ORAL ARGUMENT SCHEDULED FOR OCTOBER 9, 2012

DOCKET No. 11-1449

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 BRIEF OF PETITIONER SHIELDALLOY METALLURGICAL CORPORATION

Jay E. Silberg
Matias F. Travieso-Diaz
Alison M. Crane
Stephen L. Markus

PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, NW
Washington, DC 20037
(202) 663-8000
COUNSEL FOR SHIELDALLOY
METALLURGICAL CORPORATION

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), Petitioner Shieldalloy Metallurgical Corporation ("Shieldalloy") certifies as follows:

A. **Parties and Amici:** In addition to Petitioner, parties to this action are Respondents U.S. Nuclear Regulatory Commission ("NRC" or "Commission") and the United States of America. The State of New Jersey ("New Jersey") has been granted leave to intervene.

B. **Rulings Under Review:** The agency action under review is the NRC decision reinstating the transfer of authority over Shieldalloy's facility in Newfield, New Jersey (the "Facility") to New Jersey, as set forth in its Memorandum and Order, R57 (CLI-11-12, 74 NRC __, slip op. (Oct. 12, 2011)) ("CLI-11-12"), JA1.[1] The NRC had previously transferred jurisdiction over the Facility to New Jersey pursuant to an agreement under Section 274 of the Atomic Energy Act, 42 U.S.C. § 2021, between the NRC and New Jersey (the "Agreement"). This Court, in *Shieldalloy Metallurgical Corp. v. NRC,* 624 F.3d 489 (D.C. Cir. 2010)

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[1] In this Brief, the notation "JAxx" refers to the applicable pages in the Joint Appendix, to be provided after briefing is completed. "RXX" denotes the number of the document identified as number XX in the Certified Index of the Record.

("*Shieldalloy*"), vacated the transfer and remanded the matter to the NRC for further proceedings.

C. **Related Cases:** This matter was previously before this Court and the prior proceedings are discussed in *Shieldalloy*. Counsel is not aware of any related cases in this Court or any other court involving the validity of the transfer of regulatory authority over the Facility from the NRC to New Jersey. Several actions have been instituted but are stayed, pending the outcome of this case, relating to New Jersey's exercise of authority over the Facility after the Agreement went into effect in 2009: *Shieldalloy Metallurgical Corp. v. State of N.J., et al.*, No. 10-4319 (3d Cir. filed Nov. 24, 2010); *In re N.J.A.C. 7:28,* No. A-278-09 (N.J. Sup. Ct. App. Div. filed Sep. 14, 2009); *Shieldalloy Metallurgical Corp. v. N.J. Dep't. of Envtl. Prot.,* No. A-1481-09 (N.J. Sup. Ct. App. Div. filed Nov. 25, 2009); *N.J. Dep't of Envtl. Prot./Radiation Prot. Program v. Shieldalloy Metallurgical Corp.*, No. EER 12529-2010S (N.J. Office of Admin. Law filed Nov. 15, 2010); *N.J. Dep't of Envtl. Prot./Radiation Prot. Program v. Shieldalloy Metallurgical Corp.*, No. EER 12532-2010S (N.J. Office of Admin. Law filed Nov. 15, 2010).

Respectfully submitted,

/S/ Matias F. Travieso-Diaz
Jay E. Silberg
Matias F. Travieso-Diaz
Alison M. Crane
Stephen L. Markus

PILLSBURY WINTHROP
SHAW PITTMAN LLP
2300 N Street, NW
Washington, DC 20037
(202) 663-8000
Counsel for Shieldalloy Metallurgical
Corporation
E-mail: matias.travieso-diaz@pillsburylaw.com

Dated: July 26, 2012

SHIELDALLOY METALLURGICAL CORPORATION'S CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Shieldalloy Metallurgical Corporation by and through its undersigned counsel, hereby certifies that:

Shieldalloy is a Delaware Corporation and is a direct, wholly-owned subsidiary of Metallurg, Inc., a Delaware corporation, and an indirect subsidiary of Metallurg Holdings, Inc., a Delaware Corporation. It is also an indirect subsidiary of Metallurg Delaware Holdings Corporation, a privately-owned holding company, and of AMG Advanced Metallurgical Group N.V., a publicly-owned company.

