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VIA U.S. MAIL AND ELECTRONIC SUBMISSION

Michael T. Lesar, Chief
Rulemaking, Directives and Editing Branch
MS TWB-05-B01M
Division of Administrative Services
Office of Administration
Washington, DC 20555-0001

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RULES AND DIRECTIVES
BRANCH
OFFICE

Re: Shieldalloy Comments on New Jersey's Application to Become an Agreement State

Dear Mr. Lesar:

In response to the Federal Register notice dated May 27, 2009, 74 Fed. Reg. 25823, this letter submits comments by Shieldalloy Metallurgical Corporation ("SMC") on the application ("Application") by the State of New Jersey ("New Jersey") to enter into an agreement ("Agreement") with the U.S. Nuclear Regulatory Commission ("NRC") pursuant to Section 274 b. of the Atomic Energy Act of 1954, 42 U.S.C. § 2021(b) ("the Act"). Under the Agreement, regulatory authority over certain radioactive materials would be transferred from the NRC to New Jersey.

The Act authorizes the NRC to enter into such an agreement with a State *only if* the NRC "finds that the State program is . . . compatible with the Commission's program for regulation of such materials . . ." *Id.* As described below, the proposed New Jersey radiation control program (the "NJ Program") is not compatible with the NRC's regulatory program, thus the Application should be denied. Even if the Application were approved, the NRC should retain regulatory jurisdiction over SMC's facility in Newfield, New Jersey ("the Newfield facility"), for which SMC holds a source materials license from the NRC, and continue to oversee the facility's decommissioning until its completion.

A. The New Jersey Program Fails to Meet the NRC's Compatibility Criteria

The NRC Staff evaluates a State's radiation control program as described in the State's formal application to become an "Agreement State" and prepares a written assessment of whether the program is compatible, as defined in the NRC Policy Statement on State Agreements

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Add = D. Taylor (TMT)
D. Jollenberger (dms4)

("Policy Statement").¹ The Federal Register notice includes a summary of the Staff's assessment of New Jersey's Application. 74 Fed. Reg. at 25825-26. The summary concludes that

the State of New Jersey satisfies the criteria in the Commission's policy statement "Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement," and meets the requirements of Section 274 of the Act. Therefore, the proposed State of New Jersey program to regulate Agreement materials, as comprised of statutes, regulations, procedures, and staffing is compatible with the program of the Commission and is adequate to protect public health and safety with respect to the materials covered by the proposed Agreement.

Id. at 25826. On July 18, 2008, SMC submitted comments to New Jersey on the then proposed NJ Regulations.² In those comments, SMC pointed out the inconsistency between New Jersey's regulatory framework and the NRC's. Although the NRC Staff had these comments well in advance of the issuance of its Assessment, the Staff neither references nor addresses those comments. For that reason and the other factors discussed herein, the Staff's assessment is incomplete and in part erroneous and must be substantially revised to recognize the incompatibility of the NJ Program with the program of the Commission.

NRC guidance explains that:

An Agreement State radiation control program is compatible with the Commission's regulatory program when the State program does not create conflicts, duplications, gaps, or other conditions that jeopardize an orderly pattern in the regulation of agreement material (source, byproduct, and small quantities of special nuclear material as identified by Section 274b. of the Atomic Energy Act, as amended) on a nationwide basis.³

For determining compatibility, the NRC guidance has established a set of criteria against which a State's regulatory program is evaluated. The NJ Program is incompatible with the NRC regulations in a number of significant respects.

¹ *Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement*, 46 Fed. Reg. 7,540, 7,543 (1981), as amended by 46 Fed. Reg. 36,969 (1981) and 48 Fed. Reg. 33,376 (1983).

² Letter from Hoy Frakes (SMC) to New Jersey Department of Environmental Protection ("NJDEP"), dated July 17, 2008 ("SMC Comments"), Attachment 1 hereto.

³ *Adequacy and Compatibility of Agreement State Programs*, NRC Management Directive ("MD") 5.9, Handbook 5.9 at 1.

