985).

II. Was the Petition Timely Filed?

The Hobbs Act provides that

On entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days of its entry, file a petition to review the order in the court of appeals wherein venue lies. 42 U.S.C. §2344.

Section 42 U.S.C. 2239(a)(1)(A) refers to the "issuance or modification of rules and regulations dealing with the activities of licensees..." 42 U.S.C. 2239(a)(1)(A). Petitioner State of New Jersey has an interest in the NUREG-1757 guidance, had commented on NRC's proposed revisions to NUREG-1757 and as an interested party was waiting for the NRC to finalize its revisions to the guidance. Those NRC revisions to the NUREG-1757 guidance appeared on the NRC web site in October 2006 at [www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1757](http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1757). The text of that site refers to each of the three volumes of the NUREG-1757 Consolidated Decommissioning Guidance as a "Final Report." The site also states that it was "Last revised Friday, October 27, 2006." There is no indication on the site that these "Final Report[s]" would be published in the Federal Register.

Under the circumstances Petitioner State of New Jersey determined that it was arguable and could ultimately be determined that the NUREG-1757 guidance had been "issued" or "modified" as of the October 27, 2006 date. The State of New Jersey, therefore, filed its petition for review on December 22, 2006, to ensure that it would be filed less than 60 days after the October 27, 2006 date. The petition was timely filed pursuant to 28 U.S.C. 2344 and 42 U.S.C. 2239(a)(1)(A).

III. Is the Time for Filing Triggered by Website Publication or Federal Register Publication?

As noted in response to question II above, the website publication did not indicate that the NUREG-1757 Consolidated Decommissioning Guidance would be published in the Federal Register. When that guidance was later published at 71 Fed. Reg. 78234 it was on Thursday, December 28, 2006, more than 60 days after website publication. The Federal Register notice is not a notice of finalization of guidance, but is on its face a "Notice of Availability." The Federal Register notice could be interpreted to be a notice that copies of the already finished guidance are now available. The date of finalization of the NUREG-1757 guidance is ambiguous. Under the circumstances it was appropriate for Petitioner State of New Jersey to file within 60 days of the October 27, 2006 website date to ensure that the

petition would be timely filed. Certainly the NRC should be required to provide notice of its actions which is unambiguous and readily and universally available. The agency failed to do so here and the State was justified in filing its petition in response to the website publication.

IV. Have Administrative Remedies Been Exhausted?

In Natural Resources Defense Council v. Nuclear Regulatory Commission, 666 F.2d 595 (D.C. Cir. 1981), petitioner NRDC challenged an emergency rule issued by the NRC on procedural and substantive grounds. The NRDC filed a petition for rulemaking with the NRC which raised the procedural and substantive challenges, and after the NRC denied the petition for rulemaking, the NRDC petitioned the circuit court. Although the NRDC's court petition was filed within 60 days of the NRC's denial of the rulemaking petition, 17 months had elapsed since the NRC's issuance of the emergency rule. The court dismissed the NRDC's procedural challenge to the emergency rule on the ground that filing the petition for rulemaking did not extend the 60-day time period set forth in the Hobbs Act for seeking judicial review. NRDC v. NRC, Id. at 602-603.

In light of the ruling in NRDC v. NRC, the State filed this petition on December 22, 2006, within 60 days of the October 27, 2006 publication of the NUREG-1757 "Final Report." On the

same date, December 22, 2006, the State also filed a request for hearing on NUREG-1757 with the NRC pursuant to 10 C.F.R. §2.309, a request for rulemaking with the NRC pursuant to 10 C.F.R. §2.802, and a request that the NRC stay its consideration of the Shieldalloy decommissioning plan until the requests for hearing and rulemaking are determined.

NRC staff submitted a Response to the State of New Jersey's petition for a hearing. That Response, dated January 10, 2007, is attached hereto as Exhibit 1. NRC staff argues therein that issuance of NUREG-1757 is not an action to which hearing rights attach. Footnote 3 of Exhibit 1 states

The Staff would additionally note that the NJDEP's Petition for a hearing is not responsive to any opportunity for hearing presented in the Federal Register. The NRC has not extended an opportunity to 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.

