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DOCKET No. 09-1268

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHIELDALLOY METALLURGICAL CORPORATION

Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION AND

THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF A FINAL ORDER BY
THE UNITED STATES NUCLEAR REGULATORY COMMISSION

FINAL REPLY BRIEF OF PETITIONER SHIELDALLOY METALLURGICAL CORPORATION

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All applicable statutes, regulations and rules are reproduced in the Addendum to Shieldalloy's opening Brief.

GLOSSARY OF TERMS AND ABBREVIATIONS

AEA	Atomic Energy Act of 1954, as amended
Agreement	Agreement between the NRC and the State of New Jersey pursuant to Section 274b of the AEA, effective as of September 30, 2009
ALARA	As Low As Reasonably Achievable
ASLB	NRC Atomic Safety and Licensing Board
Commission	United States Nuclear Regulatory Commission
DP	Decommissioning Plan
Facility	Industrial facility owned by Shieldalloy Metallurgical Corporation located in Newfield, New Jersey
LTC	Long-Term Control
LTR	License Termination Rule (Subpart E of 10 C.F.R. Part 20)
mrem	Millirem
New Jersey Program	See Program

NJDEP	New Jersey Department of Environmental Protection
NRC	United States Nuclear Regulatory Commission
Program	New Jersey's Radiation Protection Program
Shieldalloy	Shieldalloy Metallurgical Corporation
Site	Location of the Facility
Staff	United States Nuclear Regulatory Commission Staff

I. INTRODUCTION

In this Reply, Petitioner Shieldalloy Metallurgical Corporation ("Shieldalloy") responds to the arguments raised by the U.S. Nuclear Regulatory Commission ("NRC") and the State of New Jersey ("New Jersey") in their filings responding to Shieldalloy's opening brief.[1] The NRC and New Jersey fail to provide any valid justification for the NRC's transfer of regulatory authority over Shieldalloy's Newfield, New Jersey facility ("Facility") to New Jersey. Therefore, the relief sought by Shieldalloy should be granted.

II. SUPPLEMENTARY STATEMENT OF FACTS

There appears to be little disagreement between the NRC and Shieldalloy regarding the relevant facts in this matter, as presented in Shieldalloy's Brief.[2] In summary, when the NRC transferred authority to New Jersey, Shieldalloy had submitted a proposed decommissioning plan ("DP") to the NRC, calling for consolidation under a substantial protective cover of the radioactive materials

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1 Brief for the Federal Respondents (June 28, 2010) ("NRC Brief"); Brief for the Amicus Curiae State of New Jersey (July 13, 2010) ("NJ Brief"). Shieldalloy's opening brief ("Shieldalloy Brief") was filed on April 22, 2010.

2 Compare Shieldalloy Brief at 13-32 with NRC Brief at 22-38. The "facts" alleged by New Jersey (NJ Brief at 4-14) are either incorrect, irrelevant (id. at 4-5, 7-9, 11-13), or repetitive of those discussed by Shieldalloy and the NRC (id. at 5-7, 10-11, 14).

present at the Facility's site ("Site") and termination of the Facility's NRC license under "restricted conditions." This is a proven remediation technology authorized by NRC regulations and successfully implemented elsewhere for similar materials. The NRC Staff ("Staff") was reviewing the DP, and there was a concurrent proceeding in progress before an NRC Atomic Safety and Licensing Board ("ASLB") to adjudicate contentions submitted by New Jersey opposing the DP. New Jersey had made it clear that, should it attain regulatory authority over the Facility, it would reject the DP and require the materials to be removed from the Site. The NRC was well aware of New Jersey's intentions. See, e.g., JA457.[3]

On October 16, 2008, New Jersey applied to become an Agreement State. Shieldalloy submitted comments to New Jersey and the NRC describing how the New Jersey Program is incompatible with the NRC's program for the regulation of radioactive materials. Rejecting those comments, the NRC and New Jersey signed the Agreement, which became effective on September 30, 2009. JA3.

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[3] In this Brief, the notation "JAxxx" is used to identify portions of the Record included in the Joint Appendix. The notation "SAxxx" is used to denote materials in the Supplemental Appendix authorized by the Court's April 28, 2010 Order.

Barely a week after assuming regulatory authority, New Jersey summarily rejected the DP and ordered Shieldalloy to submit a plan that would remove the radioactive materials from the Site. See SA300.

III. SUMMARY OF THE ARGUMENT

New Jersey's Failure to Satisfy the ALARA Principle

The New Jersey Program fails to incorporate the ALARA principle with respect to license termination. The NRC and New Jersey argue that the Program incorporates the ALARA principle because New Jersey adopts Subpart B of 10 C.F.R. Part 20, which includes the ALARA principle. However, that Subpart applies to the operation of licensed facilities, and not to the termination of licenses. The NRC regulations which apply to license termination are found in Subpart E of 10 C.F.R. Part 20, often known as the License Termination Rule ("LTR"). Like Subpart B, Subpart E includes ALARA provisions. New Jersey chose not to adopt Subpart E.