1. The Regulations issued by the NJDEP are Invalid

The NJ Program's Regulations ("NJ Regulations")⁴ are invalid because they were not adopted in accordance with the procedural requirements of New Jersey's Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.* ("APA"). Among other deficiencies:

- NJDEP failed to conduct a proper Federal Standards Analysis required by state law. *See* N.J.S.A. 52:14B-22 to -24. As further discussed below, the NJDEP regulations are more stringent than relevant NRC rules in areas (discussed below) such as dose criteria, restricted release standards, time period for dose calculations. The NJDEP has failed to analyze the effect of their inconsistency with Federal regulations, as required by the statute.
- NJDEP failed to analyze and minimize the adverse economic impacts of its proposal to become an Agreement State, as required by the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 *et seq.* The agency's approach to the decommissioning of facilities will give rise to enormous costs to Shieldalloy and other similar licensees. NJDEP failed to analyze and minimize these economic impacts as required by the APA.
- As explained below, the NJDEP modified the rule upon adoption to apply to "all persons," instead of applying only to licensees and registrants, as provided in the proposed rule. 40 N.J.R. 5201. This substantial change to the proposal means that interested parties did not have notice and an opportunity to provide meaningful public comment to the rule, as required by the APA. A rule adopted without opportunity for notice and comment is invalid.

2. The NJ Program Fails to Satisfy Compatibility Criterion 9 in that it sets Release Criteria that Differ from Those in 10 CFR Part 20

Compatibility Criterion 9 states, in relevant part: "Waste Disposal. The standards for the disposal of radioactive materials into the air, water, and sewers, and burial in the soil shall be in accordance with Part 20." As further discussed below, the NJ Regulations differ from the radiological criteria for license termination in 10 C.F.R. Part 20 in many significant respects, in violation of Compatibility Criterion 9:

- (1) The NJ Regulations establish a maximum allowable total dose to a member of the public of 15 mrem/yr, instead of the 25 mrem set in 10 C.F.R. § 20.1402.⁵
- (2) The NJ Regulations do not implement the "as low as reasonably achievable" ("ALARA") principle set forth in, *inter alia*, 10 C.F.R. § 20.1402.
- (3) The NRC regulations include restricted release criteria, set forth in 10 C.F.R. § 20.1403, but the NJ Regulations do not.

⁴ 40 N.J.R. 5196(b) (Sep. 15, 2008) (Attachment 2 hereto).

⁵ NJ Regulations at 7:28-12.8.

(4) The NRC regulations in 10 C.F.R. § 20.1401(d) set a time limit of 1,000 years after decommissioning for calculating the peak annual total effective dose equivalent (“TEDE”) to the average member of the critical group; the NJ Regulations set an indefinite, and potentially much longer, time limit described as “the time of the peak dose or 1,000 years, whichever is longer.”⁶

(5) The NRC regulations in 10 C.F.R. § 20.1403(e) permit release of a site after decommissioning if residual radioactivity at the site has been reduced so that the Total Effective Dose Equivalent (TEDE) from residual radioactivity to the average member of the critical group would not exceed 500 mrem in any year if certain conditions are met; the NJ Regulations do not allow for more than 100 mrem TEDE under any circumstances.⁷

(6) The Part 20 regulations do not impose release limits on surface or ground waters, but incorporate those releases into the overall maximum allowable dose limits in 10 C.F.R. § 20.1402; the NJ Regulations require that radioactivity releases to the ground and surface waters be limited to the levels set by the New Jersey Ground Water and Surface Water standards.⁸

In its comments on the then proposed NJ Regulations, SMC pointed out the inconsistency between New Jersey’s regulatory framework and the NRC’s.⁹ The NJDEP, the state agency charged with developing and implementing the NJ Regulations, rejected the challenge to the 15 mrem limit on the grounds, offered without further justification, that the limit was “not new”.¹⁰ The NJDEP also acknowledged that its proposed regulatory regime does not allow for the use of ALARA analysis and thus differs significantly from the NRC’s framework:

ALARA determinations allow the use of cost as a factor for determining what level of remediation is cost effective below the standards. The [NJDEP] and the [New Jersey Commission on Radiation Protection] did not include a provision for ALARA in meeting these dose criteria because the Brownfield and

Contaminated Site Remediation Act, N.J.S.A. 58:10B-1 et seq., does not allow such a provision.

NJ Regulations at 8. In applying for Agreement State status, New Jersey has not sought to remedy this inconsistency between its statutes and the NRC regulations.