Shieldalloy is an industrial company that, at its facility in Newfield, New Jersey, manufactured for a number of years metal alloys from ores containing small amounts of uranium and thorium. Shieldalloy has held for many years Source Materials License No. SMB-743 issued by the U.S. Nuclear Regulatory Commission ("NRC") authorizing it to possess the uranium and thorium at its Facility. Such license has been transferred to the State of New Jersey by order of the NRC.

Respectfully submitted,

/S/ Matias F. Travieso-Diaz
Jay E. Silberg
Matias F. Travieso-Diaz
Alison M. Crane
Stephen L. Markus

PILLSBURY WINTHROP
SHAW PITTMAN LLP
2300 N Street, NW
Washington, DC 20037
(202) 663-8000
Counsel for Shieldalloy Metallurgical Corporation
E-mail: matias.travieso-diaz@pillsburylaw.com

Dated: July 26, 2012

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases Page

Authorities upon which Petitioner chiefly relies are marked with asterisks.

Statutes, Regulations & Other Documents

GLOSSARY OF TERMS AND ABBREVIATIONS

AEA	Atomic Energy Act of 1954, as amended
AEC	United States Atomic Energy Commission (the NRC's predecessor)
Agreement	The 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
APA	Administrative Procedure Act
Commission	United States Nuclear Regulatory Commission
DP	Decommissioning Plan for the Facility
Facility	The industrial facility owned by Shieldalloy Metallurgical Corporation located in Newfield, New Jersey
LTR	License Termination Rule, Subpart E to 10 C.F.R. Part 20 (10 C.F.R. §§ 20.1401-06)
Materials	Radioactive slag and baghouse dust currently at the Facility

mrem	Millirem
New Jersey's Program	*See* Program
NJDEP	New Jersey Department of Environmental Protection
NRC	United States Nuclear Regulatory Commission
Program	New Jersey's Radiation Protection Program
RAI	Request for Additional Information issued by the NRC Staff
Shieldalloy	Shieldalloy Metallurgical Corporation
Staff	United States Nuclear Regulatory Commission Staff
TEDE	Total Effective Dose Equivalent

STATEMENT REGARDING JOINT APPENDIX

Pursuant to Circuit Rule 30(c), the parties are utilizing the deferred-appendix option described in Rule 30(c) of the Federal Rules of Appellate Procedure.

JURISDICTIONAL STATEMENT

Basis for Agency's Jurisdiction – The NRC is authorized by Section 274b of the Atomic Energy Act ("AEA"), 42 U.S.C. § 2021(b) (2006), to enter into agreements that transfer regulatory authority over certain radioactive materials to individual states. The NRC is to enter into such an agreement with a state if the NRC "finds that the State program is . . . compatible with the Commission's program for the regulation of such materials, and that the State program is adequate to protect the public health and safety with respect to the materials covered by the proposed agreement." *Id.* § 2021(d)(2). The AEA defines the categories of materials for which the NRC may transfer regulatory authority as including, *inter alia*, "source materials," such as those that are involved in the instant Petition. *Id.* § 2021(b)(2). The NRC exercised its powers under Section 274b of the AEA to enter into an agreement with New Jersey pursuant to which it transferred regulatory authority over such materials within New Jersey, including those at the Facility, to that State. Following this Court's remand in *Shieldalloy,* the NRC again exercised its powers under Section 274b to reinstate the transfer of authority over Shieldalloy's Facility to New Jersey.

Basis for Court's Jurisdiction – The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 2342(4) (2006), 42 U.S.C. § 2239(a) (2006), and 28 U.S.C.