The NRC also claims that satisfying the ALARA principle in the area of license termination is only a "threshold" requirement that must be met by a licensee seeking to terminate its license under restricted conditions. This is incorrect. The ALARA principle must be applied to all NRC licensees seeking to

terminate their licenses, whether through release of their sites for unrestricted use or through termination under restricted conditions.

Unavailability of the ALARA principle to Shieldalloy has the deleterious consequence of precluding Shieldalloy from selecting the decommissioning method that minimizes radiation doses to the public and decommissioning workers.

Unavailability of License Termination Under Restricted Conditions

The NRC and New Jersey cite sections of the New Jersey regulations which purportedly allow license termination under restricted conditions. None of those sections establishes license termination subject to restricted conditions such as on-site remediation as a permissible option. Licensees are allowed to petition to use "alternative remediation standards" without specification of the criteria for the granting of such petitions, leaving authorization to pursue such a termination to the State's discretion. Given New Jersey's explicit refusal to consider onsite remediation, the option to petition for such a standard is meaningless. Also, New Jersey has unambiguously declared that its regulations do not allow license termination based on onsite remediation.

Divergence of New Jersey's Program From the LTR

The NRC Brief argues that the differences between the New Jersey Program and the LTR are permissible because the LTR is a "compatibility Category C" regulation. However, the vast differences between the New Jersey Program and the LTR render the license termination elements of the New Jersey Program totally unlike those in the NRC regulations. The Program cannot possibly "embody the essential objective" of the LTR, the compatibility test for "Category C" regulations.

Lack of Fair and Impartial Standards

To qualify for Agreement State status, a state program must incorporate practices for assuring the fair and impartial administration of regulatory law. In developing the license termination elements of its Program, New Jersey targeted the Facility, which is the only source materials licensee in the State. Therefore, the inclusion of a host of onerous provisions affecting only the Facility signifies that the Program is neither fair nor impartial.

The NRC argues that the New Jersey regulations are not an "outlier" since other Agreement States impose radiation dose limits of 15 mrem or less. None of the Agreement States cited by the NRC has a regulatory program for the termination of source materials licenses that includes the unique provisions

established by New Jersey. The examples cited by the NRC actually illustrate the unfairness of the New Jersey Program.

Interference with Ongoing Licensing Applications

When the NRC approved the transfer of authority to New Jersey, the Staff was reviewing the proposed DP and an ASLB had been convened to rule on contentions opposing the plan. It was arbitrary and capricious for the NRC to transfer authority because, under the circumstances, the transfer was certain to result in the abrupt termination of the processing of Shieldalloy's pending license application.

The NRC refers to past situations in which "sites in various stages of decommissioning" have been transferred to Agreement States. In almost all of those instances, however, either: (1) the sites had decommissioning plans approved by the NRC and the receiving states agreed to continue implementing those plans, or (2) at the time of the transfers there were no license application reviews or adjudicatory proceedings ongoing before the NRC.

In two situations referenced by the NRC's Brief, both involving facilities in Ohio, a licensing application was pending at the time of the transfer. In each case, Ohio continued processing the application after the transfer of authority. Ohio's actions, therefore, complied with NRC compatibility criterion and are in sharp

contrast to New Jersey's refusal to continue Shieldalloy's ongoing licensing process.

NRC's Alleged Inability to Retain Jurisdiction over the Facility

The NRC alleges that its retaining jurisdiction over the Facility would result in concurrent NRC and New Jersey jurisdiction, contrary to the legislative intent of the AEA. The NRC, however, fails to acknowledge that the agency has developed criteria for deciding whether specific facilities should be excluded from the transfer of authority to a state. Thus, it is clear that the NRC has the power to exclude facilities from the transfer of authority to an Agreement State. Also, as discussed earlier, the Facility is the only license-holder of its type in New Jersey, and no other such licensees are expected in the future. Jurisdiction over the Facility could be retained by the NRC simply by excluding the subcategory of source material present at the Facility from the transfer of authority.

ARGUMENT

IV. STANDARD OF REVIEW

A court must "hold unlawful and set aside agency action" if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2006). An agency action is arbitrary and capricious if the

agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). See also Jicarilla Apache Nation v. U.S. Dep't of the Interior, No. 09-5157, slip op. at 9 (D.C. Cir. July 16, 2010). This standard is not inconsistent with that announced in the cases cited in the NRC Brief, such as Transcon. Gas Pipe Line Corp. v. FERC, 518 F.3d 916, 919 (D.C. Cir. 2008) (citation omitted), under which a court will uphold an agency decision that has considered the relevant factors and articulated a rational connection between the facts found and the choice made.