On the need to compute peak doses beyond 1,000 years, the NJDEP stated that the NRC regulation does not apply to long-lived radionuclides, and that “it is vital to consider the peak dose, whenever it occurs, to ensure that adequate measures are taken to protect public health and

⁶ *Id.* at 7:28-12.10(d).

⁷ *Id.* at 7:28-12.11(e).

⁸ *Id.* at 7:28-12.11(a)(3) and (4).

⁹ SMC Comments, Attachment 1 hereto, at 2-6.

¹⁰ NJ Regulations at 8.

safety.”¹¹ That interpretation is contrary to the explicit language of 10 C.F.R. § 20.1401(d) and has been rejected by the NRC in briefs submitted to the U.S. Court of Appeals for the Third Circuit.¹²

On the separate limits on releases to the surface and ground waters, the NJDEP did not deny that those limits are inconsistent with the NRC standards, but asserted that the intent of the New Jersey standards “is to ensure that decommissioned facilities with residual material present do not affect the quality of any surface water near the facility. The [NJDEP] and the [New Jersey Commission on Radiation Protection]’s intent in referencing the surface water quality rules was to ensure that the surface water standards for radioactivity at N.J.A.C. 7:9B-1.14(c)6 are met in order to verify that health and safety of humans and the environment are sufficiently protected.”¹³ The NJDEP did not explicitly address the absence of restricted release criteria in its regulations,¹⁴ nor the failure to provide for increased levels of residual radioactivity after decommissioning if certain conditions are met.¹⁵

The regulatory requirements and standards for facility decommissioning in the NJ Program are thus vastly different from those which the NRC has established and applies to licensed facilities undergoing decommissioning. The NJ Program creates conflicts and gaps with the essential objectives of the NRC regulations and is therefore fundamentally incompatible with the NRC regulatory framework.

3. The NJ Program Fails to Satisfy Compatibility Criterion 12

Compatibility Criterion 12 states: “Additional Requirements and Exemptions. Consistent with the overall criteria here enumerated and to accommodate special cases and circumstances, the State regulatory authority shall be authorized in individual cases to impose additional requirements to protect health and safety, or to grant necessary exemptions which will not jeopardize health and safety” (emphasis added). Contrary to that criterion, the NJ Regulations fail to provide for granting necessary exceptions to the regulatory standards that do not jeopardize health and safety. There are at least four instances of the failure of New Jersey’s regulatory scheme to comply with Criterion 12:

- (1) As discussed above, the NJ Regulations will not allow consideration of alternate remediation standards that would increase the allowed incremental dose criterion of 15 mrem/yr

¹¹ *Id.* at 5-6.

¹² *State of New Jersey v. NRC* (Third Circuit), Brief for the Federal Respondents (Aug. 27, 2007), Attachment 3 hereto, at 55-57.

¹³ NJ Regulations at 6.

¹⁴ However, NJ has strongly opposed implementation of the NRC’s restricted release criteria at SMC’s Newfield site. Such opposition has manifested itself by a legal challenge to the NRC guidance that would apply to the implementation of the criteria to SMC’s Newfield facility, as well as an administrative challenge (currently ongoing) to SMC’s decommissioning plan for that facility. *See New Jersey v. NRC*, 526 F.3d 98 (3d Cir. 2008); *Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-09-01, __ NRC __ (2009).

¹⁵ The increased levels of radioactivity allowed by the NRC and rejected by New Jersey are part of the restricted conditions for license termination that include implementation of the ALARA principle. 10 C.F.R. § 20.1403(e).

(itself significantly lower than the maximum allowable dose of 25 mrem/yr set by the NRC regulations in 10 C.F.R. § 20.1402), even if justified through an ALARA analysis. *See, e.g.*, NJ Regulations at 7:28-12.11(b).

(2) As also discussed above, the NJ Regulations do not allow for any alternative remediation standards if they would result in doses exceeding 100 mrem/yr for an “all controls fail” scenario. NJ Regulations at 7:28-12.11(e).

(3) The NJ Regulations require that the calculations of doses from radiological decommissioning use only tables of parameters based on specific exposure scenarios. NJ Regulations at 7:28-12.11(b).

(4) When modeling the “all controls fail” scenario, the NJ Regulations allow no credit for any engineering controls, such as a fence or cover, to be taken when performing the model to determine if the 100 mrem annual dose is exceeded. The NRC, however, allows the licensee to take credit for controls that may degrade but have not completely failed.

