

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

---

**Nos. 06-5140, 07-1559 and 07-1756 (Consolidated)**

---

**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**

---

**REPLY BRIEF OF INTERVENOR  
THE GLOUCESTER COUNTY BOARD OF CHOSEN FREEHOLDERS  
TO THE BRIEFS OF FEDERAL RESPONDENTS AND INTERVENOR  
SHIELDALLOY METALLURGICAL CORPORATION**

---

**JOSEPH J. McGOVERN, ESQUIRE (JJM 6162)  
PARKER McCAY P.A.  
THREE GREENTREE CENTER, SUITE 401  
7001 LINCOLN DRIVE WEST  
P.O. BOX 974  
MARLTON, NEW JERSEY 08053-0974  
(856) 596-8900**

**ATTORNEYS FOR INTERVENOR THE GLOUCESTER COUNTY  
BOARD OF CHOSEN FREEHOLDERS**

## TABLE OF CONTENTS

	<u>Page</u>
10 <u>TABLE OF CONTENTS</u> .....	i
<u>TABLE OF CITATIONS</u> .....	ii
<u>JURISDICTION, STANDING AND EXHAUSTION OF</u> <u>ADMINISTRATIVE REMEDIES</u> .....	1
20 <u>ARGUMENT:</u>	
<u>POINT I</u>	
THE BOARD'S ARGUMENTS ARE WITHIN THE SCOPE OF THE MAIN APPELLANT'S CHALLENGES AND THUS PROPERLY BEFORE THIS COURT .....	2
<u>POINT II</u>	
30                 THE BOARD'S CHALLENGE TO ALARA, AS CONTEMPLATED BY NUREG-1757, IS SUPPORTED BY THE RECORD AND HAS A SUFFICIENT FACTUAL AND LEGAL BASIS .....	6
<u>POINT III</u>	
FEDERAL RESPONDENTS AND SMC MISCHARACTERIZE THE BOARD'S ARGUMENT REGARDING CONFLICT WITH OTHER FEDERAL ENVIRONMENTAL LAW .....	10
40 <u>CONCLUSION</u> .....	12
<u>COMBINED CERTIFICATIONS</u> .....	13, 14

## TABLE OF CITATIONS

### FEDERAL CASES:

<i>Illinois Bell Telegraph Co. v. FCC</i> , 911 F.2d 776.....	4
<i>Southwestern Pennsylvania Growth Alliance v. Browner</i> , 121 F.3d 106.....	2, 4
<i>Vinson v. Washington Gas Light Co.</i> , 321 U.S. 489.....	4

### FEDERAL REGULATIONS:

10 C.F.R. §20.1402 (“ALARA”).....	3, 4, 6, 7
-----------------------------------	------------

### OTHER AUTHORITIES:

Federal Resource Conservation and Recovery Act, 42 U.S.C. 6901 .....	10, 11
Fed.R.App.P.32(a)(5).....	14
Fed.R.App.P.32(a)(6).....	14
Fed.R.App.P. 32(a)(7)(B) .....	14
Fed.R.App.P. 32(a)(7)(B)(iii) .....	14
NUREG-1757 .....	2, 3, 4, 6, 7, 8, 10, 11, 12

**JURISDICTION, STANDING AND EXHAUSTION OF  
ADMINISTRATIVE REMEDIES**

Intervenor, The Gloucester County Board of Chosen Freeholders, hereby  
adopts and incorporates by reference the Reply of the State of New Jersey to  
Federal Respondents' and Intervenor Shieldalloy Metallurgical Corporation's  
arguments that (1) this Court lacks jurisdiction to hear this appeal, (2) the State of  
New Jersey and Gloucester lack standing, and (3) they have failed to exhaust  
administrative remedies. As an intervenor, The Gloucester County Board of  
Chosen Freeholders' interests are co-extensive with those of the State of New  
Jersey, at least insofar as the issues of jurisdiction, standing and exhaustion of  
administrative remedies are concerned.

