

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-5140

STATE OF NEW JERSEY
APPELLANT

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA
APPELLEES

UNITED STATES OF AMERICA NUCLEAR REGULATORY
COMMISSION
NUREG-1757

BRIEF AND APPENDIX
OF
INTERVENOR THE GLOUCESTER COUNTY BOARD OF CHOSEN
FREEHOLDERS

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SUBJECT MATTER AND APPELLATE JURISDICTION

10 This court has subject matter and appellate jurisdiction over this appeal
pursuant to Rule 15 of the Federal Rules of Appellate Procedure, Section 2239(b)
of the Atomic Energy Act, 40 U.S.C. 2239(b), and the Hobbs Act, 28 U.S.C. 2342.
Additionally, 28 U.S.C. 2343 establishes venue in the judicial district in which the
party resides. Intervenor, The Gloucester County Board of Chosen Freeholders is
20 in the Third Judicial Circuit. Finally, the United States Nuclear Regulatory
Commission guidance document, which is the subject of this appeal, NUREG-
1757, applies throughout the United States.

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ISSUES PRESENTED

10 The issue presented in this appeal by the Gloucester County Board of
Chosen Freeholders, as Intervenor, is whether the cost-benefit analysis required by
NUREG-1757 is legally insufficient because it fails to account for long-term
adverse economic impact to the community that will be the host of a radioactive
waste storage facility.

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STATEMENT OF FACTS

10 Shieldalloy Metallurgical Corporation, Inc. ("SMC") owns and operates a
metal processing facility located in the Borough of Newfield, Gloucester County,
New Jersey. Between 1955 and 1998, SMC engaged in smelting and alloy
production, including the processing of pyrochlore, a material regulated by the
United States Nuclear Regulatory Commission ("NRC") because of its thorium
20 and uranium content. In August, 2001, SMC notified the NRC that SMC had
stopped using pyrochlore at its Newfield plant and intended to terminate its
radioactive materials license issued by the NRC. This decision to terminate the
license triggered the requirement to decommission the site, at least with respect to
30 the radioactive materials handling activities, including, most importantly, the waste
generated by SMC during the processing of pyrochlore.

Pursuant to NRC regulations and associated guidance materials, known as
NUREG-1757, SMC submitted a Decommissioning Plan ("DP") to NRC on
40 October 21, 2005. It proposes that the radioactive waste material resulting from
the smelting and alloy production, which at the time comprised a pile of nearly
33,000 cubic yards of material, including baghouse dust collected from pollution
control equipment, be left in place on the Newfield site. The DP offers certain
50 limited methods of consolidating and capping the radioactive waste pile in a
reported attempt to control any threat to the public health or environment. This

10 method of decommissioning was proffered by SMC instead of packaging and
shipping the waste material to a properly licensed radioactive waste processing,
storage and disposal facility.

20 The NRC initially rejected the DP, and on June 30, 2006, SMC submitted a
revised one, which the NRC determined met the minimum requirements of its
regulatory protocol and guidance document. Thus, on November 17, 2006, the
NRC accepted for review the DP filed by SMC for technical and environmental
review.

30 According to the NRC, this concept of long-term storage of radioactive
waste at a manufacturing facility, as proposed by SMC, is the first application of
its kind in the United States. It is also reportedly the first time that the NRC is
being asked to consider such a proposal under NUREG-1757.

RELATED CASES AND PROCEEDINGS

10 Petitioner, The State of New Jersey, and Intervenor, The Gloucester County
Board of Chosen Freeholders, separately petitioned the NRC for a hearing on a
number of contentions related to the DP submitted by SMC. The NRC granted the
State of New Jersey the right to a hearing in that pending matter on a limited
number of contentions. Gloucester County's request for a hearing was denied by
20 the NRC, but "participant" status in the State of New Jersey's hearing has been
granted to Gloucester County. Aside from this NRC hearing, Intervenor, The
Gloucester County Board of Chosen Freeholders, is unaware of any related case or
proceeding in regard to this matter.

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STANDARD OF REVIEW

10 The standard of review is whether the NRC acted arbitrarily, capriciously,
and unreasonably in finalizing NUREG-1757, and otherwise operated contrary to
law in doing so. An additional standard of review applicable to this case is
whether NUREG-1757 conflicts with statutory and regulatory requirements and
lacks a reasoned basis under law. 5 U.S.C. 706; Citizen's Awareness Network v.
20 NRC, 59 F.3d 284 (1st Cir. 1995).

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SUMMARY OF ARGUMENT

10 The NRC requires that any entity holding a radioactive materials license
make appropriate plans for the proper storage and disposal of waste arising from
the handling and processing of that radioactive material. This waste disposal
planning requirement is triggered at the time that the licensee decides to terminate
its license and takes the form of what is referred to as a decommissioning plan.

20 Regulations governing this planning activity mandate that the licensee demonstrate
that the method of handling the radioactive waste is managed in a way that results
in a dose that is "as low as reasonably achievable." Recently, the NRC adopted a
guidance document, NUREG-1757, that gives terminating licensees the
30 opportunity to establish long-term radioactive waste landfills at the point of
generation of the radiological waste. However, the NRC has not ruled on any such
decommissioning proposal under NUREG-1757, making this case the first of its
kind in the United States.

40 NUREG-1757 places on the terminating licensee a burden of proof,
including the need to demonstrate that maintaining the radioactive waste at the
point of generation is the most cost-effective solution. However, because the
factors and equations comprising the cost-benefit analysis under NUREG-1757 are
50 faulty, the purported burden of proof imposed on a terminating licensee is slanted
and biased. In particular, because NUREG-1757 does not properly account for

10 long-term adverse economic impact to the community that will be the host of a
radioactive waste landfill, with an almost infinite lifetime, the cost-benefit analysis
contemplated by NUREG-1757 results in an unbalanced assessment of cost-
effectiveness. Consequently, any decisions rendered by the NRC pursuant to
NUREG-1757 are, as a matter of law, arbitrary, capricious and unreasonable and
otherwise contrary to law.