The first two failures to comply with Compatibility Criterion 12 are discussed above, for they are also failures of comply with Criterion 9. With respect to the postulated exposure scenarios, the NJ Regulations allow licensees to request consideration of alternate parameters only for site-specific characteristics, but not for site-specific exposure scenarios. NJ Regulations at 7:28-12.11(c). SMC’s comments on the proposed regulations noted that NRC guidance allows the use of realistic site-specific scenarios with justification for the reasons stated in *License Termination Rule Analysis*, SECY-03-0069 (NRC 2003); *Consolidated Decommissioning Guidance*, NUREG-1757 (“NUREG-1757”), Vol. 2, Ch. 5.¹⁶ In rejecting SMC’s comment, the NJDEP acknowledged that New Jersey has failed to adopt the alternative exposure scenarios defined in the NRC guidance:

In proposing the adopted rules, the [NJDEP] and the [New Jersey Commission on Radiation Protection] considered the updated NRC guidance, but the basis for Tables 6 and 7 at N.J.A.C. 7:28-12.11(b) (which tables were not amended in the adopted rules) was provided when the rules were proposed at 31 N.J.R. 1723(a), and the parameters in the tables remain justified. . . . The [NJDEP] and the [New Jersey Commission on Radiation Protection] established sufficiently conservative bounds on the exposure scenarios in Tables 6 and 7 of adopted N.J.A.C. 7:28-12.11(b) to ensure that the dose criteria would be met for the length of time the residual radionuclides would be present (thousands to billions of years).

NJ Regulations at 7. New Jersey’s position is directly contrary to the NRC guidance, which allows licensees to use reasonably foreseeable land uses and resulting exposure scenarios. *See, e.g.*, NUREG-1757, Vol. 2, Ch. 5 at 5-4, 5-5.

¹⁶ SMC Comments at 5.

On the failure to allow credit for degraded, but not totally failed, engineering controls, SMC commented that the NRC approach reflects that engineered structures degrade by known physical processes. Instead, New Jersey assumes that engineered structures and other institutional controls instantaneously vanish, an assumption for which there is no reasoned basis, since progressive degradation over time is consistent with the behavior of the known physical world.¹⁷ The NJDEP rejected SMC's comment as follows:

The adopted rules do not assume that the engineered barriers fail instantaneously. Rather, the rules require the Department to consider the public health consequences in the event that the engineered barriers completely fail at some point in the future. This is a reasonable approach to ensure an adequate degree of protection to the public health and safety. The NRC approach of assuming that engineered structures degrade over time does not take into account intentional human intervention.

NJ Regulations at 7. Again, New Jersey's position is directly contrary to the NRC guidance, which allows licensees to assume that barrier degradation occurs over time in the absence of institutional controls. *See* NUREG-1757, Vol. 2, Section 3.5.2 at 3-12: ". . . When evaluating the loss of institutional controls (active monitoring and maintenance not performed), the barriers may degrade over time. An assumption of instantaneous and complete failure of a barrier is not required."

The NJ Regulations provide no justification for requiring stricter remediation standards than those provided by the NRC, or for not allowing licensees to apply the Federal standards when appropriate. They fail to allow the flexibility "to grant necessary exemptions which will not jeopardize health and safety," and have the practical impact of preventing the return of land to productive uses in appropriate cases, even when doing so would be allowed by Federal regulations. Therefore, the NJ Regulations are incompatible with the NRC regulatory framework.

4. The NJ Program Fails to Satisfy Compatibility Criterion 17

Compatibility Criterion 17 states: "Inspections Compulsory. Licensees shall be under obligation by law to provide access to inspectors." Contrary to this criterion, the governing New Jersey statute, the New Jersey Radiation Protection Act, NJSA 26:2D-1 *et seq.*, does not authorize inspections without either consent of the licensee or an order. Therefore, the NJ Regulations purporting to authorize warrantless inspections (NJ Regulations at 7:28-4.14) lack an adequate legal basis in New Jersey law and Compatibility Criterion 17 is not met.

¹⁷ SMC Comments at 5-6.