At a minimum, the review standard requires that an agency adequately explain its actions. "A fundamental requirement of administrative law is that an agency set forth its reasons for decision; an agency's failure to do so constitutes arbitrary and capricious agency action." Tourus Records, Inc. v. DEA, 259 F.3d 731, 737 (D.C. Cir. 2001) (quotations and citations omitted). While a reviewing court must "defer to the wisdom of the agency, provided its decision is reasoned and rational," an agency must explain departures from its precedent and adequately address legitimate objections to its proposed actions. Dillmon v. NTSB, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009). Also, "an agency's failure to respond

meaningfully to objections raised by a party renders its decision arbitrary and capricious." PPL Wallingford Energy LLC v. FERC, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (quotations and citations omitted).[4]

V. THE NEW JERSEY PROGRAM FAILS TO IMPLEMENT THE ALARA PRINCIPLE IN LICENSE TERMINATIONS

A pervading principle throughout the NRC regulatory scheme is that of keeping radiation doses to the public as a result of actions taken under NRC licenses "ALARA" – "as low as is reasonably achievable." Implementation of the ALARA principle requires "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." 10 C.F.R. § 20.1003 (2010). In its comments to New Jersey before enactment of the Program, and again in its comments to the NRC regarding New Jersey's Agreement State application, Shieldalloy pointed out that the New Jersey Program fails to

[4] This is not a case directly involving an interpretation by the NRC of its regulations, but rather the degree of consistency between a state program for the control of radiation and the NRC's. Thus, the cases cited by the NRC holding that an agency's interpretation of its own rules is to be given controlling weight are inapposite.

incorporate the ALARA principle in the area of license termination.[5] New Jersey has acknowledged that this is the case.[6]

The NRC Brief attempts to explain away this deficiency by arguing that the New Jersey Program does in fact incorporate the ALARA principle. It cites New Jersey's adoption of Subpart B of 10 C.F.R. Part 20, "Radiation Protection Programs," which addresses the radiation protection programs that NRC licensees must implement in their operations. Such programs must comply with the ALARA principle (10 C.F.R. §20.1101(b)).

However, Subpart B of 10 C.F.R. Part 20, applicable to the operation of licensed facilities, does not govern the termination of licenses. That regulation is Subpart E of 10 C.F.R. Part 20, "Radiological Criteria for License Termination," which governs "the decommissioning of facilities licensed under parts 30, 40, 50,

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5 See JA290 & JA261.

6 In response to a Shieldalloy comment on the proposed Program that New Jersey "should allow use of NRC remediation dose criteria when appropriate and when justified based on the As Low As Reasonably Achievable (ALARA) principle," New Jersey stated: "The [NJDEP] and the Commission 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." JA290. In its brief, in contrast, New Jersey now claims that its Program applies ALARA to license termination actions. NJ Brief at 16-17, 23. However, subsequent arguments by counsel in litigation cannot replace the official position of a party. See Dillmon, 588 F.3d at 1092.

52, 60, 61, 63, 70, and 72 of this chapter." 10 C.F.R. §20.1401(a) (2010).[7] Like subpart B, Subpart E includes explicit ALARA provisions. See, e.g., 10 C.F.R. § 20.1402 (2010). The NRC concedes that New Jersey has not incorporated the "NRC's license termination regulations in 10 C.F.R. §§ 20.1401-1405... but promulgated its own." NRC Brief at 23. The license termination regulations promulgated by New Jersey do not include ALARA provisions. Therefore, the NRC argument that the New Jersey Program makes the ALARA principle applicable to the license termination process is incorrect. As noted above, New Jersey acknowledged that it explicitly excluded ALARA in its license termination rules.

The NRC also seeks to limit the applicability of the ALARA principle in the area of license termination to merely a "threshold" requirement to demonstrate that a licensee is eligible to terminate its license under restricted conditions pursuant to 10 C.F.R. § 20.1403. NRC Brief at 19. This is also incorrect.[8] The ALARA principle must be applied to all licensees seeking to terminate their licenses,

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7 The provisions of Subpart E of 10 C.F.R. Part 20 are often known as the License Termination Rule ("LTR") and were enacted by the NRC after thorough consideration. See Shieldalloy Brief at 57-60.

