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February 11, 2011 (2:00 p.m.)

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Before the Commission

In the Matter of	)	
	)	
SHIELDALLOY METALLURGICAL	)	Docket No. 40-7102-MLA
CORPORATION	)	
(License Amendment Request for	)	
Decommissioning the Newfield Facility)	)	
	)	

**SHIELDALLOY'S RESPONSE TO NEW JERSEY'S LETTER REGARDING THE  
COMMISSION'S JANUARY 3, 2011 ORDER**

Shieldalloy Metallurgical Corporation ("Shieldalloy" or "SMC"), holder of Source Materials License No. SMB-743 for its facility in Newfield, New Jersey ("Newfield Facility" or "Facility"), hereby responds to the letter dated February 4, 2011 from the State of New Jersey ("State" or "New Jersey") to the Commission ("NJ Letter") regarding the Commission's request that Shieldalloy and New Jersey "submit views ... on whether NRC should reinstate the transfer of regulatory authority [over the Newfield Facility] to New Jersey or retain regulatory authority over the Shieldalloy site." Order (Jan. 3, 2011) at 1.<sup>1</sup> As discussed below, the NJ Letter offers no valid reason for the Commission to reinstate the transfer of authority over the Newfield Facility to New Jersey.

<sup>1</sup> The Commission issued its Order in the wake of the decision by the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit" or "Court") that vacated the Commission's transfer of its regulatory authority over the Newfield Facility to the State. The Court remanded the matter to the Commission "for proceedings consistent with this opinion." *Shieldalloy Metallurgical Corp. v. NRC*, 624 F.3d 489, 497 (D.C. Cir. 2010) ("*Shieldalloy*"). The Commission sought neither rehearing nor certiorari to the U.S. Supreme Court, and the Court's mandate issued on January 6, 2011.

In considering a state's application to become an Agreement State pursuant to 42 U.S.C. § 2021, the NRC must establish that the state's program for the regulation of nuclear materials is compatible with the NRC's. 42 U.S.C. § 2021(d)(2). To evaluate the compatibility of the state and federal regulatory programs, the NRC considers thirty-six criteria that it has enumerated in a policy statement.<sup>2</sup> The compatibility requirement mandates that the state program must "not create conflicts, duplications, gaps, or other conditions that would jeopardize an orderly pattern in the regulation of agreement material on a nationwide basis."<sup>3</sup> Each element of the NRC's program is assigned to one of five categories, A through E. For NRC program elements classified as "Category C," each element of the state program must "embody the essential objective" of its federal counterpart. In a later document, the NRC deemed the regulation at issue here, 10 C.F.R. §§ 20.1401-06 ("License Termination Rule" or "LTR") to be a Category C element of its program. *Shieldalloy*, 624 F.3d at 491-92.

The NJ Letter does not assert, let alone demonstrate, that New Jersey's program for the control of radiation hazards ("the New Jersey Program" or "the Program") in the area of facility decommissioning meets the NRC compatibility criteria or is otherwise compatible with the NRC's program for the regulation of radioactive materials. This omission in the NJ letter is significant, because the Court in *Shieldalloy* determined that the Program contravened at least one of the criteria – Compatibility Criterion 25.<sup>4</sup> Since the NRC must make a finding that its

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<sup>2</sup> Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement, 46 Fed. Reg. 7540 (Jan. 23, 1981), as amended by 46 Fed. Reg. 36,969 (July 16, 1981) and 48 Fed. Reg. 33,376 (July 21, 1983).

<sup>3</sup> Statement of Principles and Policy for the Agreement State Program; Policy Statement on Adequacy and Compatibility of Agreement State Programs, 62 Fed. Reg. 46,517, 46,524 (Sept. 3, 1997).

<sup>4</sup> Compatibility Criterion 25 states, in relevant part:

*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

(Footnote continued on next page)

compatibility criteria are satisfied, the NJ Letter fails to provide the relevant views the NRC solicited in order to decide whether to retain authority over the Newfield Facility.

Instead of providing useful insights on the issue raised by the Commission, the NJ Letter makes a number of irrelevant, legally incorrect, and factually erroneous arguments. The discussion that follows briefly addresses each of these arguments.