§ 2344 (2006). The Administrative Orders Review Act, also known as the Hobbs Act, gives federal courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of…all final orders of the Atomic Energy Commission [now the NRC] made reviewable by section 2239 of title 42." 28 U.S.C. § 2342(4). The AEA provision cited in the Hobbs Act applies to any proceeding "for the granting, suspending, revoking, or amending of any license…[and] for the issuance or modification of rules and regulations dealing with the activities of licensees… ." 42 U.S.C. § 2239(a)(1)(A). The Hobbs Act subjects to judicial review "any final order entered in any NRC proceeding of the kind specified in subsection (a) [of 42 U.S.C. § 2239]." *N.J. v. NRC*, 526 F.3d 98, 102 (3d Cir. 2008) (quotation omitted).

Upon the entry of a "final order" by the NRC reviewable under the Hobbs Act, the agency is required to give prompt notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. 28 U.S.C. § 2344. The proper venue for seeking judicial review of a final NRC action relating to NRC licenses is "in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit." *Id.* § 2343.

The NRC decision to reinstate the transfer of regulatory authority over the Facility to New Jersey was a "final order" by the NRC affecting a Commission license because regulatory authority over the possession and use of nuclear materials held at the Facility under an NRC license was transferred to New Jersey as of the date of its issuance. CLI-11-12 at 50, JA50.

Timeliness of Petition for Review – The transfer of NRC authority was effective as of the issuance of CLI-11-12, October 12, 2011. This Petition for Review was filed on November 22, 2011, within the sixty-day period established by the Hobbs Act. *See* 28 U.S.C. § 2344.

Finality of Agency Action – The NRC's reinstatement of its transfer to New Jersey of regulatory authority over the Facility is a final agency action with respect to the license for that site.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Before the NRC may transfer regulatory authority over licensed facilities to a state, the applying state must have developed a program for the control of radiation hazards that is compatible with the Commission's program for the regulation of the materials over which the state seeks to assume authority. 42 U.S.C. § 2021(d)(2). The state program must also be adequate to protect public health and safety. *Id*. The following issues arise from these requirements, as they apply to the NRC's reinstatement of the transfer of regulatory authority over the Facility to New Jersey:

1. Whether the NRC may withhold, at a licensee's request, transfer of authority over particular categories of materials to a state.
2. Whether the NRC erred in reinstating the transfer of authority over the Facility to New Jersey, since application of New Jersey's program for the control of radiation hazards ("New Jersey's Program" or "the Program") would disrupt the processing of Shieldalloy's proposed decommissioning plan for the Facility.
3. Whether the NRC erred in reinstating the transfer of authority to New Jersey despite the failure of New Jersey's Program to implement the provisions of the NRC's regulations in Subpart E of

10 C.F.R. Part 20, which require compliance with the "as low as reasonably achievable" principle.

4. Whether the NRC erred in reinstating the transfer of authority over the Facility to New Jersey despite the failure of New Jersey's Program to allow the termination of radioactive materials licenses under restricted release criteria.

5. Whether the NRC erred in reinstating the transfer of authority to New Jersey despite the failure of New Jersey's Program to implement numerous requirements of the NRC regulations in the area of license termination.

6. Whether the NRC erred in reinstating the transfer of authority to New Jersey despite the failure of New Jersey's Program to incorporate practices for assuring the fair and impartial administration of regulatory law.

7. Whether, in light of these errors, the NRC's reinstatement of the transfer of authority over the Facility to New Jersey was arbitrary and capricious and contrary to applicable law.

STATEMENT OF THE CASE

This Petition arises from the NRC's decision to reinstate its transfer of regulatory authority over the Facility to New Jersey. The NRC's original transfer was vacated by this Court in *Shieldalloy*.

The NRC reinstated the transfer even though New Jersey's Program is not compatible with the NRC's program for the regulation of the materials over which the State seeks to assume authority. *See* 42 U.S.C. § 2021(d)(2). The transfer also aborts a twenty-year process to effect the safe decommissioning of the Facility in accordance with NRC regulatory requirements and negates the considerable efforts by Shieldalloy to implement such decommissioning. In reinstating the transfer, the NRC rejected Shieldalloy's plea that the agency had, and should exercise, the power to retain jurisdiction over the materials present at the Facility.