8 The Court should disregard this argument, made for the first time in the NRC Brief, as an appellate counsel's *post hoc* rationalizations cannot justify the agency's action. See Dillmon, 588 F.3d at 1092 (citing Motor Vehicle Mfrs. Ass'n, 463 U.S. at 50).

whether through release of their sites for unrestricted use (10 C.F.R. § 20.1402) or by termination under restricted conditions (10 C.F.R. § 20.1403). Compliance with the ALARA principle in the termination of NRC licenses is not merely a "threshold" condition, but an unwaivable requirement – one that has been excluded from the New Jersey Program.[9]

The NRC charges that Shieldalloy's position is "elusive and difficult to understand," accusing Shieldalloy of vacillating between "claims that the purported absence of ALARA renders New Jersey's license termination program impermissibly too stringent and impermissibly not stringent enough compared to NRC's." NRC Brief at 39-40. The NRC's difficulty understanding Shieldalloy's position is surprising. Unavailability of the ALARA principle has deleterious consequences in two different situations: (1) if a licensee seeks to terminate its license but is unable to meet the regulatory dose limit after remediation, the absence of the ALARA principle prevents him from justifying (through an ALARA analysis) exposing the public to after-remediation radiation doses in excess of that limit; and (2) if a licensee has several decommissioning methods available, all of which meet the applicable dose limit, unavailability of the ALARA

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[9] Even where the NRC permits termination of a license using criteria other than those in 10 C.F.R. §§ 20.1402 and 1403, it still requires compliance with the ALARA principle. 10 C.F.R. § 20.1404(a)(3) (2010).

principle may preclude the licensee from selecting the method that minimizes radiation doses to the public. This second situation is the one to which Shieldalloy would be subjected under the New Jersey Program, as discussed in the Shieldalloy Brief at 47-49.

To be clear, Shieldalloy has never alleged that terminating the Facility license under restricted conditions would result in doses to the public in excess of New Jersey's 15 mrem limit. What it is alleging, and its analyses have shown, is that terminating the license under restricted conditions by the method described in the DP (i.e., isolating the materials onsite under an appropriate cover) results in doses that both meet the 15 mrem limit and are ALARA, since they are lower than those that would result from digging up the materials, loading them onto a truck or train, shipping them cross-country, and disposing of them in another state.[10] Thus, the NJDEP regulations would force an off-site remediation methodology resulting in higher, not lower, doses than the proposed methodology.

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[10] The NRC asserts that Shieldalloy's claim is supported only by "an extra-record 'sworn affidavit' prepared and filed well after the final agency decision in this case." NRC Brief at 58. This is incorrect. The DP revision that was before the NRC at the time authority was transferred contains a detailed ALARA analysis demonstrating that terminating the Facility license under restricted conditions minimizes radiation doses to the public. SA247. The same conclusion was stated in earlier revisions of the DP, dating back to at least 2005, which the NRC had reviewed. See, e.g., SA175 & 194-95.

The NRC seeks to justify – for the first time in its Brief – the failure to address Shieldalloy's ALARA comments when it approved New Jersey's Agreement State application by terming Shieldalloy's position "contradictory and abstruse." NRC Brief at 53. As the agency that originated the ALARA requirement, the NRC's failure to address Shieldalloy's concerns about the absence of such a requirement (despite its being an essential element of the LTR, see Shieldalloy Brief at 43-49) makes its decision to approve the New Jersey Program arbitrary and capricious.[11] PPL Wallingford Energy LLC, 419 F.3d at 1198.

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[11] When the NRC belatedly addressed the ALARA issue, its explanation of the Program's acceptability was that New Jersey had lowered the permissible dose limit from the 25 mrem allowed under the NRC regulations to 15 mrem. SA325. That after-the-fact justification was clearly erroneous. Lowering the permissible dose limit from 25 to 15 mrem is not equivalent to meeting the ALARA standard. The NRC now apparently concedes the distinction. See NRC Brief at 46.

New Jersey seeks to defend its use of a 15 mrem limit in lieu of incorporating the ALARA principle by citing the NRC's decision not to apply ALARA to the evaluation of the proposed Yucca Mountain high-level waste repository. NJ Brief at 19-20. However, in establishing the standards for the Yucca Mountain repository, the NRC intended to establish "a new, separate part of its regulations (at part 63) that would apply only to the proposed repository at Yucca Mountain," and which imposed "concise, site-specific criteria for Yucca Mountain that are consistent ... with site-specific information and performance assessment experience, and with EPA standards that apply solely to Yucca Mountain." SA610. The Yucca Mountain standards (which, as directed by the National Academy of Science, exclude consideration of ALARA after the repository is closed, but
(Footnote continued on next page)

VI. LICENSE TERMINATION UNDER RESTRICTED CONDITIONS IS UNAVAILABLE UNDER THE NEW JERSEY PROGRAM

The NRC argues that Shieldalloy errs in charging that the New Jersey Program does not allow for license termination under restricted conditions. It cites to several sections of New Jersey's regulations which purportedly allow such termination (NRC Brief at 55-56), and portrays Shieldalloy's position as being "nothing more than a complaint that New Jersey's dose calculation methodology with respect to failure of controls is more conservative than NRC's." Id. at 57. Such a "complaint," however, appears nowhere in Shieldalloy's filings. What Shieldalloy objects to is New Jersey's refusal to permit properly isolated radioactive materials to remain at a site even if the remediation is subject to NRC approval and long-term control of the site is maintained by the Federal Government.

