

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.)

OPPOSITION BY THE STATE OF NEW JERSEY
TO FEDERAL RESPONDENTS' MOTION TO
DISMISS THE PETITION FOR REVIEW

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The State of New Jersey (the State) respectfully submits this brief in opposition to the motion filed on January 31, 2007 by federal respondents United States Nuclear Regulatory Commission (NRC) and the United States of America to dismiss the State's petition for review. The State filed a motion on consent to extend time to file this opposition brief to February 22. The State on January 31, 2007 filed a brief which responds to questions raised by the Court. That brief sets forth the procedural history of this matter and is relied upon by the State here.

The Petition

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 would 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. NUREG-1757 Is Subject to Challenge Because it Has the Effect of a Substantive Rule and is Final

The NRC's issuance of NUREG-1757 has the effect of a substantive rule or regulation that is made reviewable by the Hobbs Act. 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 NRC argues that NJDEP may not challenge NUREG-1757 on the basis that it is a policy statement rather than a binding rule. (Rb 13-14). The NRC points to the NUREG's language, which states: "This NUREG is not a substitute for NRC regulations, and compliance with it is not required." NUREG-1757, Vol. 1, at vii. However, "[t]he agency's label of an agency action, although one factor to

be considered, does not control whether the action is in fact a rule making." Limerick Ecology Action, Inc. v. United States Nuclear Regulatory Commission, 869 F.2d 719, 734 (3d Cir. 1989).

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 United States Court of Appeals for the Third Circuit has relied upon three factors in determining whether an NRC action was a substantive rule or a policy statement. Limerick, 869 F.2d at 734. The court considered whether the action is (1) finally determinative of the issues or rights to which it is addressed; (2) subject to challenge in particular cases; and (3) subject to public notice and comment. Id. at 734-35.

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. The 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). The ALARA regulations require the NRC to consider whether the technology exists to keep radiation exposure as far below the dose limits as possible. 10 C.F.R. § 20.1003. The ALARA regulations require the NRC to consider the economics of improvements in relation to the state of technology and the benefits to the public health and safety, and other societal and socioeconomic considerations. Id. To

consider each of these factors, a case-by-case analysis of each decommissioning plan must be undertaken to consider the nature and longevity of the particular radioactive material, the current technology available to protect the public for the duration of the radiological hazard, and other societal and socioeconomic considerations that are unique to the area where the decommissioning is proposed to take place. Id. NUREG-1757 circumvents these required considerations by simply setting an arbitrary time period required for institutional controls to endure, regardless of the longevity of the radiological hazard, the state of technology regarding the hazard, or other societal and socioeconomic considerations unique to the location of the proposed decommissioning. See NUREG-1757 vol. 1 page M-23.

The factors used by the Limerick Court also demonstrate that NUREG-1757 is a substantive rule. See 869 F.2d at 734-35. First, NUREG-1757 is determinative in providing for a new type of decommissioning license called the LTC license. Nor is it simply a theoretical policy which exists only on paper: Shieldalloy has utilized NUREG-1757 in its decommissioning plan. Furthermore, the NRC Staff on February 12, 2007 filed a response (attached here as Appendix 2) to the State's request for hearing on the decommissioning plan.¹ The NRC Staff response makes NUREG-1757

¹The State's petition for a hearing on the Shieldalloy decommissioning plan has been referred to the NRC Atomic Safety and Licensing Board for determination whether to grant or deny a

look very substantive indeed. The NRC Staff asserts that the State's contention that the NUREG-1757 LTC license is inconsistent with the NRC's own license termination regulation (LTR) should be rejected because "...the Commission has already determined that the LTC license is consistent with the LTR." NRC Staff Response, p. 20. As for the State's challenge to the dose modelling period of 1,000 years, the NRC Staff asserts "...this contention proposes an impermissible challenge to the regulations." NRC Staff Response, p. 14.

The second factor in Limerick is whether the policy is subject to challenge in particular cases. Id. at 734-35. As noted above, the NRC Staff has opposed some of the State's challenges to NUREG-1757 in the Shieldalloy decommissioning hearing. Furthermore, the NRC's own regulation, 10 C.F.R. 2.335, will not allow a facial challenge to the rule in an individual licensing proceeding:

(a) except as provided in paragraphs (b), (c), and (d) of this section, no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities, source material, special nuclear material, or byproduct material, is subject to attack by way of discovery, proof, argument or other means in an adjudicatory proceeding subject to this part.

hearing on the State's contentions.