The NRC's departure from its own standards and from the requirements of the AEA renders the reinstatement of the transfer of regulatory authority arbitrary and capricious and warrants that the NRC be directed to resume regulatory authority over the Facility.

STATEMENT OF FACTS

A. FACTS LEADING TO *SHIELDALLOY* DECISION

The essential facts of this case are not in dispute; many of these facts are set forth in the Court's decision in *Shieldalloy,* as described below. Between 1955 and 1998, Shieldalloy manufactured metal alloys at its Facility. Shieldalloy's manufacturing process generated slightly radioactive byproducts in the form of slag and baghouse dust ("the Materials"). Shieldalloy held the Materials on-site under a source materials license from the NRC. *See Shieldalloy*, 624 F.3d at 491.

In the early 1990s, Shieldalloy took the first steps toward decommissioning the Facility. Based on discussions with the NRC staff ("Staff"), it developed a conceptual plan for on-site disposal of the Materials under conditions restricting the site's use. For its part, the NRC began developing, and in 1997 published, a final rule on the decommissioning of licensed facilities. License Termination Rule ("LTR"), Subpart E to 10 C.F.R. Part 20, 10 C.F.R. §§ 20.1401-06; R4 (62 Fed. Reg. 39,058 (July 21, 1997)), JA66. The LTR allows licensees the option of disposing of radioactive materials on-site under restrictions designed to guarantee public health and safety. *See Shieldalloy*, 624 F.3d at 491.

Over the next decade, the Staff and Shieldalloy engaged in extensive discussions regarding the on-site disposal of the Materials. Between 2002 and

2009, Shieldalloy submitted four revisions of its decommissioning plan ("DP"). The first two were rejected by the Staff; the third was accepted for review. The Staff declined to review the fourth revision of the DP, submitted in August 2009. Shieldalloy prepared or revised each proposed revision based on the Staff's comments on the previous version, an extensive site-specific "Interim Guidance" document provided by the Staff to Shieldalloy on April 15, 2004, and a generic three-volume regulatory guidance document issue by the NRC in 2006.[2] *See Shieldalloy*, 624 F.3d at 491.

From the start, New Jersey strongly opposed the decommissioning approach proposed by Shieldalloy. Thus, when the Staff accepted the third version of the DP for review and an adjudicatory proceeding was initiated before an NRC Atomic Safety and Licensing Board, New Jersey intervened in the proceeding, opposing approval of the DP, and raised numerous "contentions challenging the DP with respect to the technical analyses performed by the Licensee, essentially arguing that the DP has not demonstrated compliance with the relevant statutory and regulatory standards, including those prescribed in 10 C.F.R. § 20.1403" as well as "numerous contentions addressing the legality of the regulatory avenues relied on in the submission of the Licensee's DP. Specifically, it question[ed] the

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[2] R9 (NUREG-1757, Consolidated Decommissioning Guidance (Sept. 2006)), JA162.

role of the License Termination Rule's restricted use provisions, the use of the Long Term Control-Possession Only License, and the Commission's decommissioning regulations generally." *Shieldalloy Metallurgical Corporation* (Licensing Amendment Request for Decommissioning of the Newfield, New Jersey Facility), Memorandum and Order (Ruling on Hearing Requests), LBP-07-05, 65 NRC 341, 353-54 (2007), JA360-61 (footnotes omitted).

In October 2008, New Jersey requested that the NRC transfer to the State regulatory authority over certain in-state nuclear materials, pursuant to the "Agreement State" provision in the AEA. Under that provision, Congress has authorized the NRC to "enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the [NRC]" and the assumption of authority by the state. 42 U.S.C. § 2021(b). As a precondition to making such an agreement, however, the NRC must find that the state's regulatory regime is "compatible with the [NRC's] program" and that the state's regime is "adequate to protect the public health and safety." *Id.* § 2021(d)(2); *Shieldalloy*, 624 F.3d at 491.