The NRC has determined to treat the petition for rulemaking separately from the petition for a hearing (see letter from Michael T. Lesar of the NRC dated January 5, 2007, attached hereto as Exhibit 2). By order dated January 12, 2007 the NRC denied the State's petition for hearing on NUREG-1757 and the

request for stay of NRC's consideration of the Shieldalloy decommissioning plan. The order is attached hereto as Exhibit 3.

The January 12 NRC order dismissing the State's hearing request on NUREG-1757 asserts that NUREG-1757 is simply guidance which does not establish "binding" agency requirements. Exhibit 3, pages 1-2. The order further states that the State may only challenge in an individual licensing proceeding the "application of the NUREG to the licensee's request." However, the State's challenge to NUREG-1757 is to more than just its "application" to a particular licensee. Rather, the State is challenging the legality of NUREG-1757 on the basis that it conflicts with the AEA, NEPA and current NRC regulations. Thus, NRC's order arguably bars the State from challenging NUREG-1757's legality. This Court should not permit the NRC to utilize procedural maneuvering to avoid legal challenges to its actions.

There is no statutory requirement in the Hobbs Act that a party exhaust administrative remedies before resorting to judicial review. Thermal Science, Inc. v. U.S. Nuclear Regulatory Comm., 29 F. Supp.2d 1068, 1075 (E.D. Mo. 1998); aff'd, 184 F.3d 803 (8th Cir. 1999). Application of the exhaustion of remedies requirement is within the discretion of the court. Thermal Science, Id. at 1075. Petitioner State of New Jersey's interest in this matter has not been to circumvent

the administrative process but to ensure that court review of all of the NRC's actions is available to the State and not foreclosed. The Circuit Court's decision in Natural Resources Defense Council v. Nuclear Regulatory Commission, 666 F.2d 595 (D.C. Cir. 1981), demonstrates that the 60-day time for appeal will not be tolled by a request for hearing to the NRC. Thus the State filed a petition with this Court and also filed a request for hearing with the NRC. The State's request for a hearing on NUREG-1757 was denied by the agency on January 12, 2007 and the NRC cannot now claim there is an administrative remedy for the State to avail itself of.

Respectfully submitted,

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DATED:

1/30/07

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*,<sup>1</sup> 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

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<sup>1</sup> 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 . . .”<sup>2</sup> 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

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<sup>2</sup> 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.<sup>3</sup>

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<sup>3</sup> 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,

A handwritten signature in cursive script, appearing to read "Michael J. Clark".

Michael J. Clark  
Counsel for the NRC Staff

Dated at Rockville, Maryland  
this 10<sup>th</sup> day of January, 2007

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of )

NEW JERSEY DEPARTMENT OF )  
ENVIRONMENTAL PROTECTION REQUEST )  
FOR A HEARING ON NUREG-1757 )

Docket No: SMB-743

CERTIFICATE OF SERVICE

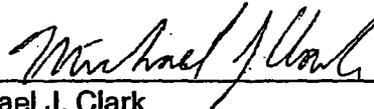
I hereby certify that copies of "NRC STAFF'S RESPONSE TO THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION'S PETITION FOR A HEARING ON NUREG-1757" in the above captioned proceeding have been served on the following persons by deposit in the United States Mail; through deposit in the Nuclear Regulatory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

Adjudicatory File \*  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, D.C. 20555

Office of the Secretary \* \*\*  
Attn: Rulemaking and Adjudications Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16 C1  
Washington, D.C. 20555  
E-Mail: [hearingdocket@nrc.gov](mailto:hearingdocket@nrc.gov)

Office of Commission Appellate Adjudication \*  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16 C1  
Washington, D.C. 20555

Kenneth W. Elwell  
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25 Market Street  
PO Box 093  
Trenton, NJ 08625  
E-Mail: [reeseand@dof.lps.state.in.us](mailto:reeseand@dof.lps.state.in.us)



Michael J. Clark  
Counsel for the NRC Staff

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:

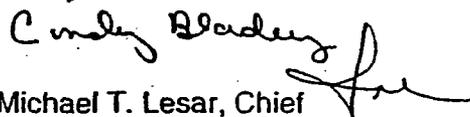
This letter acknowledges the Petition for Rulemaking on NUREG-1757, Petition for a Hearing on NUREG-1757, and Petition for a Stay of any Action on the Shieldalloy Metallurgical Corporation (License No. SMB-743) Decommissioning Plan (Docket No. 04007102), dated December 22, 2006, that you submitted to 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