5. The NJ Program Fails to Satisfy Compatibility Criterion 23

Compatibility Criterion 23 states:

Fair and Impartial Administration. State practices for assuring the fair and impartial administration of regulatory law, including provision for public participation where appropriate, should be incorporated in procedures for:

- a. Formulation of rules of general applicability;
- b. Approving or denying applications for licenses or authorization to process and use radioactive materials; and
- c. Taking disciplinary actions against licensees.

Many of the NJ Regulations are aimed specifically and uniquely at the SMC Newfield site. Thus, New Jersey acknowledges that the imposition of stand-alone limits on radioactive releases to the surface waters affects only “one facility in the State.” NJ Regulations at 7. New Jersey seeks to defend its biased standard as follows:

The fact that there may be only one facility in the State now affected by the rule does not mean that other facilities will not be affected in the future. In fact, each facility at which there is a potential for radioactive materials to migrate to a stream could be affected. Creating an open class is not the equivalent of special legislation, which is prohibited, nor is it arbitrary or discriminatory.

Id. That could arguably be seen as a reasonable position were it not coupled with, among others: (a) the refusal to apply the ALARA standard, (b) the refusal to allow restricted release criteria for license termination, (c) the requirement of peak dose computation beyond 1,000 years, (d) the requirement to calculate exposures only on specific exposure scenarios, and (e) the failure to allow credit for degraded engineering controls over time. All of these features of the NJ Regulations appear to apply only to the SMC facility, and their combined effect if implemented would be to preclude the possibility that the SMC site could be decommissioned in accordance with the permissible standards in 10 C.F.R. Part 20.

That the applicable NJ Regulations are indeed “special legislation” directed specifically at SMC is further demonstrated by the NJDEP’s statements at a meeting with SMC representatives on December 10, 2008. A summary of the meeting prepared by the NJDEP makes it clear that the intent of the NJ Program is to force SMC to remove the licensed materials at the Newfield site instead of decommissioning them in place, as the NRC regulations allow. The letter states unequivocally: “We explained that your current approach to decommissioning will not comply with our regulations and that the slag pile, as currently characterized, would have to be removed.”¹⁸

¹⁸ Letter from Nancy Wittenberg (NJDEP) to Hoy Frakes (SMC) dated Dec. 23, 2008, Attachment 4 hereto, at 1.

For these reasons, the NJ Program fails to provide “[s]tate practices for assuring the fair and impartial administration of regulatory law,” and particularly does not formulate “rules of general applicability” but its decommissioning rules are, instead, single-purpose legislation aimed exclusively at SMC. As such, the NJ Program fails to meet Compatibility Criterion 23 and is fundamentally incompatible with the NRC regulatory framework. Moreover, the “special legislation” nature of the NJ Program makes it unlawful as in violation of the New Jersey State Constitution, art. IV, § 7, ¶ 7, which provides that “[n]o general law shall embrace any provision of a private, special or local character.” *See also, Phillips v. Curiale*, 128 N.J. 608, 627 (1992).

6. The NJ Program Fails to Satisfy Criterion 25

Compatibility Criterion 25 states:

Existing NRC Licenses and Pending Applications. In effecting the discontinuance of jurisdiction, appropriate arrangements will be made by NRC and the State to ensure that there will be no interference with or interruption of licensed activities or the processing of license applications by reason of the transfer. For example, one approach might be that the State, in assuming jurisdiction, could recognize and continue in effect, for an appropriate period of time under State Law, existing NRC licenses, including licenses for which timely applications for renewal have been filed, except where good cause warrants the earlier reexamination or termination of the license.

New Jersey has not sought to make “appropriate arrangements” with the NRC to ensure there will be no interference with the processing of license applications by reason of the transfer. SMC has filed a proposed decommissioning plan (“DP”) for the Newfield facility which is currently under review by the NRC. Instead of ensuring the smooth processing of SMC’s DP application, New Jersey has opposed it at every turn. It has requested a hearing, currently pending before an Atomic Safety and Licensing Board of the NRC, raising numerous contentions against approval of the DP.¹⁹ It has unsuccessfully challenged in the courts the NRC guidance under which the DP would be implemented.²⁰ It has filed an unsuccessful request for a hearing and a stay petition with the NRC seeking to rescind the NRC guidance.²¹ It has filed a rulemaking petition, again seeking to rescind the guidance,²² and it has made other filings with the Commission challenging the DP.²³

¹⁹ *Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), LBP-07-5, 65 NRC 341, 353-59 (2007) and CLI-09-01, __ NRC __ (2009).