The NRC has set forth thirty-six Compatibility Criteria, published in a policy statement, that it considers in evaluating the compatibility of the state and

federal regulatory programs.[3] A subsequent NRC policy statement clarified its evaluation process, interpreting the compatibility requirement as mandating 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."[4] To carry out these policy statements 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 the corresponding NRC program element. The NRC determined that the LTR is a Category C program element. *Shieldalloy,* 624 F.3d at 491-92.

The NRC evaluated New Jersey's Program against the Compatibility Criteria and, after finding it adequate and compatible with the federal program, sought comments from the public on the proposed agreement. In response, Shieldalloy submitted comments setting forth a number of reasons why the New

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[3] R1 (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)), JA53.

[4] R5 (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)), JA108.

Jersey and federal programs were incompatible.[5] One of these reasons was that New Jersey's Program fails to satisfy Compatibility Criterion 25,[6] which requires that appropriate arrangements be made by the NRC and the applying state to "ensure that there will be no interference with or interruption of … the processing of license applications, by reason of the transfer."[7] Shieldalloy also argued that the NRC had the authority to retain jurisdiction over the Facility even if it decided to transfer jurisdiction over other facilities in New Jersey to the State, and requested that the agency exercise this authority given that a transfer of jurisdiction to New Jersey would be inconsistent with Criterion 25.[8]

The Staff did not address some of Shieldalloy's comments and rejected the rest, including the request that the agency retain jurisdiction over the Facility even if it decided to allow New Jersey to become an Agreement State.[9] Based on the Staff's recommendations, the Commission approved the transfer of authority to

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5 R42 (Comment Letter from Hoy E. Frakes, Jr., President, Shieldalloy (June 11, 2009)), JA461.

6 *Id.* at 9-10, JA469-70.

7 46 Fed. Reg. at 7,543, JA56.

8 R42 at 11-12, JA471-72.

9 R48 (SECY-09-0114, Memorandum from R.W. Borchardt to NRC Commissioners RE: Section 274b Agreement with the State of New Jersey (Aug. 18, 2009)), Encl. 2, JA655.

New Jersey, effective on September 30, 2009.[10] Upon approval of the transfer, the Staff forwarded the fourth revision of the DP to New Jersey, which the Staff had failed to review due to the pendency of the transfer of regulatory authority to New Jersey. *See Shieldalloy*, 624 F.3d at 491.

Only a few days after the transfer of authority, New Jersey notified Shieldalloy that the fourth revision of the DP did not meet New Jersey's regulatory requirements and directed Shieldalloy to submit a new plan that satisfied those requirements.[11] New Jersey thus summarily terminated processing of Shieldalloy's license application and did not even address the previously ongoing Staff reviews of the DP.[12]

The Court's opinion in *Shieldalloy* describes what happened next: "Worried that it would now be forced to jettison its plans for on-site remediation and instead

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[10] R50 (State of New Jersey: Discontinuance of Certain Commission Regulatory Authority Within the State; Notice of Agreement Between the Nuclear Regulatory Commission and the State of New Jersey, 74 Fed. Reg. 51,882 (Oct. 8, 2009)), JA669.

[11] *See Shieldalloy*, 624 F.3d at 492.

[12] New Jersey had announced at least as early as December 2008 that, once it assumed jurisdiction over the Facility, it would reject the decommissioning approach proposed by Shieldalloy. R42, Encl. at 175, JA648. Immediately upon assuming regulatory authority over the Facility, it proceeded to do so. The NRC was well aware of New Jersey's intentions long in advance of the transfer of regulatory authority to New Jersey. *See*, *e.g.*, R47 (Agenda and Talking Points for 8/13/09 and 8/17/09 Briefings Re: Final Staff Recommendations for NJ Agreement Application), JA651.

transfer the radioactive materials to a facility in Clive, Utah, Shieldalloy sought relief along multiple avenues. It requested an exemption from the relevant New Jersey regulatory provisions (and was denied). It filed a motion with the NRC to stay the transfer for regulatory authority (and was denied). And it filed the instant petition [in the D.C. Circuit] challenging the NRC's transfer." *Shieldalloy,* 624 F.3d at 492. Upon review, the Court issued a unanimous opinion that found the NRC decision to transfer jurisdiction over the Facility to New Jersey to be arbitrary and capricious, vacated the transfer, and remanded the matter to the NRC for further proceedings. *Id.* at 495 & 497.