20 Finally, the cost-benefit analysis required under NUREG-1757 is
inconsistent with waste disposal facility siting guidance administered by the United
States Environmental Protection Agency ("EPA") and state solid waste
management agencies under a number of Federal environmental laws, including
30 primarily, the Resource Conservation and Recovery Act. This inconsistency will
lead to arbitrary, capricious and unreasonable conflicts between decisions rendered
by the EPA and state agencies, when ruling on the siting of solid and hazardous
waste facilities, and those rendered by the NRC with respect to radioactive waste.
40 There is no reasonable basis under law for such a distinction in waste facility
siting, merely because of the nature of the chemical content of the waste material at
issue.

ARGUMENT

POINT I

THE COST-BENEFIT ANALYSIS REQUIRED UNDER NUREG-1757 IS FAULTY IN THAT IT DOES NOT REQUIRE A LICENSEE TO ACCOUNT FOR COMMUNITY-SPECIFIC ADVERSE ECONOMIC IMPACT

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The NRC's regulations regarding Standards for Protection Against Radiation establish a specific criterion for radioactive materials license termination. In particular, the NRC mandates that an applicant seeking to terminate a radioactive materials license demonstrate "...that the residual radioactivity has been reduced to levels that are as low as reasonably achievable (ALARA)." 10 CFR §20.1402. See also, 10 CFR §20.1403 (a), 10 CFR §20.1403 (e), and 10 CFR §20.1404(a)(3). Restated, the NRC ensures protection of public health and safety, and protection of the environment, by paying particular attention to the radiation dose that will remain at a site where radioactive materials have been handled and processed. And, it does so by applying the ALARA standard when an entity that has been handling and processing radioactive materials decides to "close shop" and terminate its NRC license. The concept of ALARA becomes compellingly important in a case of this kind where the party terminating its NRC license is, for all intents and purposes, proposing to create a radioactive waste landfill, with an

essentially infinite lifetime, on a site that was never designed or selected for such a purpose.

10 ALARA is by no means a hard and fast standard. However, it does have a number of guiding principles, including, most importantly, an analysis that takes into consideration "...the state of technology and the economics of improvements in relation to all of the benefits from these improvements." NUREG-1757, Vol. 2, Rev. 1, Appendix N, p. N-1. In other words, like most public health and environmental protection regulations, ALARA contemplates a balancing process that takes into account the efficacy of creative technological solutions in dealing with unacceptable radioactive dose and the economics of implementing those solutions. The end goal of this balancing process is to achieve the most cost-effective method of terminating an NRC radioactive materials license.

30 Along those lines, NUREG-1757 specifically provides that information submitted in support of a showing of ALARA should include "...a cost-benefit analysis (or qualitative arguments) for the preferred option of removing residual radioactivity to a level that meets or exceeds the applicable limit..." Id. What is most important in this portion of the guidance document is the clear and unequivocal preference that radioactive waste be "removed," as opposed to left at the point of generation. The principal burden of proof, then, is to demonstrate that the preferred waste removal option is less cost-effective than some other

10 alternative, such as constructing a long-term radioactive waste landfill at the point
of generation of the waste. As further guidance regarding the meaning of ALARA,
the NRC points out in NUREG-1757 that “[t]he decommissioning goal should be
established at the point that the incremental benefits equal the incremental costs.”
NUREG-1757, Vol. 2, Rev. 9 at p. 6-2. Additionally, the demonstration of
ALARA in support of a selected decommissioning proposal should “...include
20 risks from non-radiological hazards.” NUREG-1757, Vol. 2, Rev. 1, Appendix N,
p. N-1. Finally, according to the NRC, “[i]f the desired beneficial effects (benefits)
from the remediation action are greater than the undesirable effects or ‘costs’ of the
action, the remediation action being evaluated is cost-effective and should be
30 performed.” NUREG-1757, Vol. 2, Rev. 1, Appendix N, p. N-3.

Combined, these regulations and the NUREG-1757 guidance set forth a
clear indication of NRC’s thinking that a radioactive materials licensee must
attempt to select a decommissioning objective, at the time of terminating a
radioactive materials license, that results in the least dose of radiation to the
40 community and the environment. Chief among these regulations and NUREG-
1757 is the concept of “remediation” in the context of the decommissioning
objective. And, the clear preference of NRC’s guidance, when it comes to this
issue of “remediation” is that the radioactive waste material be “removed.” In
50 other words, there is a presumption under NUREG-1757 that removal and disposal

of radioactive waste material at a facility specifically designed for such a purpose is the preferable and cost-effective solution.

10 Moreover, this reference to “remediation” in NRC’s regulations and NUREG-1757 implicitly acknowledges that an entity looking to terminate a radioactive materials license will have some kind of expense associated with cleaning up the waste and other residual matter remaining after the processing of
20 the radioactive material that was authorized by the NRC license. And, this ALARA process of evaluating “remediation” alternatives includes an assessment of both the radiological and non-radiological implications that are likely to flow from the proposed decommissioning activity. Indeed, NRC’s interpretation of
30 ALARA is that the applicant for a decommissioning approval must perform a detailed cost-benefit analysis of a number of alternatives to justify selection of a preferred long-term disposal strategy for radioactive waste upon license termination.

40 The intent of the NRC regulations and the guidance flowing from NUREG-1757 is clear. An applicant seeking to terminate a radioactive materials license must demonstrate whether it is feasible to reduce the levels of radioactivity to concentrations below those necessary to meet minimum NRC dose criteria. If the benefits of doing so outweigh the cost, then the party terminating its license must
50 take the extra steps to achieve that lesser standard. And, that decision boils down

10 to a cost-benefit analysis. But, unfortunately, the mandate for a cost-benefit
analysis does not necessarily mean that, at the end of the ALARA process, the
licensee's decommissioning plan will be a guarantee of cost-effectiveness. To the
contrary, there is an underlying question, subject to debate, of whether and to what
extent the cost-benefit analysis required under an ALARA analysis forces the
licensee to include the kind of case-specific information and local nuances that will
20 result in the right solution for the terminating licensee and host community.

For the reasons set forth below, the cost-benefit analysis required by
NUREG-1757 fails to account for the potential of adverse regional economic
impacts flowing from a long term storage license like the one being requested here
by SMC. The result of this failure is an improper balancing of the risks and
30 rewards of an on-site disposal strategy for radioactive waste, which, as a matter of
law, leads to a faulty remedial selection under NUREG-1757.