## DISCUSSION

### **A. New Jersey's Comments Improperly Request that the NRC Disregard or Attempt to Circumvent the D.C. Circuit's Decision**

Much of New Jersey's submittal consists of expressing the State's disagreement with the holding and factual determinations of the D.C. Circuit in *Shieldalloy*, and asking the Commission to disregard or disagree with the D.C. Circuit's decision or to re-examine the Court's findings. *See, e.g.*, NJ Letter at 2, 8, 13, 14 and 28. Clearly, the NRC may not do this, and New Jersey's repeated requests should be ignored. *See, e.g., FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 140 (1940); *City of Cleveland v. FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977).

### **B. As the D.C. Circuit Found, the Transfer of Jurisdiction over the Newfield Facility to New Jersey Disrupted the Ongoing Licensing Proceedings towards the Decommissioning of the Facility**

New Jersey's first argument is that the transfer of jurisdiction over the Newfield Facility to the State does not disrupt any ongoing licensing proceeding because "Shieldalloy has had more than adequate opportunity to pursue decommissioning with the NRC." NJ Letter at 2. New Jersey also claims that Shieldalloy's delays and failures to submit an adequate decommissioning plan prevented NRC approval of its plan. After providing a distorted version

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interference with or interruption of licensed activities or the processing of license applications, by reason of the transfer. 46 Fed.Reg. 7540, 7543.

The D.C. Circuit did not find that it was necessary to reach Shieldalloy's other arguments as to the validity of the transfer of jurisdiction to New Jersey. *Shieldalloy*, 624 F.3d at 496.

of the history of Shieldalloy's efforts to decommission the Facility, New Jersey argues that "Shieldalloy has had more than adequate opportunity to pursue decommissioning with the NRC, and transferring authority to NJ will not unreasonably interfere with any ongoing licensing proceeding." NJ Letter at 7.

New Jersey's argument is clearly irrelevant. Regardless of how the NRC licensing process may have progressed over the years, it is undeniable – and New Jersey does not contest – that, at the time the NRC transferred jurisdiction over the Newfield Facility to New Jersey, there were pending licensing proceedings, both by the NRC Staff and before an NRC Atomic Safety and Licensing Board, to review and potentially approve Shieldalloy's proposed decommissioning plan ("DP") for the Facility. New Jersey cannot deny that the transfer of authority over the Facility to New Jersey disrupted – indeed, abruptly ended – the pending licensing proceedings before the NRC.

New Jersey's accounting of the history of Shieldalloy's efforts to have its DP for the Newfield Facility approved by the NRC is also contrary to facts to which both Shieldalloy and the NRC have essentially stipulated.<sup>5</sup> Just one example suffices to demonstrate New Jersey's inaccurate rendition of the facts. New Jersey claims that, "[a]lthough the NRC's Timeliness Rule requires licensees to inform the NRC that it has ceased licensed operations within 26 months of ceasing operations or within 2 months of deciding to cease principal activities, 10 C.F.R. §40.42(d), Shieldalloy waited until August 2001 to notify the NRC. Shieldalloy did not submit its first decommissioning plan until August 2002, four years after it ceased operations." NJ Letter at 4-5 (citations omitted). In reality, as related by the NRC, what transpired was:

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<sup>5</sup> See, e.g., Shieldalloy's opening brief (April 22, 2010) ("Shieldalloy Brief") before the D.C. Circuit at 13-32; Brief for the Federal Respondents (June 28, 2010) ("NRC Brief") at 22-38; *Shieldalloy*, 624 F.3d at 491.

In May 2000, the Licensee requested that it be allowed to postpone the initiation of its decommissioning process for one year in order to “explore business opportunities involving source material before planning for and proceeding with the decommissioning.” The Licensee requested a deferral of both the notification and plan submission requirements in 10 C.F.R. § 40.42. In July 2000, the Staff granted the request by amending License SMB-743 to permit the Licensee to postpone the initiation of decommissioning for one year from the date of the amendment. The Staff granted the Licensee’s request only after first finding, in accordance with 10 C.F.R. § 40.42(f), that postponing the initiation of decommissioning would not be detrimental to public health and safety and would otherwise be in the public interest.