²⁰ *State of New Jersey v. NRC*, 526 F.3d 98 (3d Cir. 2008).

²¹ *Shieldalloy Metallurgical Corporation and NUREG-1757*, Order (January 12, 2007).

²² Petition for Rulemaking on NUREG01757 and Request for Stay (December 22, 2006.) NJ’s rulemaking petition is still pending with the NRC.

²³ State of New Jersey’s Reply to the July 3, 2008 NRC Staff and Shieldalloy Submissions to the Commission (July 10, 2008).

In short, instead of ensuring that there will be no interference with or interruption of licensed activities or the processing of license applications by reason of the transfer, New Jersey has done everything possible to interfere with the processing of SMC's DP application, an interference that continues to this day. Thus, the NJ Program does not meet Compatibility Criterion 25 and is fundamentally incompatible with the NRC regulatory framework.

B. The New Jersey Radiation Protection Program is not Satisfactory Under the NRC Implementation Standards

After entering into an agreement with a State, the NRC is required to periodically review the State program and the actions taken by the State thereunder for compliance with the provisions of the Act.²⁴ Following established practice, the NRC is expected to conduct inspections under its Integrated Materials Performance Evaluation Program ("IMPEP") to verify the adequacy of implementation of the NJ Radiation Protection Program. Therefore, the NRC's assessment of a State's formal application is also expected to evaluate whether the State's program as presented would be found satisfactory during an NRC inspection. The NRC inspection program will find a State program "satisfactory" if it is both adequate and compatible.²⁵ The NJ program will not be found "satisfactory" under the NRC IMPEP evaluation criteria for inspections of Agreement State programs for at least the following reasons:²⁶

- There are numerous inconsistencies between the NJ Program and the NRC regulations, as discussed above, that preclude a finding that the NJ program is satisfactory under the IMPEP.
- The NJ Regulations are made applicable to "all persons," not just licensees. In discussing this provision, New Jersey states:

The Radiation Protection Act at N.J.S.A. 26:2D-10 requires "all sources of radiation" to be "shielded, transported, handled, used and kept in such a manner as to prevent all users thereof and all persons within effective range thereof from being exposed to unnecessary radiation." Accordingly, it was not appropriate, as proposed, to limit the scope of the rules to only those licensed or registered individuals. Rather, the rules must cover all persons, in order that they cover "all sources," as required under the statute. To limit the rules to only those licensed or registered by the State would not satisfy the requirements of the Radiation Protection Act.

Similarly, the rules as proposed would not have applied to all of those activities that the Radiation Protection Act addresses. Unlike

²⁴ 42 U.S.C. § 2021.j(1).

²⁵ *Integrated Materials Performance Evaluation Program* ("IMPEP"), MD 5.6, Handbook at 90. In contrast, the NRC reviews other Federal programs only for adequacy.

²⁶ Those criteria are set forth in MD 5.9, *Adequacy and Compatibility of Agreement State Programs*, Handbook 5.9.

the previous rules, which were sufficiently comprehensive to address the requirements of the statute, the proposed rules would not have applied to the transportation, storage, handling, or shielding of sources of radiation, contrary to the statute. As modified on adoption, the rule meets the statutory requirement.

40 NJ Reg. 5196(b), Summary of Agency-Initiated Changes. By extending the reach of its regulations to cover “all persons” in New Jersey, once the Agreement is entered into the NJ Regulations would cover persons that remain licensed by the NRC, creating a duplication with the NRC regulations.

- In particular, a decommissioned nuclear power plant in New Jersey would need to meet a surface water limit of 4 mrem per year and a one-in-a-million cancer risk for ground water, and be subject to a total TEDE limit of 15 mrem per year as per DEP’s regulations in, instead of the NRC limit of a single TEDE cap of 25 mrem per year for all pathways. *See* NJ Regulations at 7:28-12.8 through -12.11. The NJ Regulations would thus essentially supersede the NRC decommissioning dose limits for the NRC licensees.
- The NJDEP lacks statutory authority for all elements of its source material program. For example, there is a difference between “radioactive materials,” as defined in the NRC regulations, and “sources of radiation” that the New Jersey statute authorizes the NJDEP to regulate. The NRC definition includes additional safety aspects related to source material that are not covered under the New Jersey statute. The difference between radioactive materials, as defined in the NRC regulations, and “sources of radiation” that the NJ statute authorizes the NJDEP to regulate, is that the NRC definition includes additional safety aspects related to source material that are not covered under the New Jersey statute, such as the use of source of fissile or fertile isotopes for the production of special nuclear material.²⁷ The NRC compatibility guidance requires that the State program definitions be “essentially identical” to those of the NRC, and an IMPEP inspection would determine that they are not. *See* MD 5.9, *Adequacy and Compatibility of Agreement State Programs*, Handbook 5.9 at 2.