None of the cited New Jersey regulations establishes license termination subject to restricted conditions as a permissible decommissioning option.[12] At

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not in the earlier phases of repository development and waste storage (SA625) are inapplicable to other facilities and are irrelevant here.

[12] Section 7:28-12.8 (a) sets the radiation dose standards applicable to remediation of radioactive contamination of all sites regardless of the remediation method:

> (a) Sites shall be remediated so that the incremental radiation dose to any person from any residual radioactive contamination at the site above that due to

(Footnote continued on next page)

most, licensees are allowed (subject to the limitations established in these regulations) to petition to use "alternative remediation standards," without specification of the criteria for the granting of such petitions – making the availability of license termination subject to restricted conditions illusory, since the authorization to use such a termination method is left to the State's discretion.

Also, New Jersey has unambiguously declared that its regulations do not allow license termination based on onsite remediation. SA305. In addition, New Jersey has flatly told Shieldalloy that it will not allow onsite disposal of the materials at the Site. JA446. New Jersey's interpretation of what its regulations permit should control over the NRC's litigation-driven attempts to make them conform to the NRC standards.

> natural background radionuclide concentration, under either an unrestricted use remedial action, limited restricted use remedial action, or a restricted use remedial action, shall be as specified below: [***]

Likewise, Section 7.28-12.10(e) merely makes restricted use sites subject to the remediation standards in Sections 7:28-12.11 and 12.12. Finally, Section 7.28-12.11 allows the submittal of petitions for alternative remediation standards for radioactive contamination; its subsection (e) specifies that New Jersey shall not approve "alternative standard petitions that include institutional and engineering controls where failure of those controls, not including the failure of a radon remediation system, would result in more than 100 mrem (one mSv) total annual effective dose equivalent."

VII. THE NEW JERSEY PROGRAM SUBSTANTIALLY DEPARTS FROM THE LTR

The acknowledged differences between the New Jersey Program and the NRC's LTR (see, e.g., NJ Brief at 22-25) are so significant that the New Jersey standards omit the essential objective of the NRC regulations. The NRC argues that these differences are permissible because the LTR is a "compatibility Category C" regulation, and this classification allows departures from the NRC provisions. NRC Brief at 59-64. The NRC claims that Shieldalloy's "true grievance" is with "the compatibility designation, Category C, assigned to NRC's license termination rule." Id. at 62.

At no point has Shieldalloy expressed a "grievance" over the designation of the LTR as a Category C standard. Rather, the NRC has failed to properly apply the Category C standard. A State's regulatory scheme in an area of the NRC regulations classified as a Category C standard must "embody the essential objective of the corresponding Commission program elements." JA67. The Program's inclusion of standards explicitly rejected in the LTR renders the license termination elements of the New Jersey Program totally unlike those in the NRC regulations. Those elements cannot possibly "embody the essential objective" of the LTR which, as described by the NRC, is

> to provide a clear and consistent regulatory basis for determining the extent to which lands and structures must be

> remediated before decommissioning of a site can be considered complete and the license terminated. The Commission believes that inclusion of criteria in the regulations will result in more efficient and consistent licensing actions related to the numerous and frequently complex site remediation activities anticipated in the future.
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> * * *
>
> Codifying radiological criteria for decommissioning in the regulations will allow the NRC to more effectively carry out its function of protecting public health and the environment at decommissioned sites by providing for more efficient use of NRC and licensee resources, consistent application across all types of licenses, and a predictable basis for decommissioning planning.

JA25. The New Jersey Program is not "consistent" with the LTR, does not provide optimum protection of public health and safety at decommissioned sites, and does not provide a "predictable basis" for decommissioning planning. Thus, it cannot meet the compatibility criterion established by the NRC.[13] See Shieldalloy Brief at 55-60.

VIII. THE NEW JERSEY PROGRAM IS NEITHER FAIR NOR IMPARTIAL

NRC Compatibility Criterion 23 requires that a state program incorporate practices for assuring the fair and impartial administration of regulatory law in the

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[13] In another attempt at misdirection, the NRC faults Shieldalloy for failing to seek to change the classification of the LTR by filing a petition for rulemaking with the NRC under 10 C.F.R. § 2.802. NRC Brief at 63-64. The problem lies, however, not with the classification of the LTR but with the Program's lack of consistency with LTR provisions.

formulation of rules of general applicability. Shieldalloy pointed out how the regulations issued by New Jersey are aimed at, and adverse to, the Facility. The regulations' burdensome provisions include, among others: (a) the refusal to apply the ALARA standard to license termination; (b) the refusal to allow restricted release criteria for license termination; (c) the requirement of peak dose computation beyond the NRC's endpoint of 1,000 years; (d) the requirement to calculate dose potential using only specific exposure scenarios and input parameters; (e) the failure to allow credit for the rate of degradation of engineering controls over time; and (f) the imposition of stand-alone limits on the release of radioactivity to surface waters, which New Jersey acknowledges affects only "one facility in the State." JA289.