In this case, SMC performed the required cost-benefit analysis for three
40 alternatives: (1) no action, (2) shipping the radioactive material to a properly
licensed facility in Utah, and (3) leaving the radioactive waste pile at the Newfield
site under what is known as an "engineered barrier." The end result of SMC's
analysis is that the last alternative is the most cost-effective way to proceed.
However, because NUREG-1757 did not require SMC to take into account certain
50 long-term regional economic factors, such as, for example, lost business revenues

10 to the community and diminution in property values, this outcome of the cost-
benefit analysis is unreliable and indeed mistaken. In particular, for instances
where the applicant is proposing to leave radioactive waste on the site of
generation for an extended period of time, such as the case here with SMC, the
NRC should have mandated in NUREG-1757 that the applicant account for the
long-term adverse economic impact on the host community and the region as a
20 result of the existence of that lingering environmental condition.

In this case, for example, there is a distinct possibility that the existence of
the radioactive waste pile will have a direct impact on both the potential growth of
Newfield Borough and on its ability to sustain a viable business and residential
community. Allen G. Black, a well-respected real estate appraiser in the Southern
30 New Jersey region, has stated that “[t]he negative effect of the existence of the
mound [radioactive waste pile] will extend beyond the neighborhood and borough
into the surrounding area of Gloucester County and the general area. The effect
applies to all properties, not just residential. It impacts businesses, industrial and
40 public uses. The influence is not limited to potential buyers choosing not to
relocate in the area. It can include property owners choosing to leave the area and
relocate in locations they perceive as not subject to the proximity of hazardous
material.” (1a-1) (**emphasis added**). Mr. Black renders this opinion based on the
50 fact that “[n]ews stories related to this facility and its closing, together with

reporting on the decommissioning plan brings the situation to the public's attention." (Ia-1). This situation, Mr. Black points out, places a legal duty on local real estate professionals to disclose the existence of the radioactive waste pile to any potential residential or commercial buyers looking to come to the area. (Ia-1). The end market effect of this situation, according to Mr. Black, is a "stigma" on the community and its real estate market values; an effect that is well documented by real estate professionals that have published research on the topic, which research is cited to by Mr. Black in his report. (Ia-2).

Actual support for Mr. Black's position can be found in the record from the NRC public hearings regarding SMC's proposed DP. In particular, a Newfield resident, Sue Mavilla, stated that she moved to Newfield thirty years ago from Northern New Jersey to escape the refineries there. (Ia-4; December 12, 2006 Public Information Session, pg. 54, ln 5). It is reasonable to conclude that, given the suspected danger associated with a radioactive waste pile, residents would relocate to escape the potential threats to their health. And this public health concern is not some mere fantasy. As discussed in the Public Information Session, there is a suspected high rate of cancer and tumors in the area surrounding SMC's facility. Steve Shultz, Senator Lautenberg's South Jersey Director, and Senator Menendez both acknowledged public concerns about possible cancer clusters in the area attributable to SMC. (Ia-5; December 12, 2006 Public Information

10 Session, pg. 72, ln 7-9, ln 17-19). Stina Capano indicated that “[t]here isn’t a
household that you talk to that hasn’t had somebody that has died of or has had
cancer. (Ia-7; December 12, 2006 Public Information Session, pg. 102, ln 18 to pg.
103, ln 1). Dawn Pennino discussed that several members of her family, all of
whom resided on Rena Street, which is located very close to the SMC facility,
became sick with cancer or developed some type of tumor. Her grandmother died
20 from a brain tumor, her brother was diagnosed with a sudotumor, and her and her
son both developed brain tumors. (Ia-9; December 12, 2006 Public Information
Session, pg. 119, ln 19 to pg. 121, ln 22). The family’s treating doctor indicated
that none of these tumors were genetically related and the cause of the tumors must
30 be environmental. (Ia-11; December 12, 2006 Public Information Session, pg.
121, ln 11-15). Additionally, Doug Quene stated that “...when you go up and
down Rena Street, you’re not talking just one family that’s been affected with
cancer. I mean you can take about six or seven families right down the street that
all have had cancer in their homes.” (Ia-12; December 12, 2006 Public
40 Information Session, pg. 139, ln 21 to pg. 140, ln 1).

50 This testimony is now part of the public record. It is out there in the
community and on an even broader scale because of substantial media coverage of
those public hearings. It was testimony specifically solicited by the NRC as part of
the public hearing process contemplated by NRC’s regulations governing a

radioactive materials license termination. Not only that, but the news media has written extensively on the public hearing testimony and the SMC proposal. The end result of this public attention, as indicated by Mr. Black, is a “stigma” on Newfield Borough that will only be eliminated if the radioactive waste pile is removed from the SMC property. Unfortunately, NUREG-1757 does not require SMC to take that “stigma” into account, and the adverse consequential economic impact that is sure to flow from that public knowledge and unfavorable community image, when evaluating the costs and benefits of SMC’s long-term on-site disposal strategy. To say that there will be no such consequential economic impact, which is implicit in NUREG-1757 and its cost-benefit analysis formula, is disingenuous and simply avoids the harsh and difficult reality of what will inevitably happen to this community as a result of SMC’s proposal.

No doubt SMC will argue that these claims by residents are on their face speculative and without a factual basis. SMC will surely go so far as to say that there is no evidence of a single instance of a resident or a local business entity that has relocated or chosen not to move into Newfield and the surrounding areas for fear of the dangers posed by the radioactive waste pile. However, this proposition misses the point. The analysis required by NUREG-1757 deals with expectations and estimates. And, the burden of proof of showing that the preferred remedial option is cost-effective falls on SMC.