As for the third factor in Limerick, NUREG was subject to public notice and comment.

Thus, the Court has jurisdiction to review NUREG-1757 under the Hobbs Act because it has the effect of a substantive rule or regulation.

Federal Respondents contend that the requirements for a final order--"consummation" of the agency's decisionmaking process and "legal consequences" from the agency action--have not been met. (Rb 11). However, as discussed above, NUREG 1757 is in the nature of a substantive rule of the NRC found appealable in other decisions. The NRC has revised and finalized NUREG 1757 after public notice and comment. The State is here bringing a facial challenge to that document. The NRC has not announced any plans to revise the document it just finalized, so there is no consummation of the agency's decisionmaking process to wait for. The legal consequences of the NRC's action are discussed at length in this brief: the NRC has devised and finalized a new licensing scheme which is at odds with statutes and its own regulations.

II. NJDEP Has Standing on this Appeal to Challenge NUREG-1757

NJDEP has standing on this appeal because it has (1) an injury in fact; (2) there is a causal connection between the injury and NUREG-1757; and (3) it is likely that the injury will be redressed by a favorable decision of this Court. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

NJDEP is suffering an injury in fact because water and soil (sediment) in the Hudson Branch Creek is contaminated with radioactivity at levels above background and which exceed surface water standards, or State soil remediation standards, or both. Shieldalloy is storing approximately 65,000 m³ of radioactive waste outside at its facility behind a fence and without any cover adjacent to Hudson Branch Creek. Declaration of Jennifer Goodman ¶ 2., attached hereto as Exhibit 1. Shieldalloy's own sampling for uranium-238, thorium-232 and radium-226 yields results which violate either surface water standards, soil remediation standards, or both. Goodman Dec. ¶¶ 3-5; Maps² 6, 7, and 8.

The surface water standard for combined radium-226 and radium-228 is 5 picocuries per liter (pCi/L). N.J.A.C. 7:9B-1.14(c) (referencing 40 C.F.R. § 141.66(b)). Shieldalloy's own water samples from the Hudson Branch Creek of just radium-226 show levels that exceed this standard, including results of 33.1 pCi/L and 15.2 pCi/L. Goodman Dec. ¶ 3; Map 8.

The State soil remediation standard for radium-226 is 3 pCi/g. N.J.A.C. 7:28-12.9. However, Shieldalloy's sediment soil samples along the Creek's bed show levels well above the standard, including a result of 77 pCi/g taken from the beginning of

²"Map" refers to the Maps attached to the Declaration of Jennifer Goodman which show Shieldalloy's monitoring results for uranium-238, thorium-232 and radium-226.

Shieldalloy's property line and a result of 17 pCi/g taken farthest away from the property line. Goodman Dec. ¶ 3; Map 8.

The surface water standard for uranium-238 is 30 ug/L. N.J.A.C. 7:9B-1.14(c) (referencing 40 C.F.R. § 141.66(e)). Shieldalloy's water sample from the run-off from the edge of the disposal area shows uranium exceeding this standard, with a result of 52 ug/L (after converting U-238 to total uranium). See Map 6. Goodman Dec. ¶ 4; Map 6.

The State soil remediation standard for thorium-232 is 2 pCi/g. N.J.A.C. 7:28-12.9. However, Shieldalloy's sediment or soil samples for thorium-232 show results along the Creek's bed exceeding the standard, including a result of 4.94 pCi/g taken at the beginning of Shieldalloy's property line and a result of 2.61 pCi/g taken farthest away from the property line. Goodman Dec. ¶ 5; Map 7. A result of 9.8 pCi/g was also found for thorium-232. Id.