The NRC defends the New Jersey Program on two grounds: (1) an Agreement State must have a regulatory program in place for all of the materials over which it seeks regulatory jurisdiction, even if there is only one licensee currently licensed for a specific radioactive material or activity (NRC Brief at 66); and (2) the New Jersey regulations are not "outliers" since several other Agreement States impose dose limits of 15 mrem or less (id. at 66-67). The first argument is irrelevant because Shieldalloy does not contest that there can be license termination regulations applicable to source materials licensees. However, in developing the license termination elements of its Program, New Jersey knew

that these would affect only the Facility, since Shieldalloy is the only source materials licensee in the State and New Jersey expects there will be no other such licensees in the future: "Presently, New Jersey has only one Source Material licensee that is undergoing decommissioning and does not expect any applications for new source material licenses." JA224. Therefore, when the New Jersey Program includes a host of onerous provisions such as the ones mentioned above, there can be no question that the Program in this area is neither fair nor impartial – it is aimed solely at the Facility and intended to force New Jersey's preordained conclusion: the removal of the materials stored at the Site.

The NRC's second argument is, again, immaterial. Shieldalloy has not raised the 15 mrem dose limit as evidence of unfairness on the part of New Jersey. Also, and quite telling, is that none of the Agreement States cited by the NRC has a regulatory program for the termination of source materials licenses that includes the unique provisions established by New Jersey. Thus, the examples the NRC cites illustrate, rather than disprove, the unfairness of the New Jersey Program.[14]

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[14] The NRC asserts that Shieldalloy can raise its concerns at any time and request that the NRC exercise its power under Section 274j of the AEA to revoke the Agreement and restore NRC regulatory authority. NRC Brief at 67. Shieldalloy raised its fairness concerns in advance of the transfer of regulatory authority to New Jersey, and they were rebuffed. The NRC was on notice that upon assuming regulatory authority over the Facility, New Jersey would impose its unfair standards so as to force the removal of the
(Footnote continued on next page)

IX. THE TRANSFER OF AUTHORITY TO NEW JERSEY INTERFERED WITH THE PROCESSING OF SHIELDALLOY'S LICENSE APPLICATION

It is uncontested that, when the NRC approved the transfer to New Jersey of regulatory authority over the Facility, there was a pending licensing application under review by the NRC to which Compatibility Criterion 25 applied:

> *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.

JA7.

As a preliminary matter, the NRC claims that Shieldalloy construes Criterion 25's "no interference with or interruption of . . . the processing of license applications" to "require New Jersey's acceptance of standards identical to NRC's for license termination." NRC Brief at 68. Shieldalloy has not taken such a position. What Shieldalloy does contend is that it was arbitrary and capricious for the NRC to accept the New Jersey Program and transfer authority over the Facility because, under the circumstances, the transfer was calculated to result in a significant interruption, indeed the abrupt termination, of the processing of Shieldalloy's license application. As explained in Shieldalloy's Brief, Shieldalloy

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radioactive materials from the Site. Thus, the course of action that the NRC suggests Shieldalloy might take would be an exercise in futility.

had worked for many years at significant expense to develop a decommissioning plan for the Facility acceptable to the NRC. Multiple revisions of the DP were prepared to address the comments of the NRC Staff, and at the time authority was transferred to New Jersey, the NRC Staff was reviewing that plan and its adequacy was being litigated in an NRC adjudicatory proceeding. New Jersey had made abundantly clear that if it obtained regulatory authority over the Facility it would reject the approach set forth in the DP. Shieldalloy Brief at 68, n.25. The NRC was aware of New Jersey's intent to terminate the processing of Shieldalloy's licensing application (and the associated adjudicatory proceeding) when it agreed to transfer authority to the State. NRC's action approving the transfer of regulatory authority over the Facility to New Jersey, therefore, was in contradiction of Compatibility Criterion 25.[15]

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[15] The NRC also makes the irrelevant (and inaccurate) argument that the licensing application was really not far along when the NRC transferred authority over the Facility to New Jersey. NRC Brief at 73-74. In fact, the Staff's last report to the ASLB before the transfer stated that the Staff was, after a lengthy review, some five months away from completing its technical and safety review and about eleven months away from completing its environmental review. SA459. It is undeniable that the NRC proceeding for approval of the DP was a license application that was "in process" within the meaning of Criterion 25 at the time the NRC transferred regulatory authority to New Jersey.