At a minimum, then, SMC should have to take into account the possibility of flight from the community if the radioactive waste pile remains on-site and the downstream economic consequences of that potential flight. The fact that flight may not have occurred yet does not mean it will not occur. The community has been fighting this decommissioning proposal for many years. In that situation, the residents have continuing hope of a successful challenge and favorable result that SMC will be ordered to transport this waste material to a proper disposal facility and the SMC site returned to a clean and safe condition. In that circumstance, one would reasonably expect that existing residences will stay the course and continue to live in the community with the aim of convincing the NRC to order SMC to remove the radioactive waste pile. The only good fight is one that has the continuing support of residents that have an abiding love for the health and welfare of their community. However, if their fight fails, and SMC is permitted to create a radioactive waste landfill at its property, there is a reasonable likelihood that those residents who stayed the course to challenge the SMC proposal will eventually decide to leave the community. It would be ridiculous for those residents not to try to do so in the face of public testimony of an increased risk of cancer because of the existence of the radioactive waste generated by SMC.

So, then, neither the NRC nor SMC can assume that, just because the residents have not yet abandoned their hopes, they will not do so if SMC is

permitted to leave 33,000 cubic yards of radioactive waste in the Borough. And that is exactly what NUREG-1757, as drafted, allows the NRC and SMC to do. It allows them to assume that the community will continue to exist in its current form, even if the NRC permits the SMC facility to become a long-term radioactive waste landfill.

Further, SMC has not undertaken any effort to research whether and to what extent residents or businesses might have relocated into Newfield Borough, but for the existence of the radioactive waste pile. Those potential lost revenues to the community, in the form of forgone tax assessments, and similar reduced business activity, do not show up anywhere in SMC's consideration of the cost of creating this massive radioactive waste landfill at its facility. At a minimum, SMC's cost-benefit analysis should have included some survey of local real estate professionals to determine whether there is any evidence of such a refusal to reside in, or relocate to, the Borough specifically as a result of the existence of the radioactive waste pile. However, NUREG-1757, as drafted, does not force SMC to undertake that level of research. NUREG-1757 thus does not go far enough in the burden of proof it places on SMC. Restated, where an applicant is essentially proposing to establish a radioactive waste landfill, the NRC, through NUREG-1757, must require an accounting of the economic impacts of community fears of such things as cancer and other health impacts associated with that landfill.

10 Similarly, the NRC, through NUREG-1757, should impose a burden of
proof in a case of this kind for the applicant to account for diminution in property
value for real estate within at least the host municipality and perhaps even beyond.
In the case of Strawn v. Canuso, 140 N.J. 43, 657 A.2d 420 (1995), the New Jersey
Supreme Court posed the question “[i]s the nearby presence of a toxic-waste dump
a condition that materially affects the value of property?” 140 N.J. 43, 62.
20 Responding to its own question, the court observed that “[w]e know that the
physical effects of abandoned dump sites are not limited to the confines of the
dump.” Id. at p. 63 (citing to Ayers v. Township of Jackson, 106 N.J. 557, 525
A.2d 287 (1987) and Citizens for Equity v. New Jersey Department of
30 Environmental Protection, 126 N.J. 391, 599 A.2d 507 (1991)). The court went on
to conclude that “...our precedent and policy offer reliable evidence that the value
of property may be materially affected by adjacent or nearby landfills.” Id. So,
then, following the reasoning in Canuso, not only are the possibilities of flight
from, and a refusal to reside in, Newfield legitimate economic concerns, but
40 diminution in property value could also have a significant long-term adverse
economic impact on Newfield Borough in this case. Unfortunately, NUREG-1757,
as drafted, does not require SMC to account for such economic consequences in
the cost-benefit analysis of leaving the radioactive waste pile on-site.
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This lack of critical economic information skews the cost-benefit analysis performed by SMC. That is, regional adverse economic consequences, if properly accounted for, would increase the cost side of the equation under NUREG-1757 with respect to the preferred alternative of leaving the radioactive waste pile on-site. And, if those adverse economic consequences were considered over the proposed life of the radioactive waste landfill, the impact on the cost side of the equation would be overwhelmingly dramatic. Indeed, it is likely that the desirable benefits of an otherwise purported cost-effective remedial solution would take a back seat to the undesirable effects, once the reality of the long-term economic consequences to the community are taken into consideration. For example, in this case, SMC suggests that the cost of creating a radioactive waste pile with an essentially infinite lifetime is just over \$18 million as opposed to a cost of over \$83 million for properly removing and transporting the waste to a facility in Utah. However, if SMC had been forced to consider all of the potentially adverse economic consequences to Newfield Borough over the lifetime of this proposed radioactive waste landfill, it is a safe bet that the true cost of leaving this material on-site will far exceed the worst case scenario of \$83 million for shipping it to Utah. And, because SMC has essentially argued in its cost-benefit analysis that all environmental benefits are equal among the various remedial alternatives, by

definition under NUREG-1757, shipping the material to Utah for disposal would become the cost-effective solution to this problem.

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POINT II

**NUREG-1757 CONFLICTS WITH WASTE
FACILITY SITING CRITERIA UNDER OTHER
FEDERAL ENVIRONMENTAL LAW AND NEW
JERSEY LAW**

10 The Federal Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C.
6901 et seq., sets forth specific guidelines and protocol for siting new solid and
hazardous waste facilities. For example, RCRA provides that good solid waste
20 management planning generally should consider “...the location of the facilities
where ...”, solid waste collection, storage, processing and disposal will occur. 42
U.S.C. §6942(c)(2) And, as is clear from that statute, the preferred method of
considering the impact of locating a new solid waste facility is by way of
30 conducting waste management planning on a state and regional basis, as opposed
to attempting such an activity on a Federal level. Restated, local issues and
concerns, which are of paramount importance in the context of siting a new waste
facility, are appropriately left to the jurisdictional review of state and local
40 governmental agencies.

Along those lines, the EPA has delegated solid waste management planning
in New Jersey to the New Jersey Department of Environmental Protection
50 (“DEP”). As expected, the DEP was very careful to ensure a thorough
consideration of local issues, including the financial implications of siting a new
solid waste facility. For example, the DEP mandates, as part of an application for

10 a new solid waste facility,” [a] detailed written description of the municipal and
neighborhood setting of the proposed facility.” N.J.A.C. 7:26-2.9(c)(2). Similarly,
an applicant must describe the demography of the area [in which a new facility will
be sited] by providing existing population totals describing present and projected
future population trends ...”. N.J.A.C. §2.9(c)(3)(iv)(6) An applicant for a new
solid waste facility must also describe “...present land use for the site of the
20 proposed facility and the area within two (2) miles of the perimeter of the property
line.” N.J.A.C. §2.9(c)(5)(i) Finally, and perhaps most importantly, in the context
of this challenge to NUREG-1757, the NJDEP requires that an applicant:

30 [d]escribe property values within the immediate
neighborhood with respect to medium sales prices and
recent (1-2 year trends and provide a general description
of the property values of the municipality within which
the proposed facility will be located and all
municipalities within one-half (1/2) mile of the proposed
facility. The descriptions shall include such factors as
zoning changes, development patterns, development
approvals, etc., which can affect property values. The
description of property values in the immediate areas of
the facility shall be sufficiently detailed to allow
assessment of the effect construction and operation of the
40 facility area have on such values.