NRC Staff’s Summary of Actions Relevant to Decommissioning Shieldalloy’s Newfield Facility (May 8, 2008) (“Staff Summary”) at 5, footnotes omitted.<sup>6</sup> Thus, instead of violating the Timeliness Rule (as New Jersey repeatedly asserts, *see* NJ Letter at 2, 4, 29 and 31), Shieldalloy was seeking, with the NRC’s approval, to find alternative uses for the materials at the Facility. Had those uses been viable, there would have been a change in the nature of the required decommissioning of the site. The postponement of the initiation of decommissioning was thus authorized by the NRC and did not violate the Timeliness Rule.

In short, New Jersey’s argument that “Shieldalloy is solely to blame for its failure to obtain an approved decommissioning plan over the last twelve years” (NJ Letter at 7) is not only irrelevant, but is also contrary to the facts.

**C. The Ongoing NRC Licensing Proceeding for the Decommissioning of the Newfield Facility is the Result of Nearly Twenty Years of Cooperative Efforts Between the Agency and Shieldalloy**

The second argument raised by New Jersey is intended to refute the D.C. Circuit’s determination that “the NRC had a long history of dialogue and cooperation regarding the [Newfield Facility decommissioning].” *Shieldalloy*, 624 F.3d at 494-95. New Jersey concedes

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<sup>6</sup> This document is included in the Supplemental Appendix filed with the D.C. Circuit (“SA”) at 231.

that this finding by the Court is “a factor that might weigh against transferring authority to New Jersey.” NJ Letter at 8 (citation omitted).

New Jersey attempts to refute the Court’s finding by asserting that “the NRC stated early and frequently during the decommissioning process that various obstacles exist to approving the onsite disposal.” *Id.* However, New Jersey does not, and cannot, deny that the NRC strove since the early 1990s to develop a regulatory mechanism that would allow on-site decommissioning at sites, like the Newfield Facility, for which “achieving unrestricted use might not be appropriate because there may be net public or environmental harm in achieving unrestricted use, or because expected future use of the site would likely preclude unrestricted use, or because the cost of site cleanup and waste disposal to achieve unrestricted use is excessive compared to achieving the same dose criterion by restricting use of the site and eliminating exposure pathways.” Final Rule: Radiological Criteria for License Termination, 62 Fed. Reg. 39,058, 39,069 (July 21, 1997). The License Termination Rule provided the regulatory framework for such a mechanism, which was subsequently refined through the issuance of SECY-03-0069 in 2003<sup>7</sup> and the development of both Newfield-specific<sup>8</sup> and generic<sup>9</sup> guidance on how the on-site disposal provisions in the LTR could be implemented.

The NRC never promised that the on-site disposal alternative would be approved for the Newfield Facility, but it established a framework for such approval and accepted for review a

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<sup>7</sup> Attachment 1 to SECY-03-0069, “Results of Evaluations for the Restricted Release and Institutional Control Issue,” and Attachment 11 to SECY-03-0069, “Potential Applicability of License Termination Rule Issues to Existing Decommissioning Sites (SDMP, Complex, and Formerly Terminated Licensed Sites) and Future Decommissioning Sites,” identified the Newfield Facility as among those for which on-site decommissioning might be implemented. *See* SA at 122 and 145.

<sup>8</sup> NRC Staff Interim Guidance for a Long-Term Control Possession only License At the Shieldalloy Newfield Site, New Jersey (Apr. 15, 2004), SA at 153.

<sup>9</sup> NUREG-1757, Consolidated Decommissioning Guidance (“NUREG-1757”) (Sept. 2006).

revision of the DP (Rev. 1a) prepared by Shieldalloy that was based on the on-site disposal concept. While a favorable outcome was not assured – making an objective determination on Shieldalloy’s application is, after all, the very purpose of the ongoing licensing proceedings – it cannot be gainsaid that there was a long history of Shieldalloy working to develop an acceptable decommissioning strategy under regulations and guidance developed by the NRC for that purpose, all the while in constant consultation with the agency. As the NRC Staff reported to the Atomic Safety and Licensing Board in the Shieldalloy DP proceeding, “since the Licensee stopped processing pyrochlore in 1998, the Staff and the Licensee have had, and continue to have, extensive interactions regarding the decommissioning of the Newfield site.” Staff Summary at 11, SA at 241.