New Jersey accuses Shieldalloy of being dilatory in the pursuit of the decommissioning of the Facility. Nothing could be further from the truth. As the chronology provided by the NRC Staff demonstrates, Shieldalloy has
(Footnote continued on next page)

On the merits of compliance with Criterion 25, the NRC claims that the pendency of a license application is no bar to the transfer to a state of regulatory authority over a licensee (NRC Brief at 68-69). That, again, is not Shieldalloy's argument and is irrelevant, as are the examples cited by the NRC. It is not transfer of authority over a facility with a pending license application, but the interruption of that licensing process which Criterion 25 prohibits.

The NRC refers to past situations in which "sites in various stages of decommissioning" have been transferred to Agreement States. NRC Brief at 69. In many of those instances, however, the sites had decommissioning plans previously approved by the NRC that were already being implemented and the receiving states simply continued overseeing the plans' implementation. See, e.g., SA422 & SA633 (decommissioning plans for the Pennsylvania sites had been approved by the NRC prior to the transfer of authority to Pennsylvania in 2008).

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always been diligent in its efforts to obtain approval of a plan for the termination of its license and decommissioning the Facility, and the delays have been driven in large measure by the fact that the "restricted conditions" license termination process was novel and the NRC Staff, as well as Shieldalloy, were trying to find the best way to implement it. See SA234-41. New Jersey also charges that Shieldalloy had failed over the years to obtain NRC approval of its DP and that "[m]any significant legal obstacles stood in Shieldalloy's way to obtaining approval" for its plan. NJ Brief at 27-31. Those "obstacles" are imaginary and merely New Jersey's invention. Even if existing, they could have been dealt with in the framework of the NRC regulatory process.

In most of the other cited instances, at the time of the transfer of regulatory authority to the state there was no license application review ongoing by the NRC nor was a related adjudicatory proceeding pending, and the existing license was unaffected by the transfer. See, e.g., SA344 & SA632. These situations have nothing to do with Criterion 25 or the circumstances presented in this case. Here, Shieldalloy's DP was in the midst of final review by the NRC Staff and was being adjudicated in a related proceeding when New Jersey assumed authority.

Nor are the NRC's remaining examples on point. For example, the case of Kerr-McGee's Chicago facility (NRC Brief at 69, n.29), did not involve an ongoing review by the NRC of a license application at the time the transfer of regulatory authority occurred. An ASLB had directed the NRC to issue a requested license amendment permitting Kerr-McGee to dispose of thorium mill tailings at its site. Kerr-McGee Chem. Corp. (West Chicago Rare Earths Facility), LBP-90-9, 31 N.R.C. 150, 194-95 (1990), vacated by Kerr-McGee, CLI-96-2, 43 N.R.C. 13 (1996). The order was issued and license granted in February 1990, while the NRC still had authority over the site. The State of Illinois subsequently appealed the decision to the Atomic Safety and Licensing Appeal Board, and on November 1, 1990, while that appeal was pending – but not yet decided – Illinois became an Agreement State and the NRC transferred authority over the site to it. See Kerr-McGee Chem. Corp. (West Chicago Rare Earths Facility), ALAB-944,

33 N.R.C. 81, 94 (1991), vacated by Kerr-McGee, 43 N.R.C. 13. Although an adjudicatory appeal was pending at the time that authority was transferred, there was no review of a license application ongoing by the NRC Staff because the license in question had already been issued. Here, by contrast, authority was transferred to New Jersey when the Staff was in the midst of reviewing Shieldalloy's decommissioning application and a related adjudicatory proceeding was ongoing.

There are two situations referenced in the NRC's Brief at 69, n.29, both involving licensees in Ohio, which merit discussion. In the first case, Advanced Medical Systems, Inc. had filed an application to renew its operating license and the application was pending when Ohio became an Agreement State. After assuming authority over the site, the State continued to process the application. Thereafter, a decommissioning plan was developed by the licensee and eventually approved by Ohio. See SA636. Criterion 25 does not preclude the transfer of pending license applications, but prohibits interference with or interruption of the processing of such applications because of the transfer. No such interference or interruption occurred in the Advanced Medical Systems case.

In the second Ohio case, the NRC transferred regulatory authority to the State while an application submitted by Shieldalloy for its facility in Ohio was pending before the NRC. See SA638 & SA632. After assuming authority, Ohio

continued to process the application, approving it in March 2002. Id. Therefore, Ohio's action, which continued processing of the application, complies with Criterion 25 and is in sharp contrast to New Jersey's refusal to honor the ongoing license application process.