N.J.A.C. §2.9(c)(3)(iv)(7) (**Empasis added**).

50 Combined, these regulations show how the DEP clearly takes into account
potential economic impact to the community that will be the host of a new solid
waste facility. Indeed, the emphasized portion of the DEP’s regulation cited above
goes to exactly the kind of considerations that Mr. Allen G. Black suggest be taken

10 into account for a NUREG-1757 cost-benefit analysis to be appropriate, which was
discussed above in Point I. Unfortunately, the cost-benefit analysis under
NUREG-1757 does not go that far, even though it is essentially a solid waste
landfill authorization procedure similar to that embodied in RCRA and the NJDEP
regulations. Instead, NUREG-1757 merely requires a terminating licensee to
evaluate the relative costs of implementing various remedial alternatives without
20 close consideration of the potential off-site economical impact.

30 This result is in direct conflict with the mandates of RCRA and the New
Jersey solid waste management planning protocol implemented pursuant to that
Federal law. Such a conflict will inevitably lead to inconsistent decisions on
facility siting between the NRC, for radiological waste materials, and either the
EPA or state solid waste agencies, which have been delegated RCRA authority, for
all non-radiological waste. Indeed, if the NRC rules favorably on SMC's pending
proposal, it will not be long before the United States is littered with countless
40 radiological waste landfills, which is precisely what RCRA was designed to
prevent. Not only that, but the "Small-Town Environmental Planning"
contemplated by RCRA, with the goal of identifying "... means to provide
regulation of environmental treatment systems and infrastructure ... to improve the
economic condition of such systems ..." will have been gutted by this likely
50

proliferation of spotty radioactive waste landfills across the country. See, 42
U.S.C. §6908.

10 To sum up, there is no logical reason to treat radioactive waste any
differently than other waste materials, merely because they fall jurisdictionally
under different Federal agencies. That disparate treatment, however, is precisely
what will happen if the NRC is permitted to apply the faulty cost-beneficial
20 analysis of NUREG-1757 to a proposal like that of SMC.

30

40

50

CONCLUSION

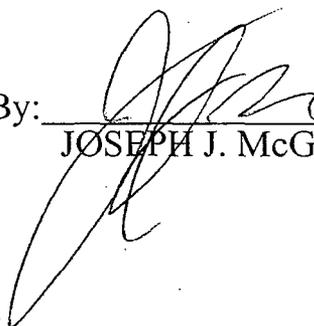
10 NUREG-1757, while having some similarities with other public health and
environmental protection policies, fails to ensure an adequate cost-benefit analysis
of remedial solutions required of NRC license holders at the time of license
termination. The unfortunate outcome of this faulty NRC guidance is that all
20 decisions based on the cost-benefit analysis embodied in NUREG-1757 will be
plagued with misinformation. Nowhere is this situation more evident than with
SMC's current proposal to create a radioactive waste landfill, of an almost infinite
lifetime, in the Borough of Newfield. The absence of any consideration of the
long-term adverse economic impact of this proposal on the community skews the
30 cost-benefit analysis and wrongly concludes that such a method of
decommissioning the nearly 33,000 cubic yards of radioactive waste generated by
SMC over the past 40 years is ALARA. But, it is not. In fact, the millions of
dollars in diminished property values, taken together with the lost business
40 opportunities from commercial establishments refusing to locate in the community,
when considered over the lifetime of the proposed radioactive waste landfill, give
rise to an astronomical cost of this proposal. That cost, unfortunately, is nowhere
to be found on the regulatory balance sheet required by the NRC under NUREG-
1757. By definition, then, the selected remedial approach under NUREG-
50 cannot be ALARA, as required by NRC regulation. The inescapable conclusion,

then, is that any decision made by the NRC under this faulty cost-benefit analysis will be arbitrary, capricious and unreasonable, and otherwise contrary to law.

10 Additionally, NUREG-1757 conflicts with the normal and customary siting criteria applied by the EPA and the DEP for non-radiological waste. The result of this conflict will be inconsistent decisions by the NRC and the EPA/DEP on the location of waste disposal facilities, with radiological waste being given wider
20 latitude in terms of acceptable siting. There is no reasonable basis for such disparate treatment of waste material, regardless of its content or chemical constituents.

30 For these reasons, this Honorable Court should order the NRC to modify NUREG-1757 to include a reasonable calculation of adverse economic impact on a host community, where a licensee proposes a decommissioning plan that
40 contemplates leaving radioactive waste on the site of generation.

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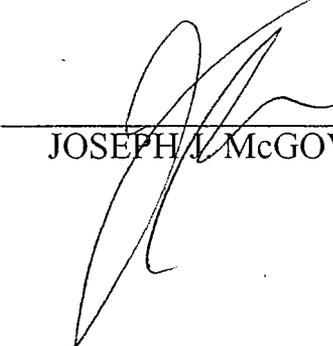
By: 

JOSEPH J. McGOVERN

CERTIFICATION OF BAR MEMBERSHIP

I, JOSEPH J. McGOVERN, counsel for Intervenor, The Gloucester County
Board of Chosen Freeholders, hereby certify that I am a member in good standing
of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: 7/3/07



JOSEPH J. McGOVERN

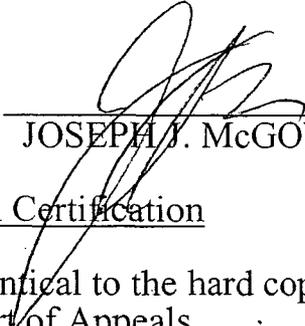
WORD COUNT

10 This Brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B) because this brief contains 5,391 words of proportionately spaced, 14-point text, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

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20 Our brief has been checked by Symantec Antivirus and contains no viruses.