B. POST-REMAND PROCEEDINGS

Following the remand, the NRC "invited Shieldalloy, as well as New Jersey, to submit any views on whether we should reinstate the transfer of regulatory authority to New Jersey or retain regulatory authority over the Shieldalloy site." CLI-11-12 at 7, JA7. Shieldalloy and New Jersey each filed initial and reply responses to the NRC's invitation. *Id.* Eight months after receiving the last of these responses (*see id.* at 7 n.16, JA7), the NRC issued its decision, in which it reinstated its transfer of authority to New Jersey. The agency's decision failed to give due account to Shieldalloy's positions, as presented in prior proceedings and in the most recent submittals.

SUMMARY OF THE ARGUMENT

A government agency must articulate a satisfactory explanation for its actions if they are to survive review under the "arbitrary or capricious" standard. An agency must also adequately address legitimate objections and explain departures from its precedent. An agency's failure to respond meaningfully to objections renders its decision arbitrary and capricious.

The NRC failed to provide a satisfactory explanation for transferring regulatory authority over the Facility to New Jersey despite the incompatibility of New Jersey's Program with NRC regulations in the area of facility license termination. The agency also failed to respond meaningfully to Shieldalloy's objections to the license termination elements of New Jersey's Program. For these reasons, the NRC's reinstatement of the transfer of authority over the Facility to New Jersey was arbitrary and capricious and should be set aside.

In particular, Compatibility Criterion 25 provides that the NRC and the applying state should "ensure that there will be no interference with or interruption of licensed activities or the processing of license applications, by reason of the transfer." 46 Fed. Reg. at 7,543, JA56. The NRC's reinstatement of the transfer of regulatory authority over the Facility to New Jersey failed to satisfy this Criterion.

Despite the NRC's long history of working with Shieldalloy to implement a decommissioning plan based on stabilization of the Materials and on-site disposal, the NRC reinstated the transfer of authority in full knowledge that New Jersey would derail the ongoing licensing process. The NRC also rejected Shieldalloy's request that the agency exclude the class of materials present at the Facility from the transfer of authority to New Jersey, even though the NRC has the power to do so and should have exercised it under the circumstances of this case.

In order for a state program for the control of radiation hazards to be compatible with the NRC's, the state's program elements for which the counterpart NRC regulations are classified as Compatibility Category C must "embody the essential objective" of the corresponding NRC program elements. In the area of facility decommissioning, the essential objective of the LTR is "to ensure that decommissioning will be carried out without undue impact on public health and safety and the environment." 62 Fed. Reg. at 39,058, JA66.

A critical aspect of the LTR is a principle that is central to the NRC's radiation protection regulations: decommissioning must be conducted such that the radiation doses resulting from the decommissioning process are as low as reasonably achievable ("ALARA"). To "embody the essential objective" of the LTR, a state's radiation protection program needs to incorporate the ALARA

principle into its license termination regulations. New Jersey's Program, however, fails to incorporate the ALARA principle into its license termination regulations, and in so doing forecloses the decommissioning option for the Facility that would result in the lowest radiation exposures. New Jersey's Program, therefore, is inconsistent with the NRC's regulatory regime in the area of license termination.

Another important aspect of the LTR is that it addresses the few licensed sites containing large quantities of materials contaminated with low-level radioactivity where public health and the environment may be best protected by on-site stabilization and disposal. To permit the safe decommissioning of those sites, the LTR includes the option of terminating a license by allowing radioactive materials to remain at the site upon the implementation of approved stabilization methods, subject to government supervision and other controls. The NRC specifically identified the Facility as a site for which the on-site disposal option is beneficial, and it worked with Shieldalloy for twenty years towards the implementation of that option.