## ARGUMENT

### POINT I

#### **THE BOARD'S ARGUMENTS ARE WITHIN THE SCOPE OF THE MAIN APPELLANT'S CHALLENGES AND THUS PROPERLY BEFORE THIS COURT**

Both the Federal Respondents and Intervenor Sheildalloy Metallurgical Corporation ("SMC") allege that Intervenor, The Gloucester County Board of Chosen Freeholders (the "Board"), raises issues and arguments beyond the scope of the State of New Jersey's appeal. FR Brief at 49; SMC Brief at 63. The Board does not dispute the axiom that, as an intervenor appellant, the Board may assert only those claims raised by the main appellant, as articulated in *Southwestern Pennsylvania Growth Alliance v. Browner*, 121 F.3d 106, 121 (3d Cir. 1997). However, the Board disagrees with the Federal Respondents' and SMC's assertion that the Board's arguments and allegations are somehow broader than those raised by the State of New Jersey.

In its Petition for Review, the State of New Jersey initially asserted, in "The Grounds on Which Relief is Sought" section, that the NUREG-1757 guidance is unlawful and "arbitrary, capricious and otherwise contrary to law." NJ Petition for Review at 1. This allegation is obviously a broad challenge to the entirety of the NUREG-1757 guidance. Although the State, later in its Petition for Review, went on to allege some more particular challenges to specific portions of NUREG-1757,

10 those more particular challenges do not alter the fact that the State's unequivocal  
intent was an attack on the NUREG-1757 guidance in its entirety. The Board's  
challenges to NUREG-1757 are thus amply within the scope of issues raised by the  
State in its Petition for Review in that the Board's challenges are directed at  
particular aspects of NUREG-1757, as drafted.

20 Additionally, one of the State's specific challenges concerned the regulatory  
requirement of addressing the concept of "as low as reasonably achievable" or  
"ALARA" and how the United States Nuclear Regulatory Commission's ("NRC")  
efforts must inevitably fail under this standard. This concept of weaknesses in  
NUREG-1757's implementation of ALARA is precisely the same area of argument  
30 undertaken by the Board. In short, and so as not to restate its Brief entirely, the  
Board advanced an argument that NUREG-1757 did not guarantee ALARA  
because of a failure to take into account the long-term adverse economic impacts to  
the community. Accordingly, the State raised the issue of ALARA deficiencies  
and the Board simply augmented that challenge by demonstrating weaknesses with  
40 ALARA, as implemented by NUREG-1757, that were unique to Gloucester  
County and Newfield Borough.

50 The Board also raised an issue about the potential for conflict with other  
federal environmental statutes if the interpretation and implementation of ALARA  
by way of the NUREG-1757 guidance were upheld in this case. This issue too is

consistent with the challenges raised by the State in its Petition for Review. In particular, the State claimed in its Petition that “[t]he NUREG-1757 guidance conflicts with statutory and regulatory requirements, is arbitrary and capricious and lacks a reasoned basis in numerous respects, including but not limited to those described below.” NJ Petition for Review at 2. (Emphasis added). The purpose of the emphasized portion of the State’s challenge is clear: it wanted the broadest attack possible on NUREG-1757. It is against that broad backdrop that the State expressly mentioned NUREG-1757’s conflict with statutory and regulatory requirements. And, that conflict is precisely what the Board explained in more detail and with particularity in its Brief. That is, the Board simply demonstrated how a decision by the NRC under the flawed ALARA analysis contemplated by NUREG-1757 would result in obvious and unfounded conflict with other federal agency decisions under other federal environmental laws.

In conclusion, then, the Board believes that its argument regarding the weakness with the ALARA analysis under NUREG-1757 and its argument regarding inconsistent federal agency actions resulting from that weakness are both within the purview of the State’s Petition for Review. The Board has thus satisfied the mandates of *Sw. Pa. Growth Alliance* and companion cases on the scope of an intervenor’s participation. *Vinson v. Washington Gas Light Co.*, 321 U.S. 489 (1944); *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990). The issues

raised by the Board are therefore properly before this Court and should be given  
due consideration.

10

20

30

40

50



## POINT II

### **THE BOARD'S CHALLENGE TO ALARA, AS CONTEMPLATED BY NUREG-1757, IS SUPPORTED BY THE RECORD AND HAS A SUFFICIENT FACTUAL AND LEGAL BASIS**

Both the Federal Respondents and SMC point out in their respective Briefs that NUREG-1757 calls for a consideration of changes in land values in the ALARA cost-benefit analysis. FR Brief at 51; SMC Brief at 64. The Board does not dispute this position. However, this position misses the more specific point raised by the Board in its Brief. In particular, and again without restating its Brief in its entirety, the Board alleges that 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. So, for example, the Board pointed out that the record in this case does not have any assessment by SMC of such things as potential lost business revenues and diminution in property values. More importantly, NUREG-1757, as drafted, does not mandate that kind of assessment when an applicant is seeking a long-term materials license essentially to create a radioactive waste landfill with an infinite life.