X. THE NRC HAS AUTHORITY TO RETAIN JURISDICTION OF AN INDIVIDUAL SITE AFTER THE TRANSFER OF AUTHORITY TO AN AGREEMENT STATE

The NRC incorrectly alleges that its retaining jurisdiction over the Facility (as requested by Shieldalloy) "would result in concurrent NRC and New Jersey jurisdiction over the same type of nuclear materials" contrary to the legislative intent of Section 274 of the AEA. NRC Brief at 70. The NRC points to its explanation for rejecting Oklahoma's request to exclude five facilities from a transfer of authority to that State because Oklahoma's proposed approach would have resulted in "the creation of a 'form of dual regulation,' where licensees using the same nuclear material would be subject to differing NRC and state regulations." Id. The NRC Brief, however, fails to even acknowledge that, in that very same document, the agency developed criteria for deciding whether specific facilities should be excluded from the transfer of regulatory authority to a state. These criteria are:

> Overall, the staff would consider whether the proposed Agreement would jeopardize "...an orderly regulatory pattern between the Commission and the State governments..." as indicated by Section

> 274a(3) of the AEA. In particular, requests for limited Agreements would have to identify discrete categories of material or classes of licensed activity that (1) can be reserved to NRC authority without undue confusion to the regulated community or burden to NRC resources, and (2) can be applied logically, and consistently to existing and future licensees over time. Under this approach, NRC would not reserve authority over a single license unless that licensee clearly constituted a single class of activity or category of material meeting the two criteria described above.

JA18.

Under these criteria, the NRC could reserve authority over a single license if that "licensee clearly constituted a single class of activity or category of material meeting the two criteria" of being able to reserve authority to the NRC without undue confusion or burden and being applicable logically and consistently to existing and future licensees over time. Id. Thus, it is clear that the NRC has the power to exclude facilities from the transfer of authority to an Agreement State.

The NRC is also incorrect in asserting that it cannot retain authority over the Facility because to do so would create concurrent NRC and New Jersey jurisdiction. As discussed earlier, the Facility is the only one of its type in New Jersey and no other such facilities are expected to be licensed in the future. Therefore, jurisdiction over the Facility could be retained by the NRC simply by excluding source materials (or even the particular subcategory of source material

existing at the Site) from the transfer of authority to New Jersey.[16] Such an approach would not result in a concurrent exercise of jurisdiction by the NRC and New Jersey and would fully satisfy the criteria developed by the NRC and set forth in SECY-97-087. The NRC's failure to apply those criteria and exercise the option of retaining authority over the Facility was thus arbitrary and capricious.

Another, related argument raised in the NRC Brief is that its Office of the General Counsel "'has indicated that implementation of this approach [retaining authority over a single licensee] may be inconsistent with the Commission's authority under the AEA.'" NRC Brief at 71. In the first place, the NRC cannot render valid an erroneous position merely by citing a document in another matter that refers to an indication from its Office of General Counsel, particularly where the indication is tentative ("may be inconsistent") and is given without any analysis or authority. Also, the criteria discussed above demonstrate that the NRC recognizes that retaining authority over single licensees is within its powers under

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16 The NRC can retain authority by excluding a particular category of materials (such as those present at the Facility) from the Agreement State transfer, rather than by excluding any particular facility by name. Indeed, although the NRC at first refused to accede to Oklahoma's request to exclude the five named facilities in SECY-97-087, the NRC and Oklahoma entered into an agreement which applied to only a specific subcategory of source material and had the effect of continuing NRC jurisdiction over those facilities while transferring to Oklahoma authority over other source material licenses. In doing so, the NRC specifically applied the criteria it had identified in SECY-97-087. See SA598.

the AEA, as long as authority can be reserved to the NRC "without undue confusion to the regulated community or burden to NRC resources," and "can be applied logically, and consistently to existing and future licensees over time." The NRC makes no attempt to show that these conditions could not have been met. Both conditions are met for the Facility, and the NRC could have retained jurisdiction over it without exceeding its authority under the AEA.

XI. CONCLUSION

As stated in the Shieldalloy Brief, the arbitrary and capricious actions of the NRC, individually and taken together, warrant that the Court remand the case with instructions that the NRC either (1) require New Jersey to modify its Program in the area of facility decommissioning to make it compatible with the NRC regulations and apply the modified program to the Facility's decommissioning; or (2) rescind its transfer of regulatory authority over the Facility to New Jersey and regain authority over the Facility.

Petitioner respectfully requests that the Court grant the above and such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Petitioner's Counsel hereby certifies that the foregoing "Reply Brief of Petitioner Shieldalloy Metallurgical Corporation" complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B)(ii) in that it contains, exclusive of the table of contents, table of authorities, statement with respect to oral argument, and the certificates of counsel, 6845 words of proportionally spaced, 14 point Times New Roman font text.

In making this certification, Petitioner's Counsel has relied on the word count function of Microsoft Word 2003, the word-processing system used to prepare this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, in accordance with Circuit Rule 31, that the electronic original and eight (8) paper copies of the foregoing Final Reply Brief of Petitioner Shieldalloy Metallurgical Corporation (the "Final Reply Brief") were filed with the Clerk of the Court this 17th day of August 2010. In addition, on this 17th day of August 2010, paper copies of the Final Reply Brief were served on the following participants in the case by United States first class mail, postage prepaid:

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