The NRC reinstated the transfer of regulatory authority over the Facility with full knowledge that New Jersey's Program precludes license termination based on on-site disposal of radioactive materials. The NRC erred in finding New

Jersey's Program compatible with its regulations when the Program fails to achieve the LTR's "essential objective" – minimizing public exposure to radiation.

There are other respects in which the decommissioning provisions of New Jersey's Program significantly deviate from those in the LTR. In promulgating the LTR, the NRC had given due consideration to, and rejected, positions identical to those contained in New Jersey's Program. There is no rational basis for the NRC's conclusion that the Program is "compatible" with the NRC's when the agency had explicitly rejected those positions in its own rulemaking.

Compatibility Criterion 23 requires that state practices for assuring the fair and impartial administration of regulatory law should be incorporated into the state's rules of general applicability. In contravention of this Criterion, New Jersey's regulations on license termination are unfairly and uniquely aimed at the Facility.

Each of the instances of incompatibility between New Jersey's Program and the NRC regulations suffices to invalidate the NRC's reinstatement of the transfer of regulatory authority over the Facility. In addition, examining the totality of the NRC actions in disregard of its own regulations and Compatibility Criteria, as well as the requirements of the AEA, compels the conclusion that the NRC has acted in an arbitrary and capricious manner.

STANDING

Shieldalloy held NRC Source Materials License No. SMB-743 for its Facility in Newfield, New Jersey. Effective September 30, 2009, the NRC transferred to New Jersey the regulatory authority over the possession and use of certain categories of materials held under licenses granted by the NRC. R50 (74 Fed. Reg. 51,882 (Oct. 8, 2009)), JA669. Shieldalloy's NRC license for the Facility was one of those for which regulatory authority was transferred to New Jersey. R48 (SECY-09-0114) at 3-4, JA659-60. On October 12, 2011, the NRC reinstated its transfer of regulatory authority over the Facility to New Jersey. CLI-11-12, JA1.

This latest NRC action has had a direct and detrimental impact on Shieldalloy. In this Petition, Shieldalloy is asking the Court to provide redress by again reversing the transfer to New Jersey of regulatory authority over the Facility.

This Court has noted: "In many if not most cases the petitioner's standing to seek review of administrative action is self-evident; no evidence outside the administrative record is necessary for the court to be sure of it. In particular, if the complainant is 'an object of the action (or forgone action) at issue' - as is the case usually in review of a rulemaking and nearly always in review of an adjudication - there should be 'little question that the action or inaction has caused him injury,

and that a judgment preventing or requiring the action will redress it.'" *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992)). Here, based on the above facts, it is "self-evident" that Shieldalloy has standing to challenge the NRC's action.

ARGUMENT

I. STANDARD OF REVIEW

The Administrative Procedure Act ("APA") requires a court to "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). The standard of review applicable to this Petition was summarized by the Court in *Shieldalloy* as follows:

> In reviewing agency action that is alleged to be arbitrary or capricious, we are "not to substitute [our] judgment for that of the agency," but we must ensure that the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77L.Ed.2d 443 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962)). Encompassed in the latter duty, of course, is the obligation of an agency to explain any important changes of policy or legal interpretation. *Ramaprakash v. FAA*, 346 F.3d 1121, 1124 (D.C.Cir.2003). And agencies must evaluate parties' proposals of "significant and viable" alternatives. *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1511 n.54 (D.C.Cir.1984).

Shieldalloy, 624 F.3d at 492-93 (alterations in original).

Also, "an agency's failure to respond meaningfully to objections raised by a party renders its decision arbitrary and capricious. We have stressed that unless the agency answers objections that on their face seem legitimate, its decision can

hardly be classified as reasoned." *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (quotations and citations omitted).

