UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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U.S.C.A. 3rd. CIR.

STATE OF NEW JERSEY,)
)
Petitioner,)
)
v.)
)
UNITED STATES NUCLEAR)
REGULATORY COMMISSION)
and UNITED STATES OF)
AMERICA,)
)
Respondents.)

PETITION FOR REVIEW

The Nature of the Proceedings for Which Review is Sought

Pursuant to Rule 15 of the Federal Rules of Appellate Procedure, §2239(b) of the Atomic Energy Act, 42 U.S.C. 2239(b), and the Hobbs Act, 28 U.S.C. 2342 et seq., the State of New Jersey hereby petitions the Court to review the determination of the United States Nuclear Regulatory Commission (NRC) to finalize revisions of NUREG-1757 guidance published by the NRC on its website on October 27, 2006 (http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1757/).

The Facts on Which Venue is Based

28 U.S.C. 2343 establishes venue in the judicial circuit in which the petitioner resides. Petitioner State of New Jersey is in the Third Judicial Circuit. The NRC's NUREG 1757 guidance applies throughout the United States.

The Grounds on Which Relief is Sought

Petitioner State of New Jersey requests that this Court hold unlawful and set aside the NUREG-1757 guidance as arbitrary and capricious and otherwise contrary to law.

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The NRC on November 17, 2006 determined to accept for technical and environmental review a decommissioning plan filed by Shieldalloy Metallurgical Corporation, Inc., located in Newfield, New Jersey. 71 Fed. Reg. 66986. That decommissioning plan was drafted in accordance with and will be reviewed by the NRC in accordance with the NUREG-1757 guidance. The decommissioning plan proposes to permanently dispose of radioactive waste at the Shieldalloy facility located in a residential area of Newfield, New Jersey, creating a risk to public health, safety and the environment. Since the Shieldalloy wastes are long-lived nuclides, this risk will persist for billions of years.

The State of New Jersey participated as a party in the proceeding before the NRC by submitting timely comments dated December 28, 2005 on Draft NUREG-1757 Supplement 1. By publishing final revisions to NUREG-1757, the NRC has acted in a manner reviewable by this Court. 42 U.S.C. §2239, 28 U.S.C. §2342. Nevertheless, the NRC has to date not yet responded to the comments submitted.

The 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. 5 U.S.C. 706; Citizen's Awareness Network v. NRC, 59 F.3d 284 (1st Cir. 1995). Petitioner State of New Jersey reserves the right to also raise issues raised by all the parties who commented on the guidance.

The NUREG-1757 guidance violates the Atomic Energy Act because that statute requires the NRC to utilize rules or regulations when establishing a new license, when setting the terms and conditions of a new license and when setting forth the information an applicant for a license is required to submit. 42 U.S.C. §2232(a), 2233. Yet the NUREG-1757 guidance establishes a new NRC license, a long-term control license, which allows permanent restricted use disposal of radioactive wastes. NUREG-1757 Vol. 1 page 17-65; 71 Fed. Reg. 66986. Furthermore, NUREG-1757 conflicts with existing NRC decommissioning regulations which contemplate that once a site is decommissioned the NRC license is terminated. 10 C.F.R. §20.1003. NUREG-1757 envisions a long-term license which continues in perpetuity. The NRC admits that this was not contemplated under the license termination rule decommissioning regulations:

> NRC licensing oversight for some sites could be permanent because the current sites are sites with uranium and thorum contamination. Although this NRC role was not envisioned under the LTR....SECY-03-0069 page 27 (Section 4.2.2).