PARKER McCAY P.A.

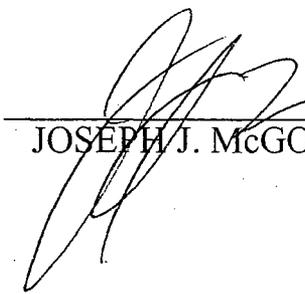


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Electronic Identical Certification

30 I certify that the electronic Brief is identical to the hard copy Brief which was hand-delivered to the Third Circuit Court of Appeals.

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*NJ State Certified General Real Estate Appraiser

HARRISON L. TODD, MAI (1988)

DATE: June 20, 2007

TO: Joseph McGovern, Esq.
Parker McCay, P.A.

PREPARED BY: Allen G. Black, MAI, SRA, CRE, Real Estate Appraiser
Todd and Black, Inc.
1209 South Union Avenue, Cherry Hill, NJ 08002

REGARDING: Shieldalloy Metallurgical Corporation
Decommissioning Plan, Newfield Township, Gloucester County, NJ

I have visited Newfield Borough, Gloucester County and toured the borough in order to understand the location of the Shieldalloy Corporation facility and the uses in the surrounding area. This industrial facility operation involves smelting and alloy production. It has apparently been in operation for more than 60 years. As part of the industrial process, slag was stored on site on part of the 67-acre facility. In addition, "baghouse dust" was dumped on the slag pile and 30 foot mound estimated to have some 33,000 cubic meters of material containing hazardous and radioactive material. The magnitude of the slag pile would require 1,000 years of monitoring.

News stories related to this facility and its closing, together with reporting on the decommissioning plan brings the situation to the public's attention. This adds to the need for real estate professionals to inform potential buyers of the presence of radioactive source material. Licensed real estate practitioners are required to inform buyers of circumstances that may affect properties anywhere in the area. In addition, the Shieldalloy property is on the list of Known Contaminated Sites, in the New Jersey 7th Edition Spring of 2006.

The negative effect of existence of the mound will extend beyond the neighborhood and borough into the surrounding area of Gloucester County and the general area. The effect applies to all properties not just residential. It impacts business, industrial and public uses. The influence is not limited to potential buyers choosing not to relocate in the area. It can include property owners choosing to leave the area and relocate in locations they perceive as not subject to the proximity of hazardous material.

I have appraised many properties and various types of uses that have or are perceived to have environmental problems. In the last 15-20 years, the appraisal publications have published extensively on the concept of stigma. This is defined as, "an adverse public perception regarding

a property; the identification of a property with some type of opprobrium (environmental contamination, a grisly crime), which exacts a penalty on the marketability of the property and hence its value.” *

Part of the reason for the interest in contaminated properties is a result of a better public understanding of the damages to health and safety, as well as the obvious economic loss. The concept of stigma has been studied and tested by the appraisal community to an extent where the general concept can be characterized as accepted appraisal consideration. It has become an element that when present requires study, analysis and consideration, as a value aspect including the general area.

The following published studies show the influence of the concept of stigma. The appraisal professionals recognize the value problem. This is only a small sample of the extent of current research on the subject.

1. Thomas O. Jackson, MAI, PhD., “The Effect of Previous Environmental Contamination on Industrial Real Estate Prices”, Appraisal Journal, April 2001, Appraisal Institute – Chicago.
2. Onell C. Anderson, MAI, “Environmental Contamination: An Analysis in the Context of the DC Matrix”, Appraisal Journal, July 2001, Appraisal Institute – Chicago.
3. Brian H. Hurd, PhD, “Valuing Superfund Site Clean-up: Evidence of Recovering Stigmatized Property Values”, Appraisal Journal, October 2002, Appraisal Institute – Chicago.
4. Albert R. Wilson, CRE, “Proximity Stigma: Testing the Hypothesis”, Appraisal Journal, Summer 2004, Appraisal Institute – Chicago.
5. James Flynn, PhD. (and others), “A Survey Approach for Demonstrating Stigma Effects in Property Value Litigation”, Appraisal Journal, Winter 2004, Appraisal Institute – Chicago.
6. Douglas S. Bible, PhD. (and others), “Analysis of the Effects of Contamination by a Creosote Plant on Property Values”, Appraisal Journal, Winter 2005, Appraisal Institute – Chicago.
7. Michael Greenberg, PhD. And Justin Hollander, “Neighborhood Stigma Twenty Years Later: Revisiting Superfund Sites in Suburban NJ”, Appraisal Journal, Spring 2006, Appraisal Institute – Chicago.

* The Dictionary of Real Estate Appraisal – 4th Edition

QUALIFICATIONS OF APPRAISER

ALLEN G. BLACK, MAI, CRE, SRA, is a principal in the firm of Todd and Black, Inc., having offices at 1209 South Union Avenue, Cherry Hill, New Jersey; formerly Vice President of Leon E. Todd, Inc., real estate brokers in Medford, Medford Lakes, and Mount Laurel.

He has been engaged in the appraisal, sale, purchase, and lease of commercial, industrial, and residential property since 1956. Experience includes eight years corporate real estate work with a major oil company. Appraisal experience includes the three major classifications of property as well as vacant land, special purpose properties, easements, and riparian rights. He has qualified as an expert witness before various commissions and New Jersey courts.

