

NRC issuance of a license amendment allowing implementation of the plan. The agency must hold a hearing on the amendment “upon the request of any person whose interest may be affected . . .” 42 U.S.C. § 2239.

New Jersey opposes Shieldalloy’s proposal and has filed a Petition to Intervene and a Request for Hearing to challenge the proposed plan. The Request for Hearing includes 33 contentions challenging specific aspects of the plan, including 16 Technical Contentions, 16 Environmental Contentions (which duplicate verbatim the Technical Contentions), and one “Miscellaneous Contention.” A copy of the “Miscellaneous Contention” is enclosed as Exhibit 1.¹

New Jersey’s Petition to Intervene has been referred to the NRC’s Atomic Safety and Licensing Board (“Licensing Board”), an independent NRC hearing tribunal. See 72 Fed. Reg. 4048 (Jan. 29, 2007). That Board, comprised of a lawyer and two technical judges, will rule on New Jersey’s Petition to Intervene, as well as the six other petitions to intervene that have been filed in the case. Licensing Board decisions may be appealed to the Commission itself. See 10 C.F.R. §§ 2.311; 2.411.

I. The NRC Has Yet To Take a Judicially Reviewable Action.

This Court has jurisdiction only over “final” orders issued by the agency. 28 U.S.C. § 2344. A “final” order must not only be the consummation of a the agency’s decision-making process, but also “the action must be one from which rights or obligations have been determined or from which ‘legal consequences flow.’” *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citations and internal quotation marks omitted). See *Pinho v. Gonzales*, 432 F.3d 193, 200 (3d Cir. 2005). As we pointed out in our Motion to Dismiss, the issuance of NUREG-1757 did not determine any “rights or obligations” and “no legal consequences flow” from it.

¹The entire 182-page Petition for Hearing(including all 33 contentions) is available on the NRC’s website. See <http://www.nrc.gov/reading-rm/adams.html>, “web-based access,” at ML070290433.

In its Opposition, New Jersey fails to point to any “rights or obligations” conclusively determined by NUREG-1757. There are none. Likewise, New Jersey does not explain what “legal consequences” flow from the issuance of the document. Instead, New Jersey argues that NUREG-1757 “has the effect of a substantive rule or regulation . . .” Opp. at 2. It does not. New Jersey never flatly calls the NUREG a “substantive rule” and never explains the meaning of the phrase “has the effect of a substantive rule.”

New Jersey’s semantic struggles are necessary because NUREG-1757 is not a “substantive rule” in any shape, form, or fashion. As we pointed out in the Motion to Dismiss, no licensee is required to comply with the guidance in NUREG-1757. NUREG-1757 explicitly says as much. See Motion to Dismiss, at 14. New Jersey never claims the contrary. Thus, it is hard to fathom why New Jersey says NUREG-1757 “has the effect of” a substantive rule.

New Jersey also claims that NUREG-1757 is reviewable under the criteria for substantive rules developed by this Court in *Limerick Ecology Action v. NRC*, 869 F.2d 719, 734-35 (3d Cir. 1989). See Opposition at 4, 7-8. But application of the *Limerick* factors shows that NUREG-1757 is not a substantive rule and thus, not a “final” agency action.

First, NUREG-1757 is not “finally determinative of the rights to which it is addressed.” 869 F.2d at 734. The NUREG does not “determine” the rights of any person or entity. It simply guides licensees regarding ways to obtain NRC approval of certain actions in certain situations. Second, the guidance in the NUREG is “subject to challenge in particular cases.” In fact, New Jersey has already challenged both the application of the NUREG to the proposed decommissioning for the Shieldalloy site, and the NRC Staff’s compliance (or lack thereof) with the NRC’s organic statute and regulations in issuing the document in the first place. Third, the NUREG was not subject to the notice and comment requirements of the Administrative Procedure Act, although the NRC Staff did publish the NUREG for comments as a matter of

discretion. Thus, NUREG-1757 does not meet the standards set by this Court in the *Limerick Ecology Action* decision.²

New Jersey also relies on *Citizens Awareness Network v. NRC*, 59 F.3d 284 (1st Cir. 1994), and *Public Citizen v. NRC*, 845 F.2d 1105 (D.C. Cir. 1988), for the proposition that NRC “Policy Statements” are subject to challenge under the Hobbs Act. Opposition at 4. But even if NUREG-1757 were a Policy Statement, that does not mean that it is automatically reviewable. As this Court noted in *Limerick Ecology Action*, “[g]eneral policy statements, because they are ineffective except as applied and defended in specific proceedings, are often insulated from judicial review at the time of issuance.” 869 F.2d at 735-36. Here, NUREG-1757 is not even a Policy Statement; it is an informal guidance document.