New Jersey also raises a curious estoppel argument, claiming that the “NRC cannot be estopped by any guidance or assistance provided by the NRC Staff to licensees” and that “any representations made by the NRC Staff or its guidance documents during the course of the decommissioning cannot be viewed as an approval to any part of Shieldalloy’s decommissioning plan.” NJ Letter at 12. However, Shieldalloy did not argue, and the Court did not find, that the doctrine of estoppel requires the NRC to approve Shieldalloy’s DP application. Therefore, New Jersey’s argument that the NRC may not be estopped from rejecting the DP is irrelevant.<sup>10</sup>

New Jersey goes on to argue that “Shieldalloy cannot claim detrimental reliance. Shieldalloy decided to pursue onsite disposal regardless of the factual or legal obstacles to approval of such a plan at Newfield.” NJ Letter at 13. Again, neither Shieldalloy nor the D.C.

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<sup>10</sup> In fact, New Jersey itself points out that the NRC had rejected two previous revisions of the DP before it accepted Rev. 1a for detailed review. NJ Letter at 5-6.

Circuit invoked detrimental reliance as grounds for invalidating the transfer of regulatory authority to New Jersey.

**D. The NRC can Retain Jurisdiction over the Newfield Facility even if it Transfers Jurisdiction over other Facilities to New Jersey**

New Jersey acknowledges that the D.C. Circuit found that the NRC's past practice allows concurrent NRC and state jurisdiction over licensed facilities. NJ Letter at 13. However, New Jersey disagrees with the Court's finding and seeks to distinguish the Oklahoma precedent as being the result of the State of Oklahoma, not a licensee, requesting the exemption to its authority, and here New Jersey is not requesting such an exemption. *Id.* This argument was made by the NRC at oral argument in the *Shieldalloy* case and was rejected by the D.C. Circuit.

The Court ruled:

But the statute also provides that "the Commission is *authorized* to enter into agreements" with a state "with respect to *any one or more* of" a variety of classes of nuclear materials. 42 U.S.C. § 2021(b) (emphasis added). As the opening phrase suggests that the NRC is not *required* to enter into agreements, it suggests that it has discretion to negotiate the terms of the agreement with the state requesting authority.

*Shieldalloy*, 624 F.3d at 495 (emphasis in original). The Court's interpretation controls and must be followed. *City of Cleveland v. FPC, supra.*

New Jersey also claims that a number of licensees in the State "have been confused regarding whether New Jersey still has jurisdiction over them. To avoid further confusion, the NRC should restore New Jersey's authority over *Shieldalloy* so that it includes all licensees." NJ Letter at 13-14. Yet, nowhere in the 500-page appendix of documents submitted by New Jersey with its letter to the NRC is there any evidence of "confusion" by other licensees; in any case, there can be no real confusion because the Newfield Facility is the only licensed source material site in the State and the only facility covered by the Court's decision. New Jersey can, therefore,

easily clear up any confusion that other licensees may express by simply stating that the decision in the *Shieldalloy* case and the NRC's retention of jurisdiction over the Newfield Facility do not apply to them.

**E. Compatibility Criterion 25 is not and cannot be Satisfied if Authority over the Newfield Facility is Transferred to New Jersey**

The Court found, with respect to the NRC Newfield DP licensing proceedings, that “the state has been consistently hostile to those termination proceedings.” *Shieldalloy*, 624 F.3d at 495. New Jersey attempts to dispute the D.C. Circuit's determination by asserting that New Jersey “was neither biased nor hostile.” New Jersey Letter at 14. Rather, New Jersey alleges, its participation in the regulatory proceedings was limited to “raising legitimate factual, technical, and legal problems with Shieldalloy's proposed decommissioning plan.” *Id.*

New Jersey's attempt to rewrite history cannot withstand scrutiny. From the start, New Jersey has been opposed to the approval of Shieldalloy's proposed DP and the potential on-site decommissioning of the Newfield Facility.<sup>11</sup> When the State sought to intervene in the NRC licensing proceeding for approval of the DP, it filed a petition in which it raised thirty-three contentions challenging the license application, asserting that “Shieldalloy's proposed decommissioning will not protect the public health and safety and the LTC license sought by Shieldalloy will violate the law.” State of New Jersey Department of Environmental Protection (“NJDEP”) Petition for Hearing and to Intervene on Shieldalloy's Decommissioning Plan” (Jan. 16, 2007), at 182 (“Conclusion”). New Jersey also unsuccessfully challenged in court the NRC guidance (NUREG-1757) under which the DP would be implemented.<sup>12</sup> It filed an unsuccessful

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<sup>11</sup> New Jersey acknowledges that this opposition dates back to at least 2004. NJ Letter at 16-17.