Education

B.B.A. Real Estate & Insurance - Upsala College, East Orange, New Jersey
Completed American Institute of Real Estate Appraisers: Course I, Course II, and Course VIII
Completed additional course in Real Estate Principles and Practice - New Jersey Association of Real Estate Boards, Camden, New Jersey
Educational Series - American Right-of-Way Association, Princeton, New Jersey
Principles & Techniques of Residential Appraising - SREA
Advanced Condemnation Course - American Society of Appraisers
Successfully completed the following college credit courses: Real Estate Fundamentals; Real Estate Management; Real Estate Mortgage Investment; Real Estate Appraising

Professional Affiliations include:

American Institute of Real Estate Appraisers

Awarded MAI designation #5397 - November, 1975 - Member American Institute
Awarded RM designation - November, 1972 - Residential Member
Co-Vice Chairman - National RM Required Examinations Subcommittee ('81)
N.J. Chapter #1 - Director, 1988 through 1990

American Society of Real Estate Counselors

The Counselors of Real Estate of the National Association of Realtors - CRE Designation #1639

Society of Real Estate Appraisers

Awarded SRPA designation - January, 1975 - Senior Real Property Appraiser
Awarded SRA designation - January, 1970 - Senior Residential Appraiser
Past President Southern New Jersey Chapter #26, 1977-78; Director, 1991-92
Past Vice-Governor, District #16, State of New Jersey

American Society of Appraisers

Awarded ASA designation - November, 1967 - Senior Member - Real Property
Past President - Southern New Jersey Chapter, 1971-72
Past Director - State of New Jersey

New Jersey State Certified General Appraiser - SCGRE #RG00574
Licensed New Jersey Real Estate Broker
Instructor - Realtor Institute, New Jersey Association of Realtors
Instructor - Department of Government Services, Rutgers University
Member - Pinelands Agricultural Study Commission, State of New Jersey

Has Made Appraisals for:

Municipalities in the States of New Jersey, Pennsylvania, Ohio, Virginia, Massachusetts, and New York.
Assignments include acquisition and re-use appraisals, transient housing studies, and land utilization and marketability studies in connection with various urban renewal projects.
Residential Transfers - various national companies.
Various municipalities in connection with tax appraisals and appraisal for the Green Acres Program.

| | | |
|---------------------|---------------------|--------------|
| Individual Owners | Attorneys | Corporations |
| Insurance Companies | Major Oil Companies | Banks |

we go further into the review process.

2 MS. MAVILLA: My name is Sue Mavilla, 600 Drive, Newfield. I've been a resident here for about 430 years. I chose to move to Newfield from North Jersey where there are refineries and a lot of different corporate business. I chose Newfield 30 years ago and the question I have is I think NRC has a responsibility to this town to return this town and to return the land to where it was in 1955. I personally don't care how much money it takes. I don't care what the engineers are saying. I believe that this land should be the way it was in 1955 when Shield Alloy moved into town.

14 I have to tell this room that I was a supporter of Shield Alloy in the 30 years that I've lived here. I'm embarrassed that they've left us with this mess. I believe you're talking about land that they own on the other side of town that has nothing to do with this. I think their assets have everything to do with this and I think the NRC should look into the rules and regs or whatever will allow them to attach any assets that they have right now so that this can be cleaned up, moved out of town.

25 The community, the legislators,

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submitted by ShieldAlloy regarding its site in Newfield, New Jersey. During last week's meeting, the public voiced their opposition to the plan and described the past and present environmental impact of the site on their town. They described the particulate that flows through the air and lays on their homes and in their cars. They talk about the many instances of cancer that they feel are directly related to the mismatch at ShieldAlloy. They're concerned about the groundwater and do not want their health and the health of their families put at risk. These are all valid concerns which must be considered before the final plan is set in motion.

15 The focus of tonight's meeting was supposed to be the environmental impact of the decommissioning plan. I am very concerned that this plan may put the health and well-being of the residents and the fragile eco-system surrounding the site at risk. At the previous meeting, members of the public educated on nuclear materials informed the audience that radioactive slag will take anywhere from 500,000 years to 14 billion years to break down. ShieldAlloy's plan calls for the site to be closed and monitored for 1,000

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financially to clean up these sites, they are paying with their health as families drink polluted water and children play in contaminated soil. Now I know that we're not talking in this context as it relates to the Commission about a Superfund site. That's already -- it's a Superfund site, but in a different context. This is particularly, however, relevant here, because ShieldAlloy has been a Superfund site for over 22 years, with extensive contamination of the soil, river, and groundwater by chromium and other toxic compounds. ShieldAlloy has been cleaning up since the late 1970s, as they should. But there is no denying that the residents of Newfield have been exposed to a serious health hazard for quite some time, one that still lingers to this day.

17 I am aware of concerns in the community that a cancer cluster may exist here and those concerns need to be investigated. While I understand that this is a separate issue, I think it is irrelevant to mention it because on top of this existing hardship, the community has experienced, it is simply too much to ask them to also accept a 30 foot high pile of radioactive waste that will supposedly need to be monitored for a thousand

1 MAYOR BARSE: We stand behind Newfield, our legislators. It's really scary when you have to talk to residents and talk to good people and say a nuclear dump that's out in the open literally a few hundred yards away from our northern border with all the issues we've had over the years. It's just scary and we have to do something about it. We are here to support this effort in any matter or form we can. God bless each and all of you and let's keep up the good fight. Thank you.

11 (Applause.)

12 FACILITATOR RAKOVAN: Thank you, Mayor. I'd like to point out that it's about 9:05 p.m. My last word count said that we had about 14 people yet that wanted to speak. So again if you could please keep your comments short and to the point, we would appreciate it. Stina Capano.

18 MS. CAPANO: Hello. My name is Stina Capano. I live in North Vineland. No one asked me if they could put a test well in my front yard. I had no voice. My voice is now for all the people who have gone down because of the cancer. Okay. We know it's there. I have it in my household. There isn't a household that you talk to that hasn't had somebody that has died or has had

cancer.

2 I plead with the Commission to do the right thing. When you make your decision, think of your children playing in that dirt. Think of it as your family and please use your voices. Thank you. God bless.

7 (Applause.)

8 FACILITATOR RAKOVAN: Thank you very much. 9 I believe it's Perry Barse.

10 AUDIENCE MEMBER: That was the mayor.

11 FACILITATOR RAKOVAN: Okay. I guess I did have a card for him. John Nordberg.

13 MR. NORDBERG: I think I want to comment that I'm trying over again. When they pick on the NRC, I think they're picking on the wrong people. I believe the NRC represents us in their capacity as engineers and people to work with statistics.

19 I reviewed the disk that was given out last week and there is all kind of calculations that nobody unless they were physicist in nuclear energy would understand any of it. But their calculations are probably right. The right thing to do is probably eliminate radiation and I'm not talking about the low level. It's just the concept

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stuck with the rest.