In support of this argument, the Board offered evidence of, among other things, the possibility of both flight from community as a result of the presence of the long-term storage of radioactive waste and the refusal to establish new business or residences as well. All of these things could have devastating economic impact on

10 Gloucester County generally and Newfield Borough in particular. The changes in  
land values contemplated by the ALARA cost-benefit analysis, while admittedly  
embodied in NUREG-1757 as drafted, is a much more limited form of assessment  
than what the Board argued for in its Brief.

20 The Board understands and agrees with the Federal Respondents' position that  
"NUREG-1757, as a guidance document, does not 'mandate' the performance of  
particular analyses, such as the one demanded by [the Board]..." FR Brief at 51.  
That conclusion is precisely the reason behind the Board's contention that  
NUREG-1757 is arbitrary, capricious and unreasonable. The kind of long-term  
economic assessment suggested by the Board, as supported by the expert opinion  
30 of Allen Black, should be mandated by NUREG-1757 in order for the cost-benefit  
analysis contemplated by ALARA under 10 C.F.R. §20.1402 to be reliable and  
reasonable. The Federal Respondents argue that "the guidance is clear that the  
enumerated costs are not exhaustive..." and that, under ALARA, "...other costs  
that are appropriate for the specific case may also be included." FR Brief at 51.  
40 While this is helpful guidance, it misses the Board's point. That is, the Board  
seeks to have long-term community specific adverse economic impact a mandatory  
requirement for purposes of ALARA. Otherwise, by definition, the risks and  
benefits of a particular decommissioning plan will be skewed in favor of leaving  
50 the radioactive waste at the point of generation.

10 The Board disagrees with the Federal Respondents' characterization of the  
Board's argument as one that challenges only the manner in which NUREG-1757  
is being applied to the SMC Decommissioning Plan. FR Brief at 52. The Board  
was careful in its Brief to show that the failure of NUREG-1757 to require a  
consideration of long-term community specific adverse economic impact is a  
failure of the guidance generally that will have nationwide impact. The fact that  
20 SMC's application is the first of its kind in the country, and that this aspect of the  
case will inevitably come through in the briefing, does not mean that the Board's  
arguments are limited to those presented by the NRC's application of NUREG-  
1757 to the SMC Decommissioning Plan. To the contrary, any decision made by  
the NRC in this case, including decisions made under a faulty cost-benefit analysis,  
30 will have a much broader impact than on just Gloucester County and Newfield  
Borough. Indeed those decisions will permeate the entire country, as radioactive  
waste generators begin to line up seeking to establish their own on-site radioactive  
waste landfills, using NRC's decisions in this case as precedent.

40 SMC similarly contests this point by saying that it will not be establishing a  
waste landfill. SMC Brief at 63. How else would one characterize 33,000 cubic  
yards of radioactive waste material, stockpiled at the point of generation, that is  
going to be capped and monitored? It is a waste landfill. The fact that it will  
50 contain waste generated by SMC only, and that the waste will be radioactive in

nature, makes no difference in terms of what this site currently is and will continue to be, if SMC has its way. There are many dumps and landfills across the country that were designed for use by one waste generator only. That use, however, does not change or mitigate the fact that those site are dumps or landfills that have long-term impact on the host community.

### POINT III

#### **FEDERAL RESPONDENTS AND SMC MISCHARACTERIZE THE BOARD'S ARGUMENT REGARDING CONFLICT WITH OTHER FEDERAL ENVIRONMENTAL LAW**

Both the Federal Respondents and SMC seemingly misunderstand the Board's argument regarding the implication of NUREG-1757's faulty cost-benefit analysis. For example, SMC characterizes the Board's argument as saying that NUREG-1757 "violates" the requirements of the Federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6901. SMC Brief at 64. Similarly, the Federal Respondents raise the implication that the Board wants the NRC decision on SMC's Decommissioning Plan subject to concurrent review under other Federal and New Jersey environmental statutes and regulations. FR Brief at 52-53. That is not the case at all. The Board understands that radioactive waste materials are regulated under separate and distinct statutes and regulations. And, the Board understands the underlying public policy behind doing so. After all, radioactive waste is indeed pretty nasty stuff.