NUREG-1757's requirement to provide dose assessments for only 1,000 years is based on decommissioning regulations at 10 C.F.R. §20.1401 NUREG-1757 Vol 1 page 17-88. 10 C.F.R. §20.1401 is only intended to apply to short-lived nuclides. 62 Fed. Reg. 39058, 39069, 39083 (July 21, 1997). Furthermore, the NRC is mandated to protect public health by the Atomic Energy Act, 42 U.S.C. §§2012(d), 2013(d), 2022(f)(3), 2099, 2111(b)(1)(A),

2113(b)(1)(A), 2114(a)(1), 2201(b). NUREG-1757 guidance fails to achieve that statutory requirement by not requiring adequate controls, particularly for long-lived nuclides.

NUREG-1757 conflicts with the ALARA analysis for decommissioning a site. For sites that are being decommissioned, the regulations require residual radioactivity to be reduced to levels that are as low as reasonably achievable ("ALARA"). 10 C.F.R. §§20.1402, 20.1403(A), 20.1404(A)(3). ALARA is defined as

> making every reasonable effort to maintain exposures to radiation as far below the dose limits in this part as is practical consistent with the purpose for which the licensed activity is undertaken, taking into account the state of technology, the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to utilization of nuclear energy and licensed materials in the public interest. 10 C.F.R. §20.1003.

NUREG-1757 circumvents the ALARA analysis required by 10 C.F.R. §§20.1402, 20.1402(a) and 20.1404(a)(3). Specifically, NUREG-1757 states:

> the Commission recognized that requiring absolute proof that institutional controls would endure over long periods of time would be difficult, and the commission did not intend to require this of licensees. Rather, the Statement of Considerations explained that institutional controls should be established with the objective of lasting 1000 years. NUREG-1757 Vol. 1 page 23

NUREG-1757's mandate that modeling the durability of institutional controls beyond 1000 years is not required because the difficulty

involved is in direct conflict with the analysis required by the NRC's ALARA regulations.

NUREG-1757 underestimates the amount of financial assurance required by a licensee, thereby making permanent onsite disposal upon decommissioning under NUREG-1757 more attractive to licensees. NUREG-1757 claims that the licensee must provide sufficient financial assurance so that the licensee funds the long-term control of the site with no additional costs being passed on to a future site owner/licensee, even where a site contained long-lived nuclides. NUREG-1757 Vol. 1 pages 15-2 and 17-82. However, this reliance on financial assurance ignores the NRC conclusions that the amount of additional financial assurance required may likely be underestimated "because of uncertainties associates with the burial performance and potential releases of contamination, transport of contamination in the subsurface environment, cleanup costs of subsurface contamination, and future disposal costs." SECY-03-0069 page 3.

The National Environmental Policy Act (NEPA) requires federal agencies to conduct an environmental impact statement (EIS) for any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). Specifically, NUREG-1757 establishes a new license called the long term control license, which allows decommissioning facilities to permanently dispose of their radioactive waste at the decommissioned facility. NUREG-1757 Vol 1 page 17-65. NUREG-1757 provides various terms and conditions that a long term control license would provide,

including required institutional and engineering controls. NUREG-1757 Vol 1 pages 17-65, 17-79 to 17-80. NUREG-1757 will increase the number of permanent radioactive waste disposal sites throughout the United States and multiply the risks such sites pose to health and the environment. NEPA requires that the environmental consequences of this agency policy be considered. The NRC's finalization of this guidance without having conducted an EIS is contrary to NEPA.

Relief Sought

Petitioner State of New Jersey requests that this Court set aside the NUREG-1757 guidance as arbitrary and capricious and otherwise contrary to law.

Respectfully submitted,

FOR THE STATE OF NEW JERSEY

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Dated: 12/21/06

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CERTIFICATION OF SERVICE

I, Dianne Davis, hereby certify that on December 22, 2006, I caused a true copy of the Petition for Review in this matter to be served by certified mail, return receipt requested, upon the following parties and respondents U.S. Nuclear Regulatory Commission and United States of America:

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STATE OF NEW JERSEY V. U.S. NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA

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REPRESENTATION STATEMENT

The undersigned attorney represents the State of New Jersey in this appeal.

Respectfully submitted,
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