The decommissioning plan seeks to decommission the facility based upon issuance of the LTC license and related provisions of the NUREG-1757. As discussed above, because the LTC license and related provisions of NUREG-1757 fail to comply with statutory and regulatory laws, any decommissioning plan that relies upon the LTC license or these provisions of the NUREG will also fail to comply with these laws. Nevertheless, in November 2006, the NRC initiated its technical review of the decommissioning plan despite its being based on the LTC license and the NUREG. The NRC

admitted that it will take at least two years to complete its technical review. During these two years, the radioactive waste at the Shieldalloy site will remain uncovered and exposed to the elements adjacent to the Hudson Branch Creek. Thus, because the NRC is taking a two-year review of the decommissioning plan, which cannot be upheld in the end since it relies on the LTC license and related provisions of the NUREG, there will be two years of continued unnecessary exposure of the creek to contamination. Furthermore, during the two year NRC review process this uncovered pile of radioactive waste behind a chain link fence remains in the midst of the community of Newfield.

The additional exposure of the Creek to contamination can be prevented if this Court holds that the LTC license and related provisions of NUREG-1757 are invalid. A favorable decision by this Court will stop the technical review of the decommissioning plan and require the submission and review of a decommissioning plan that complies with current statutory and regulatory standards, namely, removal of the contaminated material to an appropriate low-level radioactive waste disposal facility and termination of the license. Once an appropriate decommissioning plan is approved and implemented, the radioactive waste will be removed and the contamination of the property and surrounding areas will be addressed.

III. NJDEP's Challenge to NUREG-1757 Is Ripe for Review

In evaluating whether a case is ripe for review, courts consider the "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." National Park Hospitality Ass'n v. Department of Interior, 538 U.S. 803, 808 (2003).

The NRC argues that the State challenge is not ripe for review by characterizing it as solely a challenge to the application of NUREG-1757. (Rb 13). While the State has filed a petition for a hearing in the Shieldalloy licensing matter, which challenges the application of NUREG-1757, the State's challenge before this Court is on the basis that the NUREG is facially invalid. Specifically, the NRC was required to promulgate rules or regulations in establishing the LTC license. 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, which conflicts with the regulations' modeling requirements regarding all materials that contain 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.

Finally, the State contends that NUREG-1757 violates the National Environmental Policy Act (NEPA), 42 U.S.C. §4321 et seq., by creating a new license which will allow disposal of radioactive waste in perpetuity at sites through the United States without considering the effect of this action on the quality of the human environment as required by NEPA. 42 U.S.C. §4332(2)(c). The impact of this new license cannot be adequately assessed merely on a case by case or site by site basis. The NRC must assess the nationwide implications of allowing more small, permanent nuclear waste disposal sites on the quality of the human environment.

In Mountain States Tel. & Tel. Co. v. FCC, 939 F.2d 1035, 1040-41, (D.C. Cir. 1991), the FCC argued that the challenge to its regulations was not ripe for review because it was an as-applied challenge rather than a facial challenge. The court rejected this argument, holding that the "carriers are making a facial challenge to the agency's across-the-board shift in the burden of proof, which does not depend upon consideration of such particularized facts." Id.

In Khodara Env'tl., Inc. v. Blakey, 376 F.3d 187, 198 (3d Cir. 2004), the court held that where a challenge involves a purely legal question, this factor weighs heavily in favor of a finding of ripeness. The court also held that where delay will not lead to further development of relevant facts, the case is ripe for review. Id.

The United States Court of Appeals for the D.C. Circuit also held that an agency action that has taken its final form is ripe for review even though the petitioners were challenging the validity of a guideline or rule rather than waiting for their application to a particular case. United Church of Christ v. FCC, 911 F.2d 813, 816-17 (D.C. Cir. 1990).

The D.C. Circuit also held that "when the Congress passed the Hobbs Act, which allows a petitioner 60 days within which to challenge an order of the FCC, . . . it determined that the agency's interest generally lies in prompt review of agency regulations." Mountain States Tel. & Tel. Co., 939 F.2d at 1040. In Public Citizen v. Nuclear Regulatory Commission, 845 F.2d 1105, 1106 (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. Petitioners pursued their administrative remedies by filing a petition for a rulemaking. Public Citizen, 845 F.2d at 1106-07. When the NRC denied the petition, an appeal

was filed with the United States Circuit Court of Appeals. Id. at 1107. However, the court dismissed the appeal on the basis that petitioners had not filed within 60 days of the issuance of the policy statement pursuant to the Hobbs Act. Id.