<sup>12</sup> *New Jersey v. NRC*, 526 F.3d 98 (3d Cir. 2008).

request for a hearing and a stay petition with the NRC seeking to rescind the NRC guidance.<sup>13</sup> It also filed a rulemaking petition, again seeking to rescind the guidance,<sup>14</sup> and made other filings opposing the DP.<sup>15</sup>

Moreover, New Jersey announced as early as December 2008 that it would reject the decommissioning approach proposed by Shieldalloy once it assumed regulatory authority over the Newfield Facility.<sup>16</sup> Indeed, it proceeded to do so immediately upon assuming authority.<sup>17</sup> Even to this day, New Jersey persists in its opposition to the decommissioning of the Facility in accordance with the DP and continues to insist that the radioactive materials present at the Facility must be removed.<sup>18</sup> New Jersey's letter to the Commission does not indicate that there has been any change in the State's position or in its ultimate intentions with respect to the Newfield Facility.

New Jersey alleges that Shieldalloy never raised to the Court the argument that the State was "biased," and that consequently neither the NRC nor New Jersey were able to address the charge of bias.<sup>19</sup> NJ Letter at 15. But Shieldalloy made no claim of bias, and the Court did not make a finding of bias. What Shieldalloy did was assert numerous times, both before the NRC and to the Court, that the Program's non-compliance with Compatibility Criterion 25 would be

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<sup>13</sup> *Shieldalloy Metallurgical Corporation and NUREG-1757*, Order (Jan. 12, 2007).

<sup>14</sup> Petition for Rulemaking on NUREG-1757 and Request for Stay (Dec. 22, 2006).

<sup>15</sup> State of New Jersey's Reply to the July 3, 2008 NRC Staff and Shieldalloy Submissions to the Commission (July 10, 2008).

<sup>16</sup> December 23, 2008 letter from NJDEP to Shieldalloy, Joint Appendix submitted to the D.C. Circuit ("JA") at 446-47.

<sup>17</sup> October 8, 2009 letter from New Jersey to Shieldalloy, SA at 300.

<sup>18</sup> See Carly Romalino, *Nuclear Regulatory Commission issues order for Shieldalloy, New Jersey to offer cases for clean-up control of Newfield slag pile*, GLOUCESTER COUNTY TIMES, Jan. 5, 2011, at 1, Exhibit 1 to Shieldalloy's Response to the Commission's January 3, 2011 Order (Feb. 4, 2011).

<sup>19</sup> New Jersey argues that a court may not hold that a state is biased without any direct proof, and that courts have not found agency bias where the agency had simply been performing its statutory responsibilities. NJ Letter at 27-28. However, the D.C. Circuit did not hold New Jersey to be biased.

certain to result in the abrupt termination of the processing of Shieldalloy's pending DP license application upon the transfer of authority to New Jersey because of the State's manifest hostility to the DP proposed by Shieldalloy.<sup>20</sup> Both the NRC and New Jersey had the opportunity to respond to Shieldalloy's claim of non-compliance with Criterion 25, and did so.<sup>21</sup>

New Jersey claims that its regulations provide options other than unrestricted release, allowing "unrestricted use, limited restricted use, restricted use, and alternative standards." NJ Letter at 23-24. This claim, however, even if they were valid, would not be germane to the issue of compliance with Criterion 25.

In addition, the claim is invalid. It implies that Shieldalloy's on-site disposal plan could be permissible under New Jersey's regulations. This is incorrect. Among other things, New Jersey's unrestricted use, limited restricted use, and restricted use standards do not allow consideration of engineered barriers such as that proposed by Shieldalloy. *See, e.g.*, N.J.A.C. 7:28-12.9. The "alternative standards" option also prohibits on-site remediation of Shieldalloy's source material because New Jersey requires modeling of impacts beyond 1,000 years and calls for the use of an instantaneous, highly restrictive "all controls fail" exposure scenario. *See* NJAC 7:28-12(e) and (f)2.iii. For those reasons, while licensees are allowed to petition to use "alternative remediation standards," even alternative standards would effectively prohibit on-site remediation of Shieldalloy's source material.