DISTRIBUTION: RDG SUBJ MLESAR BGOLDEN  
ADAMS ACCESSION NUMBER: ML07

OFFICE	RDEB:DAS:ADM	RDEB:DAS:ADM
NAME	BGOLDEN	MLESAR CB for
DATE	1/5/07	1/ 5/07

**EXHIBIT 2**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED 01/12/07  
SERVED 01/12/07

Dale E. Klein, Chairman  
Edward McGaffigan, Jr.  
Jeffrey S. Merrifield  
Gregory B. Jaczko  
Peter B. Lyons

\_\_\_\_\_)  
In the Matter of )  
 )  
SHIELDALLOY METALLURGICAL )  
CORPORATION and )  
NUREG-1757 )  
\_\_\_\_\_)

Docket No. SMB-743

**ORDER**

This matter is before the Commission on a Petition for Hearing filed by the State of New Jersey. The State's Petition requests a hearing to rescind specified portions of NUREG-1757. In addition, both the Petition for Hearing and an associated Petition for Rulemaking request a stay of "any action" to review the proposed decommissioning plan submitted by the Shieldalloy Metallurgical Corporation ("SMC") until the Commission rules on the petitions. Both the NRC Staff and SMC have filed pleadings in opposition to SMC's filings. Pursuant to 10 C.F.R. § 2.346(h), the Commission denies both the Petition for Hearing and both requests for stay. The Petition for Rulemaking (which seeks to rescind portions of NUREG-1757) has been referred to the appropriate NRC Staff Office.

First, the Petition for Hearing requests a hearing to rescind portions of NUREG-1757, "Consolidated Decommissioning Guidance," which the Commission placed (in revised form) on its public website on or about October 27, 2006. The Petition appears to argue that the NUREG is a "rule or regulation dealing with the activities of licensees[,]" 42 U.S.C. § 2239(a)(1)(A), and that issuance, modification, or suspension of the NUREG requires an adjudicatory hearing under the Atomic Energy Act. However, NUREG-1757 does not establish "binding" agency requirements; instead, it simply provides guidance on how a licensee may

comply with various provisions of the Commission's decommissioning regulations. See NUREG-1757, Vol. 1, Rev.2, xvii. No NRC licensee is required to comply with NUREG-1757. Moreover, New Jersey had advance notice of the proposed NUREG revisions and submitted comments on them, and the NRC has responded to those comments. See 71 Fed. Reg. 78234 (Dec. 28, 2006).

Furthermore, if a licensee is involved in a proceeding in which it seeks to obtain a license or license amendment by seeking to demonstrate compliance with regulatory requirements by showing that its proposed action is consistent with regulatory guidance set forth in a NUREG, any petitioner requesting intervention in that proceeding may seek to challenge the application of the NUREG to the licensee's request. Thus, if a person successfully petitions to intervene in the proceeding to review SMC's proposed decommissioning plan, that person may contest SMC's attempt to rely on the disputed portions of NUREG-1757 in that proceeding. In other words, a person may file contentions with their Petition to Intervene contending that compliance with NUREG-1757 does not demonstrate that the proposed decommissioning plan meets the requirements of the applicable NRC regulations and that additional specified actions are necessary. See generally 10 C.F.R. § 2.309.

Second, the Petition for Hearing (and the Petition for Rulemaking) requests that the Commission stay the proceeding to consider SMC's proposed decommissioning plan, citing 10 C.F.R. § 2.802(d). That regulation provides that a person who has submitted a petition for rulemaking "may request the Commission to suspend all or any part of any licensing proceeding to which the petitioner is a party pending disposition of the petition for rulemaking." *Id.* (emphasis added). However, while New Jersey has submitted a Petition for Rulemaking, the State is not a "party" to the proceeding it seeks to stay. The NRC Staff has published a Notice of Opportunity for a Hearing regarding the proposed decommissioning plan. See 71 Fed. Reg.