In this case, the State's challenge is ripe for review because the challenge does not depend upon consideration of the particularized facts in the Shieldalloy licensing matter, or any other individual case. See Mountain States, 939 F.2d at 1040-41; Khodara, 376 F.3d at 198; United Church of Christ, 911 F.2d at 816-17. Also, the Petition for Review presents a purely legal challenge. See Khodara, 376 F.3d at 198. The State's challenge is on the basis that portions of NUREG-1757 violate statutory and regulatory law, regardless of which case the NUREG is applied.

Furthermore, ripeness in this case derives from the Hobbs Act. See Mountain States, 939 F.2d at 1040. As discussed above in the first section, the Hobbs Act required the State to file this challenge within sixty days of the issuance of NUREG-1757. Because the State has timely filed, the Petition is ripe for review.

There will be hardship to the State of New Jersey and its citizens if the Court withholds consideration. See National Park Hospitality Ass'n, 538 U.S. at 808. As discussed above in the previous section, withholding the Court's review at this time will allow the radioactive waste at the Shieldalloy facility to remain in the community of Newfield uncovered and exposed to the elements

adjacent to the Hudson Branch Creek--which is already contaminated with radioactivity--for an additional two years. Because the decommissioning plan relies upon the LTC license and NUREG-1757, both of which conflict with statutory and regulatory law, the decommissioning plan may not be issued to Shieldalloy. Withholding the Court's consideration will only allow continuing exposure of radioactive waste while the NRC continues its two-year technical review of the decommissioning plan.

The State's challenge is thus ripe for review because of the challenge's fitness for judicial decision and the hardship that would otherwise occur to the State of New Jersey.

IV. Exhaustion of Administrative Remedies in this Case Is Not Required

The United States Court of Appeals for the Third Circuit has held that "a party need not await a final agency decision if the preliminary agency decision clearly and unambiguously violates statutory or constitutional rights." Barnes v. Chatterton, 515 F.2d 916, 920 (3d Cir. 1975). Exhaustion is not required where there is "a clear departure from [a] statutory mandate." Oesterech v. Select Serve. BD., 393 U.S. 233, 237 (1968).

The NRC has clearly deviated from its statutory mandate by setting forth a completely new license without first promulgating regulations as required by 42 U.S.C. §§ 2232(a), 2233, 2022(f)(3).

Also, the NUREG-1757 provisions regarding the LTC license, the legal agreement and restrictive covenants ("LA/RC"), the 1000 year dose modeling, the ALARA analysis, and the financial assurance violate the Low-Level Radioactive Waste Policy Act ("LLRWPA") and the AEA by failing to require the permanent isolation of low-level radioactive waste or protect the public health and safety. See 42 U.S.C. §2021b(7); 42 U.S.C. §§2012(d), 2013(d), 2022(f)(3), (referring to §2022(b)(2)), 2099, 2111(b)(1)(A), 2113(b)(1)(A), 2114(a)(1), 2201(b). The NRC has admitted in non-decommissioning cases that there exist "uncertainties associated with the burial performance and potential releases of contamination, transport of contamination in the subsurface environment, cleanup costs of subsurface contamination, and future disposal costs." SECY-06-0143 page 5. Such probability of radioactive contamination is an even greater concern for onsite disposal in decommissioning cases since the materials will be onsite in perpetuity.

Yet, NUREG-1757 makes it easier for decommissioning facilities to conduct onsite disposal of radioactive materials. NUREG-1757 makes it easier to decommission by providing a LTC license or LA/RC for sites containing long-lived nuclides where the Federal or State government is not willing to take ownership or control of the site. NUREG-1757 vol. 1 pages 17-65 to 67. Also, NUREG-1757 allows dose assessment modeling for 1000 years,

regardless of the duration of the radioactive hazard. NUREG-1757 vol. 1 pages 17-87 to 17-88. This may create a greater number of decommissioned facilities with onsite disposals of long-lived radioactive waste under restricted release throughout the country. Thus, the NRC has clearly deviated from its statutory mandate by issuing NUREG-1757. Finally, the NRC has not complied with NEPA by considering the effect of NUREG-1757 on the quality of the human environment. This overall impact cannot be adequately assessed on a case by case or site by site basis.