2 MS. TADESSE: I think we're looking at
that. 3

4 FACILITATOR RAKOVAN: Okay. I think
we're about -- Sir, we've passed your question and
if you have any further questions afterwards, I
think we can -- Hopefully someone will be around
to talk to you. There had better be. I have six
more commentors here. I'm going to try to get
through them. We'll start with Dawn Pennino.

11 MS. PENNINO: Yes. I'm Dawn Pennino.
I was born and raised in --

13 FACILITATOR RAKOVAN: I'm sorry to
interrupt. If everybody could please give her your
attention. If you're going to have side
conversations, if you could take them out to the
hall I want to make sure that everybody could hear
her make her statements. Thank you.

19 MS. PENNINO: Really it's a comment
that I want to make. I want to put it on the
record. I was born and raised in Newfield. I left
for a very brief amount of time, came back to live
on property next to my parents' house which is the
street right adjacent to where Shieldalloy is.
That would be Rena Street.

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1 A brief history of my family. I have had a grandmother who passed away from a brain tumor who lived on Rena Street. I had a brother who has, he's still living, but he was diagnosed with a tumor when he was three years old. I have, thank God, a son who survived a brain tumor at two and a half years old. I myself am living with a brain tumor right now. I'm not sure if they were cancerous. My son's was not. My brother's was not. Mine, thank God to this day, is not.

11 But the main thing that people need to know, I did speak to the doctors in Philly where we took my son, is none of these tumors were related. So that they were definitely not genetic. It has to be environmental. Now Shieldalloy is there. That is a main concern. That's going back to 1955. My grandmother passed away in 1975.

18 My concern is it's not just cancer. There are other factors. I have lost a lot of very dear friends to me and at a very young age. I have lost a lot of family members. I am begging you. At the last meeting, there was a statement made by your people that you were not responsible to a health study and to look into this. I beg of you. This is a very, very important for the people in

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this town.

2 Like it was stated last week and it was stated tonight, there is nobody in here that can say they were not affected by a cancer or unfortunately brain tumors is a very, very big think in this town. Now I don't know. I'm not a scientist. I don't know if it has anything to do with that, but I think it's an issue that needs to be addressed because I want to stay here with my family. I want to continue to raise my family here and it's funny. Most people when they are growing up they can't wait to get out of here, but they can't wait to get back in here to raise their family. I mean that's a statement anybody will tell you.

16 So I'm just begging you on behalf of my children. My whole family lives on that street and I beg of you to please do the health study or whoever it is that needs to do the health study, then you need to push that button and to follow up on it and to take that into consideration when you make your decision. Thank you.

23 (Applause.)

24 FACILITATOR RAKOVAN: Thank you very much 25 Terry Ragone. Would you like to go to the

1 MR. QUENE: But does the NRC feel that they've monitored them properly and let them build up a 35 foot pile in Newfield? It doesn't make sense4to -- It's not even common sense to do something like that.

6 MR. KALMAN: They operated within their license requirements.

8 MR. QUENE: Well, who makes their license and allows them to do that? I mean you say you've been checking them and monitoring them since 196311 You never had a question about what they've doing2there. I mean this stuff has been blowing in our yards since `63. I mean I know that some of the discoloration of some of the houses on Rena Street and the cars.

16 In the night time, there used to be cloud7of smoke blowing over this town when nobody was watching it. No, it's ridiculous what these people have been able to do and I mean you guys are supposed to be monitoring them. I don't understand it. 2I mean I have grandkids and kids and when you go up2and down Rena Street, you're not talking just one family that's been affected with cancer. I mean2you can take about six or seven families right down2the street that all have had cancer in their

homes1 It's not right.

2 (Applause.)

3 FACILITATOR RAKOVAN: Okay. We're
slowly approaching 10:00 p.m. I see a hand in the
back.5 If you could identify yourself, sir.

6 MR. PRICE: Robert Price. I live in
Newfield. One question.

8 FACILITATOR RAKOVAN: If everyone could
give him your attention please.

10 MR. PRICE: This radioactive pile, the
so-called slag, the pile, how did they come up with
the upper licensing for the quantity? Is that by
the volume that they see on top? Because we all
know that some of that stuff can be heavier than
dirt and can be pushing the dirt away. I'm a
scientist, but in a geology, magna flows through
dirt,17 pushes it and this for slag 20 feet down can
it be impeding the groundwater. Is it larger than
what they say it is?

20 I was out there working for a company
that was crushing the big pieces of slag, taking
them out of the earth. I wasn't told that that
stuff was radioactive. I have a right to know.
Can somebody answer that? How do we judge how much
tonnage was their license allowed?

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**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

STATE OF NEW JERSEY

Appellants,

v.

**UNITED STATES NUCLEAR
REGULATORY COMMISSION
And UNITED STATES OF
AMERICA**

Appellees.

NO. 06-5140

PROOF OF SERVICE

I, Joseph H. McGovern, of full age, hereby certify that:

1. I am an attorney with the Law Firm of Parker McCay P.A., and am the attorney assigned with the handling of this matter on behalf of Intervenor, The Gloucester County Board of Chosen Freeholders.

2. On July 3, 2007, I caused to have forwarded copies Motion to Supplement Record with supporting Certification and accompanying Proof of Mailing, on behalf of the Intervenor, The Gloucester County Board of Chosen Freeholders, in the within action as follows:

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601 Market Street
Philadelphia, PA 19106-1790

Two (2) Copies:

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Via Federal Express #8605 8104 5846
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Office of the Attorney General
Department of Law and Public Safety-New Jersey Division of Law
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 093
Trenton, NJ 08625-0093
Attorney for Appellant State of New Jersey

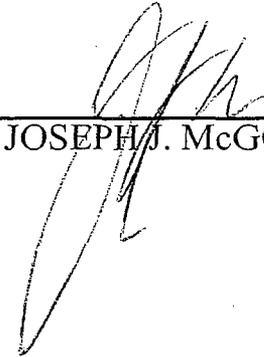
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**Attorney for Intervenor ShieldAlloy Metallurgical
Corporation**

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 willfully false, then I am subject to punishment.

Dated: 7/3/07



JOSEPH J. McGOVERN