66986 (Nov. 17, 2006). That Notice offers "any interested person" the opportunity to intervene in the proceeding to review the proposed decommissioning plan and to request a hearing on that plan. *Id.* If a person responds to the Notice of Opportunity for a Hearing, and if the Atomic Safety and Licensing Board grants the request to intervene, that person may then seek to invoke Section 2.802(d).

Furthermore, as SMC's opposition argues, the requests for a stay appear to constitute "Motions" under the Commission's Rules of Practice. As such, they should comply with 10 C.F.R. § 2.323. In this case, both of New Jersey's stay requests - on their face - do not meet the requirements of section 2.323.

In summary, the Petition for a Hearing on the revisions to NUREG-1757 is denied. In addition, both requests for a stay of the proceeding to consider the proposed SMC decommissioning plan are denied.

IT IS SO ORDERED.

For the Commission

*/RA/*

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Annette Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland  
this 12<sup>th</sup> day of January, 2007.



Docket No. SMB-743  
COMMISSION ORDER ADDRESSING INTERVENTION  
PETITION AND STAY REQUESTS

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David R. Smith, Radiation Safety Officer  
Shieldalloy Metallurgical Corporation  
12 West Boulevard  
P.O. Box 768  
Newfield, NJ 08344-0768

[Original signed by Evangeline S. Ngbea]

---

Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 12<sup>th</sup> day of January 2007

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

STATE OF NEW JERSEY, ) DOCKET NO. 06-5140  
)  
Petitioner, )  
)  
v. )  
)  
UNITED STATES NUCLEAR )  
REGULATORY COMMISSION )  
and UNITED STATES OF )  
AMERICA, )  
)  
Respondents. )

STATEMENT OF RELATED CASES  
AND PROCEEDINGS

The undersigned is unaware of any matters in the federal courts related to State of New Jersey v. U.S. Nuclear Regulatory Commission and United States, Docket No. 06-5140. As discussed in the Response to Order filed on behalf of the State in this case, there are matters filed with the Nuclear Regulatory Commission (NRC) which are related to this matter:

1. New Jersey Department of Environmental protection Request for a Hearing on NUREG-1757, filed on December 22, 2006. The NRC denied this hearing request by Order dated January 12, 2007, Docket No. SMB-743.

2. New Jersey Department of Environmental Protection Petition for Rulemaking on NUREG-1757, filed December 22, 2006. The NRC is evaluating the rulemaking petition.

3. New Jersey Department of Environmental Protection Petition for a Stay on Any Action on the Shieldalloy

Decommissioning Plan, filed December 22, 2006. The NRC denied this stay request by Order dated January 12, 2007, Docket No. SMB-743.

4. New Jersey Department of Environmental Protection Petition for a Hearing on the Shieldalloy Metallurgical Corp. Decommissioning Plan, Docket No. 04007102, filed January 16, 2007 in response to Federal Register Notice 71 FR 66986. The NRC has not, as of this date, acted on.

STUART RABNER  
ATTORNEY GENERAL OF NEW JERSEY

By: 

Kenneth W. Elwell  
Deputy Attorneys General  
R. J. Hughes Justice Complex  
25 Market Street  
P.O. Box 093  
Trenton, New Jersey 08625  
(609) 292-1401

DATED:

1/30/07

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

STATE OF NEW JERSEY, ) DOCKET NO. 06-5140  
)  
Petitioner, )  
)  
v. )  
)  
UNITED STATES NUCLEAR )  
REGULATORY COMMISSION )  
and UNITED STATES OF )  
AMERICA, )  
)  
Respondents. )

CERTIFICATION OF SERVICE

I, Brooke Zeltt, hereby certify that on January 30, 2007,  
I caused a true copy of the Response to Court Order in this matter to  
be served by UPS Next Day Air upon the following representatives of  
the U.S. Nuclear Regulatory Commission and United States of America:

Kathryn E. Kovacs  
U.S. Department of Justice  
Environment & Natural Resources Division  
Appellate Section  
P.O. Box 23795  
Washington, DC 20026

Charles E. Mullins  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
11555 Rockville Pike  
Rockville, MD 20852-2738

I certify that the foregoing statements made by me are  
true. I am aware that if any of the foregoing statements made by  
me are wilfully false, I am subject to punishment.

  
\_\_\_\_\_  
BROOKE ZELTT

Dated: January <sup>30</sup> /, 2007