Courts have further held that exhaustion is not required where recourse to the available administrative proceedings "would be futile." W. B. v. Matula, 67 F.3d 484, 496 (3d Cir. 1995). The State's pursuit of an administrative remedy would be futile in this case because the NRC does not permit the challenge of its rules or regulations in licensing proceedings. See 10 C.F.R. § 2.335(a). Therefore, the State's facial challenge to the NUREG may only be sought before this Court. As noted above, the State has requested a hearing on the Shieldalloy decommissioning plan, yet the NRC Staff in that proceeding has taken the position that the State's contention that the NUREG LTC license is inconsistent with the NRC's own license termination regulation should be rejected because "...the Commission has already determined that the LTC license is consistent with the LTR." Staff Response, p. 20. As for the State's challenge to the dose modelling period of 1,000 years, the

NRC Staff asserts "...this contention proposes an impermissible challenge to the regulations." NRC Staff Response, p. 14.

The NRC's submissions demonstrate that it wants to have it both ways. The NRC would create a new license for the permanent disposal of radioactive waste and consider applications for such a license and disposal facility, while at the same time asserting that neither this Court nor the NRC can consider a facial challenge to this new license and disposal program because it is not in a regulation. In its motion papers before this Court the Federal Respondents appear to say that a facial challenge to NUREG-1757 would be acceptable if remedies had been exhausted and the matter was ripe. A closer reading of the NRC's papers suggests that a future facial challenge to NUREG-1757 will be opposed. Respondents' brief says that the State "potentially has 'standing' to challenge any application of the provisions in the revised NUREG to the Shieldalloy site...." (Rb10, emphasis supplied). Federal Respondents' brief cites the NRC's January 12th Order and suggests that it allows the State to raise its challenges to NUREG-1757 in a petition for a hearing on the Shieldalloy decommissioning. That decision, however (as quoted in Federal Respondents' brief on page 15) states

...any petitioner requesting intervention in that proceeding may seek to challenge the application of the NUREG to the licensee's request (emphasis supplied).

Thus, the NRC opposes a facial challenge to NUREG-1757 here in the Third Circuit Court of Appeals and asserts that any challenge to NUREG-1757 must be in a proceeding before the agency "as applied." Then the NRC Staff brief in that very agency proceeding takes the position that the Commission has already found challenged NUREG-1757 provisions to be "consistent with" NRC regulations and also asserts that another of the State's contentions concerning NUREG-1757 is "an impermissible challenge to the regulations." NRC Staff Response, pp. 20, 14. The NRC has circled the wagons to prevent a facial challenge to NUREG-1757 in any forum, and this Court should not sanction it.

Exhaustion of administrative remedies is not required where the question is purely legal. Abbott Labs. v. Gardener, 387 U.S. 136, 149 (1967). In this case, the State's petition for a review is purely legal because, as discussed above in the previous sections, NUREG-1757 violates statutory and regulatory laws.

Thus, the State need not exhaust its administrative remedies since the NRC clearly deviated from its statutory mandate by issuing NUREG-1757, pursuing administrative remedies would be futile to the State's facial challenge of the NUREG, and the State's challenge is purely legal.

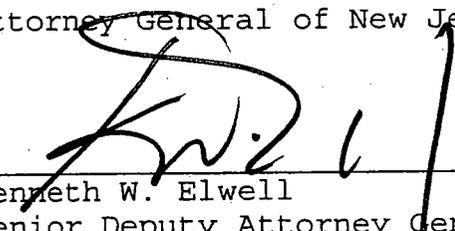
CONCLUSION

For the foregoing reasons, the State respectfully submits that the Federal Respondents' Motion to Dismiss be denied.

Respectfully submitted,

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DATED: February 22, 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.)

CERTIFICATION OF SERVICE

I, Dianne Davis, hereby certify that on February 22, 2007, I caused a true copy of brief in Opposition by the State of New Jersey to Federal Respondents' Motion to Dismiss the Petition for Review in this matter to be served by UPS Next Day Air upon the following parties:

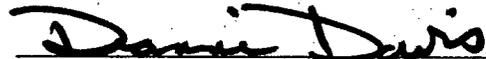
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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.


DIANNE DAVIS

Dated: February 22, 2007