Furthermore, both *Citizens Awareness Network* and *Public Citizen* are inapposite to the case at bar. In *Public Citizen*, the Commission (as opposed to the NRC Staff) issued an across-the-board Policy Statement that set forth the Commission’s response to Section 306 of the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10226. The Policy Statement established guidelines and standards for training of nuclear plant personnel that were generally applicable to the nuclear industry. See 50 Fed. Reg. 11,147 (Mar. 20, 1985).

Likewise, in *Citizens Awareness Network*, the Commission (again as opposed to the NRC Staff) issued a binding, across-the-board policy change, re-interpreting its regulations to hold that the agency was not required to grant hearings to review proposed decommissioning plans. 59 F.3d at 289. The Commission then issued a decision in response to a specific request by the group – Citizens Awareness Network – denying its hearing request explicitly

²This Court should note that it had jurisdiction in *Limerick Ecology Action* because that case was the review of a final order issuing an operating license, not the review of a “Policy Statement.” One of the elements in the case was the Commission’s issuance of a Policy Statement that allegedly resolved an issue in the case. Applying the factors cited above, this Court found the Policy Statement was not a binding substantive rule. 869 F.2d at 733-35.

based on the across-the-board policy change. *Id.* at 290. Thus, the decision under review was a decision denying a request for a hearing, based upon (effectively) a change in a regulation.

In both cases the Commission (as opposed to the NRC Staff) issued a binding, across-the-board ruling that was a “final” agency action and was applied as such. Here, by contrast, the Commission has yet to apply NUREG-1757 as anything at all – much less as a “binding rule.” New Jersey must wait and see how NUREG-1757 will be applied in the on-going administrative proceeding (in which it is participating).

II. This Case Is Not Ripe For Adjudication and This Court Should Require New Jersey To Exhaust Its Administrative Remedies.

It is a well-settled principle of administrative law that

[a] reviewing court usurps the agency’s function when it sets aside the administrative determination upon a ground not theretofore presented, and deprives that Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action.

Unemployment Compensation Commission of Alaska v. Aragon, 329 U.S. 143, 155 (1946).

See also McKart v. United States, 395 U.S. 185, 193 (1969). This Court has noted that, “[w]e have explained that the purposes of the exhaustion requirement are to promote administrative efficiency, ‘respect[] executive autonomy by allowing an agency the opportunity to correct its own errors,’ provide courts with the benefit of an agency’s expertise, and serve judicial economy by having the administrative agency compile the factual record.” *Robinson v. Dalton*, 107 F.3d 1018, 1020 (3d Cir. 1997), quoting *Heywood v. Cruzan Motors, Inc.*, 792 F.2d 367, 370 (3d Cir.1986).

1. In the case at bar, New Jersey seeks to challenge NUREG-1757 in this Court before the agency has had a chance to complete the administrative process. But New Jersey can present – and in fact, has already presented – every argument that it will make to this Court directly to the NRC’s Licensing Board. And if New Jersey is dissatisfied with the Licensing

Board's ruling on its contentions, New Jersey can present its arguments directly to the Commission itself.

New Jersey's contentions before the NRC's Licensing Board raise exactly the same issues that New Jersey raises in this lawsuit. For example, New Jersey argues before this Court that the agency violates the Atomic Energy Act if it issues an Long Term Control (or LTC) license, described in NUREG-1757, without first promulgating formal regulations governing the license. See Opposition at 6. The Miscellaneous Contention now before the Licensing Board (numbered Contention 17) similarly argues that "[t]he NRC may not issue a LTC license until it promulgates rules and regulations to establish its terms and conditions." See Exhibit 1. In addition, New Jersey argues before this Court that the language in NUREG-1757 regarding 1000 year modeling conflicts with the NRC's regulations that establish modeling requirements for long-lived nuclides. See Opposition at 6. But Contention 6 states exactly the same argument: "The 1000-year modeling conducted by Shieldalloy fails to adequately protect the public safety and health because the waste will remain a radioactive hazard for billions of years." See Petition for Hearing at 39, 108; see note 1, *supra*.