The Board's warning on this point is quite simple and straightforward. NUREG-1757, as drafted, will result in decisions being made by the NRC that conflict with the policy underlying other federal environmental laws and similar New Jersey statutes. In particular, allowing the disposal of waste material, whether radioactive or otherwise, to remain indefinitely at the point of generation is not a

desired approach to waste management. Rather, what the Federal government desires, as articulated by RCRA, is the environmentally protective removal of waste material from the point of generation and disposal of that waste material at facilities properly designed and operated for such a purpose. New Jersey shares this policy. In its arbitrary, capricious and unreasonable approach to evaluating long-term radioactive materials licenses, NUREG-1757 allows this long-standing and well-defined policy to take a back seat to convenience.

In conclusion, then, the Board is not attempting to apply the provisions of RCRA or any other environmental law or regulation to an NRC licensing decision. Rather, it is the Board's position that, if the faulty cost-benefit analysis under NUREG-1757 continues unabated, there will inevitably come a point where arguably more dangerous waste, with known radioactive content, will be allowed to be disposed of in areas where less dangerous waste cannot be sited. This is the illogical regulatory result that the Board was pointing out in its Brief.

## CONCLUSION

10 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  
contemplates leaving radioactive waste on the site of generation.

20 PARKER McCAY P.A.  
Attorneys for Intervenor, The  
Gloucester County Board of Chosen  
Freeholders

30 Dated: 9/13/07

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: 9/13/07

  
\_\_\_\_\_  
JOSEPH J. McGOVERN



**WORD COUNT**

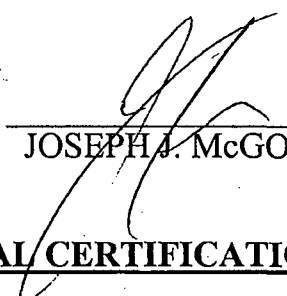
This Reply Brief complies with the type-volume limitations of Fed.R.App.P.  
32(a)(7)(B) because this brief contains 2,028 words of proportionately spaced, 14-  
point text, excluding the parts of the Reply Brief exempted by Fed.R.App.P.  
32(a)(7)(B)(iii).

This Reply Brief complies with the typeface requirements of  
Fed.R.App.P.32(a)(5) and the type style requirements of Fed.R.App.P.32(a)(6)  
because this brief has been prepared in a proportionally spaced typeface using  
Word XP 2002 in Times New Roman 14 point font.

Our Reply Brief has been checked by Symantec Antivirus and contains no  
viruses.

PARKER McCAY P.A.

Dated: 9/13/07

  
\_\_\_\_\_  
JOSEPH J. McGOVERN

**ELECTRONIC IDENTICAL CERTIFICATION**

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

PARKER McCAY P.A.

Dated: 9/13/07

  
\_\_\_\_\_  
JOSEPH J. McGOVERN

## CERTIFICATE OF SERVICE

10 I, Joseph J. 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.

20 2. On September 13, 2007, I caused to have forwarded copies of Reply Brief of Intervenor The Gloucester County Board of Chosen Freeholders to the Briefs of Federal Respondents and Intervenor ShieldAlloy Metallurgical Corporation with accompanying Certificate of Service, in the within action as follows:

### Original and Nine (9) Copies

30 Office of the Clerk, Marcia M. Waldron  
**Via Hand Delivery**  
United States Court of Appeals for the Third Circuit  
21400 United States Court House  
601 Market Street  
Philadelphia, PA 19106-1790

### Two (2) Copies:

40 Kenneth W. Elwell, Esquire  
**Via Federal Express #8619 3741 8097**  
Senior Deputy Attorney General  
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**

50 Kathryn E. Kovacs, Esquire  
**Via Regular Mail, First Class Postage Prepaid**  
United States Department of Justice  
Environment and Natural Resources Division  
Appellate Section  
P.O. Box 23795 – L'Enfant Plaza Station  
Washington, D.C. 20026  
**Attorney for Appellee United States of America**

Charles E. Mullins, Esquire  
**Via Federal Express #8619 3741 8101**  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
11555 Rockville Pike  
Rockville, MD 20852  
**Attorney for Appellee United States Nuclear Regulatory  
Commission**

Matias F. Travieso-Diaz, Esquire  
**Via Federal Express #8619 3741 8112**  
PILLSBURY WINTHROP SHAW PITMAN LLP  
2300 N Street NW  
Washington, DC 20037  
**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: 9/13/07

  
\_\_\_\_\_  
JOSEPH J. McGOVERN