While considering a State program against the IMPEP standards prior to entering an agreement is a discretionary adjunct to the evaluation process, there should be no obvious issues at the time the Agreement is implemented that would be found to lead to program unacceptability when the NRC performs its first inspection. Such obvious issues are well in evidence in the NJ Program.

C. Even if NJ Becomes an Agreement State, the NRC Can and Should Retain Jurisdiction Over the Newfield Site and its Decommissioning

Should the Commission decide to enter into the proposed Agreement with New Jersey, it has the power to exclude the Newfield site from the transfer of authority to the State. This is explicitly contemplated by the policy embodied in Compatibility Criterion 25, which directs that

²⁷ *See generally, Licensing of Source Material Proposed Rule*, 25 Fed. Reg. 8,619 (1960).

“appropriate arrangements will be made by NRC and the State to ensure that there will be no interference with or interruption of licensed activities or the processing of license applications by reason of the transfer.” Exclusion of the Newfield site from the transfer of authority to NJ is also consistent with notions of fundamental fairness and efficiency, given the major expenditures of time and resources by SMC (including NRC decommissioning oversight costs of \$744,000 in 2007, \$995,000 in 2008 and \$580,000 to date in 2009) in working with the NRC Staff to characterize the site and select the safest and environmentally soundest way of achieving its decommissioning.

Faced with a similar situation with respect to Kerr McGee’s West Chicago site, the Appeal Board wrote:

Further, the Commission policy on the state agreement process, pursuant to which the agreement was negotiated and executed, provides that, in effecting the discontinuance of jurisdiction, appropriate arrangements will be made by NRC and the State to ensure that there will be no interference with or interruption of licensed activities or the processing of license applications, by reason of the transfer.

The unquestionable intent of this NRC policy is that jurisdiction is to be transferred to an "agreement state" in an orderly manner, with minimal disruption to any pending licensing proceeding, such as that here. The agreement with Illinois in this case contains no indication that "appropriate arrangements" have been made to assure this orderly process; indeed, it is silent as to its effect on any pending licensing or enforcement proceedings. It is reasonable to infer from this and from the Commission's statement declining to express an opinion on how the motion to terminate and to vacate should be decided, however, that those "appropriate arrangements" are to be fashioned in and through this adjudicatory proceeding. Thus, in these circumstances, we find unpersuasive the argument that the transfer of jurisdiction to the State in and of itself demands immediate termination of this proceeding.

Kerr-McGee Chemical Corporation (West Chicago Rare Earths Facility), ALAB-944, 33 N.R.C. 81, 101-02 (1991), *vacated as moot*, CLI-96-2, 43 NRC 13 (1996). In *West Chicago*, as here, there had been a protracted examination by the NRC Staff of the licensee’s decommissioning plan and an administrative proceeding had been ongoing for some time. Under these circumstances, the Appeal Board concluded that application of Commission policy required ensuring “that there will be no interference with or interruption of licensed activities or the processing of license applications,” and such policy could not be given effect if the oversight of the facility was transferred to the State while in the midst of an NRC adjudication. The same conclusion should be reached here.

Michael T. Lesar, Chief

June 11, 2009

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D. Conclusions

As demonstrated above, the NJ Program deviates significantly from established NRC regulations and regulatory policies. Accordingly, the Staff's assessment that the NJ Program is compatible with the Commission's program must be set aside and New Jersey's Application to become an Agreement State must be denied.

If you have any questions concerning these comments, please feel free to contact me or my HSE Director, David White (614-599-9582).

Sincerely,



Hoy E. Frakes, Jr.
President

Enclosures (4)

c: Matias F. Travieso-Diaz, Esq., Pillsbury Winthrop Shaw Pittman LLP
NRC, FSME
J. Hayes, NRC