New Jersey also argues in this Court that various other provisions in NUREG-1757 conflict with the applicable NRC regulations. See generally, Opposition at 6-7; 13-14. But New Jersey's contentions make identical arguments. For example, Contention 13 reads "[t]he DP [*i.e.*, Decommissioning Plan] conflicts with the regulations regarding termination of the license upon decommissioning." Petition for Hearing at 69. Similarly, Contention 15 states "The LTC license sought by Shieldalloy conflicts with the regulations regarding the radiological criteria for unrestricted and restricted use." Petition for Hearing at

In sum, New Jersey has already raised every claim that it seeks to raise in this Court before the NRC's Licensing Board, and the Licensing Board is reviewing those claims right

now. The Licensing Board's decision on New Jersey's contentions is appealable to the full Commission, and New Jersey can obtain judicial review of any final Commission decision on those claims. This Court should allow that administrative review to continue uninterrupted.

2. New Jersey argues that it should be exempt from the normal exhaustion requirement and be allowed to short-circuit the administrative process by coming directly to this Court. This Court should reject that argument. First, granting New Jersey's request will undermine the goals of the exhaustion doctrine. As this Court noted in *Robinson v. Dalton, supra*, that doctrine (1) allows agencies to correct their own mistakes; (2) provides the Court with the agency's expertise; and (3) allows the agency to compile a factual record. Thus, removing the case from the NRC at this stage will mean the agency will not have a chance (1) to correct any mistakes; (2) to provide the Court with its expertise, as well as a legal and policy rationale for its actions; or (3) to compile a factual record.

Second, there are compelling reasons why this Court should await the completion of the administrative process in this particular case. Here, the NRC Staff (who like New Jersey is a party to the ongoing administrative proceeding below) proposed the concept of the "LTC" license that New Jersey seeks to challenge. The Commission, the ultimate decision-making authority in the agency, allowed the Staff to proceed with the concept, but has never formally endorsed NUREG-1757 and its contested provisions. Thus, neither the Licensing Board, which reviews NRC Staff findings in contested licensing proceedings, nor the Commission has approved the specific provisions in NUREG-1757, including those contested in this case.

Furthermore, neither the Licensing Board nor the Commission has addressed the legal arguments raised by New Jersey in the context of a contested case. If this case goes forward now, the Commission will not have had an opportunity to address that issue based upon the

arguments presented by the State. Moreover, this Court will be deprived of the Commission's "expertise" and "explanation" for its actions. *Robinson v. Dalton, supra*.

If the Licensing Board finds the contested guidance in NUREG-1757 violates the Atomic Energy Act and/or the NRC's regulations, the Licensing Board will deny the request for approval of the decommissioning plan. In the alternative, the Licensing Board could conclude that while NUREG-1757 is well-founded, the proposed plan does not meet other decommissioning requirements. Either result would stop the decommissioning of the site in a manner which the State disapproves.

In any event, this Court should await the conclusion of the administrative process. If New Jersey is dissatisfied with the result, this Court will then review NUREG-1757 with the benefit of the technical and legal expertise of both the Licensing Board and the Commission in the context of a contested proceeding and in the context of a concrete factual record (the Shieldalloy decommissioning proceeding).

3. New Jersey relies on *Mountain States Telephone and Telegraph Co. v. FCC*, 939 F.2d 1035 (D.C. Cir. 1991), among other cases, for the proposition that this case is "ripe" for review. Opposition at 14-16. In that case, the court of appeals took review of a regulation enacted by the FCC despite the FCC's request to wait for the application of the case to individual cases. But in that case, (1) the agency had adopted a final rule that was binding "across the board," 939 F.2d at 1040, and (2) as the Court noted, "the FCC has not suggested, in the rulings themselves, or even in its effort to avoid our present review, that its views on these subjects are open to modification." *Id.* In this case, not only is NUREG-1757 not a binding, "across the board" rule, as we have noted above, but the Commission has also expressly stated that "its views . . . are open to modification." See, e.g., Commission Order of January 12, 2007, submitted with Federal Respondents' Motion to Dismiss (January 31, 2007).