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<sup>20</sup> *See* JA at 267; SA at 280; Brief of Petitioner Shieldalloy Metallurgical Corporation (Apr. 22, 2010) at 61- 62; Reply Brief of Petitioner Shieldalloy Metallurgical Corporation (July 26, 2010) at 26-27.

<sup>21</sup> *See* Memorandum from R.W. Borchardt to NRC Commissioners, Section 274b Agreement with the State of New Jersey, SECY-09-0114, Encl. 2 (Aug. 18, 2009) at 8; Brief for the Federal Respondents ( June 28, 2010) at 67-68; Brief for the Amicus Curiae State of New Jersey in Support of Affirming the Order of Federal Respondents (July 13, 2010) at 27-28.

Thus, New Jersey's suggestion that these alternatives provide an opportunity under New Jersey's regulatory program for the success of a source material decommissioning plan that calls for anything other than unrestricted release is simply not true.<sup>22</sup>

New Jersey also argues that its regulations provide for exemptions from its provisions. NJ Letter at 25. The option to petition for an exemption is, however, meaningless.<sup>23</sup> This was demonstrated when Shieldalloy petitioned for an exemption from the New Jersey regulatory requirements and its request was summarily denied. In denying Shieldalloy's request, New Jersey declared that its regulations do not allow license termination based on on-site remediation.<sup>24</sup>

#### **F. Costs Incurred by Shieldalloy Seeking NRC Approval of the DP**

The D.C. Circuit made reference to the fact that, in Shieldalloy's comments to the NRC on the proposed transfer of regulatory authority to New Jersey, SMC had "pointed to the time and expense that Shieldalloy devoted to working with the NRC staff to develop a plan for safely decommissioning the site (over \$2 million in 2007-2009 alone), which it implied would be

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<sup>22</sup> New Jersey asserts: "Because Shieldalloy has not submitted a decommissioning plan under New Jersey's regulations, it is unclear the extent to which Shieldalloy would be required to dispose its radioactive waste offsite." NJ Letter at 24. For the reasons described above, this assertion is disingenuous.

<sup>23</sup> New Jersey states that Shieldalloy would be entitled to an administrative hearing on New Jersey's licensing decision and to a subsequent review in the New Jersey Superior Court, Appellate Division. NJ Letter at 24-26. However, the review rights cited by New Jersey are largely illusory. In an administrative appeal of an NJDEP action, the administrative judge's initial decision is reviewed by the agency, which then makes a final decision. N.J.S.A. 52:14B-10(c); *Matter of Certain Sections of the Uniform Administrative Procedure Rules*, 90 N.J. 85, 91, 447 A.2d 151, 154 - 155 (N.J. 1982) ("The [New Jersey] Administrative Procedure Act gives the agency head the power to adopt, reject or modify the recommended report and decision of the administrative law judge.") Thus, the final determination is left in the hands of the Commissioner of the very agency that was an adverse party in the hearing. This final determination will be upheld by the appellate court unless arbitrary and capricious, a high standard for an unsuccessful litigant to meet. *See, e.g., B & J Realty, LLC v. N.J. Dep't of Env'tl. Prot.*, 381 N.J. Super. 52, 60-61 (App. Div. 2005).

<sup>24</sup> Letter from State of New Jersey to Dennis J. Krumholz (Shieldalloy Metallurgical Corp.) (Dec. 11, 2009), SA at 305-06.

largely wasted under New Jersey's different approach.” *Shieldalloy*, 624 F.3d at 493 (citation omitted).

New Jersey questions those costs and asks that the NRC direct Shieldalloy to provide an itemized and certified statement of the decommissioning costs incurred. NJ Letter at 28. It also claims that “most” of Rev. 1b of the DP would apply to decommissioning under New Jersey’s regulations; therefore, the expenditures would not be wasted because major portions of Shieldalloy’s DP would apply to a decommissioning in accordance with the New Jersey regulations “with minimal revision.” *Id.* at 29.