The *Mountain States* Court also noted that the agency had not identified “any specific benefit to be had by deferring review in this case[.]” *Id.* But here is a significant benefit. Not only will this Court have the benefit of a decision by a panel of the Atomic Safety and Licensing Board, a body of experienced and independent lawyers and scientists, but it will also have the opinion of the Commission itself. Given the technical nature of the case, and its complex regulatory background, the opinions of both bodies should be a significant benefit to this Court.

4. New Jersey claims it will suffer a “hardship” if this Court withholds its consideration. Opposition at 16. That claim lacks merit. First, New Jersey claims that it will take two years for the NRC Staff to review the proposed decommissioning plan and that, in the meantime, the Shieldalloy site will continue to contaminate the surrounding area. But New Jersey does not allege that the contamination results in any immediate irreparable injury or exceeds the applicable Federal guidelines.³ And the mere fact that New Jersey will have to participate in the NRC’s administrative proceeding does not excuse a failure to exhaust administrative remedies or to await a final agency decision. *See, e.g., FTC v. Standard Oil*, 449 U.S. 232, 244 (1980). Every case involving the exhaustion, ripeness, and finality doctrines requires a delay in judicial review of an agency decision. There is nothing extraordinary about this case to justify departing from the usual requirements of administrative law.⁴

Second, New Jersey argues that exhaustion would be “futile,” alleging that the agency will treat the NUREG as a rule or regulation that cannot be challenged in an administrative

³New Jersey is not an “agreement” state under section 274 of the Atomic Energy Act, 42 U.S.C. § 2021. Thus, the applicable standards with regard to soil remediation and radiation safety are established by the NRC and preempt any standards established by the State. New Jersey also does not explain the significance of the alleged surface water contamination, the relationship of the state standards to EPA standards, and which standard is controlling.

⁴As our Motion to Dismiss showed (p. 12), unless and until the NUREG-1757 guidance is applied at the Shieldalloy site to the detriment of New Jersey, the State lacks “injury-in-fact” – standing – to bring suit in this Court. An abstract legal grievance about an as-yet-unapplied agency guidance is not cognizable injury.

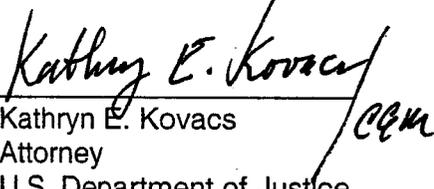
proceeding. As evidence, New Jersey cites to statements made in a NRC Staff filing before the Licensing Board. *See, e.g.*, Opposition at 19-20. However, those statements were made in an NRC Staff pleading as an advocate before the Licensing Board; they should not be confused with the position the Commission might take when reviewing a decision by the Licensing Board.

Finally, New Jersey claims that it cannot challenge NUREG-1757 "on its face" in the administrative proceeding, but is limited, instead, to an "as applied" challenge. *E.g.*, Opposition at 20-21. But New Jersey has already filed a facial challenge to the NUREG before the Licensing Board. *See, e.g.*, Contention 17. This Court should wait to see whether the Licensing Board admits that contention for litigation and, if not, whether the Commission upholds the decision on appeal. At that point, regardless of the decision, this Court will be able to review a fully-exhausted claim, which is much more appropriate for judicial review than the unexhausted claim currently before the Court.

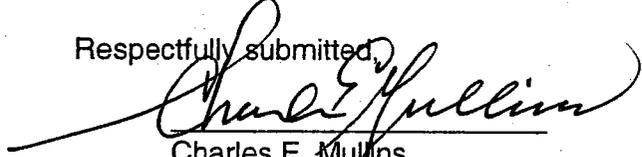
In sum, every claim that New Jersey has submitted to this Court can be - and already has been - submitted to the NRC's administrative process. New Jersey has not stated any compelling reason for this Court to short-circuit the judicial process. This Court should require New Jersey to exhaust its administrative remedies.

CONCLUSION

For the foregoing reasons, this Court should dismiss the petition for review.


Kathryn E. Kovacs
Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Appellate Section
(202) 514-4010 (voice)
(202) 514-8865 (fax)

Respectfully submitted,


Charles E. Mullins
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
(301) 415-1606 (voice)
(301) 415-3200 (fax)

Dated: March 14, 2007.