Even if New Jersey’s comments were relevant to the question posed by the Commission (which they are not), the comments are baseless.<sup>25</sup> As to the appropriateness of the costs, the figures cited by Shieldalloy in its comments were NRC oversight costs of \$744,000 in 2007, \$995,000 in 2008 and \$580,000 through the middle of 2009. JA at 270. There is thus no need for Shieldalloy to provide an itemized and certified statement of those costs to the NRC. The oversight costs could not be recovered if the regulatory regime shifted to the State. In addition, the cost of preparing the DP (which is not included in the \$2 million figure) would also be largely wasted, since most of the analyses, dose assessments and discussions in the DP are directed at leaving the materials on-site. The costs of having performed those analyses and discussing them in the DP would certainly be wasted if regulatory authority transferred to New Jersey.

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<sup>25</sup> New Jersey again charges Shieldalloy with violating the NRC’s Timeliness Rule, being dilatory in submitting the various iterations of its DP, and making the choice “to continue to pursue one failed on-site disposal plan after another,” and therefore forfeiting the right to complain of the time and expense incurred by its choices. NJ Letter at 31. Those allegations are without factual support and are irrelevant to the issue of the financial consequences of a transfer of regulatory authority from the NRC to New Jersey.

**G. The NRC's Retention of Authority over the Newfield Facility would not Result in "Dual Regulation"**

New Jersey argues that the Atomic Energy Act disfavors dual regulation by different governmental entities, hence New Jersey's authority should include all source material licensees. NJ Letter at 32. However, as the D.C. Circuit noted, since there is only *one* source material licensee in New Jersey (Shieldalloy), the potential problem of dual regulation does not in fact exist. As the Court wrote:

Two years later, in 1999, Oklahoma proposed a limited agreement that excluded a subcategory of materials - a category that aligned closely with the sites Oklahoma had desired to exclude in its site-specific proposal two years earlier. Applying the previously developed factors for limited agreements, the NRC staff this time recommended approval of the limited transfer. The Oklahoma case is strikingly relevant to Shieldalloy's situation because Shieldalloy argues, and the NRC does not dispute, that *its* radioactive wastes constitute the sole New Jersey example of a discrete subcategory of materials.

*Shieldalloy*, 624 F.3d at 493-94 (emphasis in original; footnotes omitted).

**H. Any Legal Obstacles to the NRC's Approval of the DP by the NRC can be solved by the Agency and do not Warrant Transfer of Jurisdiction over the Newfield Facility to New Jersey**

New Jersey claims that "many significant legal obstacles stand in Shieldalloy's way to obtaining approval for the on-site disposal plan under the NRC's authority," hence authority should be transferred to New Jersey. NJ Letter at 32. Shieldalloy disagrees that the "obstacles" postulated by New Jersey (NJ Letter at 32-35) actually exist.<sup>26</sup> But it is clear in any event that all of the "obstacles" referred to by the State are within the NRC's power to address and, if necessary, would be resolved as part of the agency's regulatory activities. It is inappropriate and

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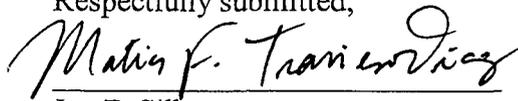
<sup>26</sup> Indeed, one of the "obstacles" raised by New Jersey – the alleged need to prepare a programmatic Environmental Impact Statement on the long term control license program – was rejected by the U.S. Court of Appeals for the Third Circuit. *New Jersey v. NRC*, 526 F.3d at 103-04.

belittling to the NRC to suggest, as New Jersey does, that the NRC should expediently transfer jurisdiction in order to avoid confronting those issues.

### CONCLUSION

New Jersey has alleged no valid reason why the NRC should seek to reinstate the transfer of jurisdiction over the Newfield Facility to the State. Accordingly, the NRC should retain jurisdiction and complete its review of Shieldalloy's decommissioning plan.

Respectfully submitted,



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Dated: February 11, 2011

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Commission

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SHIELDALLOY METALLURGICAL	)	Docket No. 40-7102-MLA
CORPORATION	)	
(License Amendment Request for	)	
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**CERTIFICATE OF SERVICE**

I hereby certify that copies of Shieldalloy's Response to New Jersey's Letter Regarding the Commission's January 3, 2011 Order, dated February 11, 2011, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk also by electronic mail, this 11<sup>th</sup> day of February, 2011.

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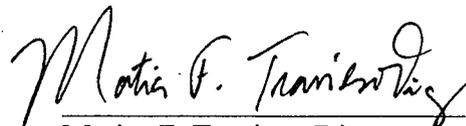
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