EXHIBIT 1

Contention 17

THE NRC MAY NOT ISSUE A LTC LICENSE UNTIL IT PROMULGATES RULES AND REGULATIONS TO ESTABLISH ITS TERMS AND CONDITIONS.

10 C.F.R. § 2.309(f)(i) Provide a specific statement of the issue of law or fact to be raised or controverted.

The NRC is required to promulgate rules or regulations when setting forth the information an applicant for a license is required to submit or when the NRC establishes the form and conditions of a license pursuant to the AEA. 42 U.S.C. §§ 2022(f)(3) 2232(a), 2233.

10 C.F.R. § 2.309(f)(ii) Provide a brief explanation of the basis for the contention.

The AEA provides as follows:

Each application for a license hereunder shall be in writing and shall specifically state such information as the Commission, by rule or regulation, may determine to be necessary to decide such of the technical and financial qualifications of the applicant, the character of the applicant, the citizenship of the applicant, or any other qualifications of the applicant as the Commission may deem appropriate for the license.

42 U.S.C. § 2232(a) (emphasis added). The AEA also provides the following: "Each license shall be in such form and contain such terms and conditions as the Commission may, by rule or regulation, prescribe to effectuate the provisions of this chapter." 42 U.S.C. § 2233 (emphasis added).

The AEA also requires the NRC to promulgate regulations or rules regarding the disposal of byproduct material. Environmental Defense Fund v. U.S. N.R.C., 902 F.2d 785, 789-90 (10th Cir. 1990). The AEA provides: "Not later than 6 months after the date on which the Administrator promulgates final standards pursuant to subsection (b) of this section, the Commission shall, after notice and opportunity for public comment, amend the October 3 regulations, and adopt such modifications, as the Commission deems necessary to conform to such final standards of the Administrator." 42 U.S.C. § 2022(f)(3). The referenced subsection (b) requires the EPA to promulgate regulations concerning the protection of the public health, safety and the environment from radiological and nonradiological hazards associated with the possession, transfer, and disposal of byproduct material. Id. § 2022(b)(1). The U.S. Court of Appeals for the Tenth Circuit held that this provision of the AEA requires the NRC to promulgate rules or regulations regarding the disposal of byproduct material. Environmental Defense Fund, 902 F.2d at 789-90.

A rule or regulation imposes rights and obligations on a person or entity. Texaco, Inc. v. Federal Power Com., 412 F.2d 740, 744 (3d Cir. 1969). A rule or regulation creates a binding standard on an agency and the regulated public. Cabais v. Egger, 690 F.2d 234, 237 (D.C. Cir. 1982); Guadamuz v. Bowen, 859 F.2d 762, 767 (9th Cir. 1988).

10 C.F.R. § 2.309(f)(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding.

Shieldalloy has submitted a DP that seeks a LTC license upon decommissioning. DP rev. 1 page xxv.

10 C.F.R. § 2.309(f)(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding.

For NRC to review the DP, it must determine whether it is permitted by the AEA to issue a LTC license despite the existence of an applicable rule or regulation.

10 C.F.R. § 2.309(f)(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue.

NUREG-1757 states that it is a guidance document that does not establish a binding norm. NUREG-1757, Vol. 1, page xvii ("This NUREG is not a substitute for NRC regulations, and compliance with it is not required."). However, NUREG-1757 provides a new license called LTC license though a guidance document. NUREG-1757 vol. 1 page 17-65. NUREG-1757 provides various terms and conditions that an LTC license would provide. NUREG-1757 vol. 1 pages 17-65 to 17-66, 17-79 to 17-80. Furthermore, NUREG-1757 sets forth guidance on the information that an applicant should submit in an application for a LTC license. NUREG-1757 vol. 1 pages 17-71 to 17-82; vol. 2 pages 2-4 to 2-15. Also, NUREG-1757 applies to the

disposal of byproduct material at a decommissioned facility. NUREG-1757 vols. 1 and 2 page xv.

10 C.F.R. § 2.309(f)(vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.

NRC believes that NUREG-1757 does not require rulemaking because the changes are within the scope of the LTR requirements.

NRC Response to Comment 2.4.3. (Document # ML062370521).