II. THE NRC HAS THE POWER TO WITHHOLD TRANSFER OF AUTHORITY OVER PARTICULAR CATEGORIES OF MATERIALS AT THE REQUEST OF A LICENSEE

In its earlier challenge to the NRC's transfer of authority over the Facility to New Jersey, Shieldalloy argued that the NRC had the authority to retain jurisdiction over the Facility even if it approved New Jersey's Agreement State application, and should do so consistent with Compatibility Criterion 25 and notions of fundamental fairness and efficiency. The NRC responded to Shieldalloy's argument by alleging: (1) that its retaining jurisdiction over the Facility (as requested by Shieldalloy) would result in concurrent NRC and state jurisdiction over the same type of nuclear materials, contrary to the legislative intent of Section 274 of the AEA; (2) that implementation of this approach (retaining authority over a single facility) may be inconsistent with the Commission's authority under the AEA; and (3) (at oral argument) that the AEA did not permit a partial transfer of regulatory authority other than at the request of the would-be transferee state. *See Shieldalloy,* 624 F.3d at 493-95. The Court rejected most of these arguments "as inapposite and woefully incomplete" (*id.* at 493) and, with respect to the new allegation at oral argument that the AEA allows partial transfers of authority only if requested by the applying state, it concluded

that it could not "defer to the interpretive proposals offered by NRC counsel at oral argument. As the sections of the statute to which our attention has been drawn do not plainly compel the reading now proposed, we cannot affirm on the basis of that reading." *Id.* at 495.

In *Shieldalloy,* the Court read Section 274b to "suggest[] that the NRC is not *required* to enter into agreements" and to indicate that the Commission "has discretion to negotiate the terms of the agreement with the state requesting authority." *Shieldalloy,* 624 F.3d at 495 (emphasis in original). On remand, the NRC chose to interpret the Court's ruling in *Shieldalloy* as leaving the agency "entirely free, unrestrained by any judicial holding, to decide for ourselves what section 274 [of the AEA] requires." CLI-11-12 at 11, JA11. It then proceeded to interpret Section 274b of the AEA as merely giving the NRC "a general grant of legal authority…to turn regulatory authority over certain designated nuclear materials to the states." *Id.* at 12, JA12. The legislative history of the provision makes clear, however, that Congress intended the NRC to have flexibility to determine how its agreement with a state should be framed. *See* H.R. Rep. No. 86-1125 at 10 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2872, 2880 ("Subsection b. *permits* the Commission to discontinue its authority [over designated categories of material] and encourages States, when qualified, to assume the responsibility.") (emphasis added); 105 Cong. Rec. 19043 (daily ed. Sept. 11, 1959) (statement of

Sen. Anderson) ("[t]he bill *authorizes* the Commission to enter into agreements with State Governors providing for discontinuance of certain of the Commission's regulatory authority, after proper certification by the Governor and findings by the Commission that the State program is adequate.") (emphasis added).

The NRC's gloss on another provision, Section 274d of the AEA, would have the agency strait-jacketed into accepting without modifications a requested transfer of authority to a state if specified conditions are met. *See* CLI-11-12 at 16-17, JA16-17. However, the legislative history of Section 274 suggests that Congress intended for the Commission to retain flexibility as it entered into agreements with states.

On May 13, 1959, the Atomic Energy Commission ("AEC") (the NRC's predecessor) submitted a proposed bill to the Joint Committee on Atomic Energy in response to a request by Senator Clinton Anderson. Section d of the AEC's proposed bill closely corresponds to the ultimate AEA Section 274d language. The AEC explained its intended responsibilities under the proposed bill in permissive, rather than mandatory, terms: "Essentially, the objectives of this proposed bill…are to provide procedures and criteria whereby the Commission *may* turn over to individual States, as they become ready, certain defined areas of regulatory jurisdiction." Letter to Hon. Clinton P. Anderson, Chairman, Joint Committee on

Atomic Energy, from A. R. Luedecke, General Manager, Atomic Energy Commission, May 13, 1959, *Federal-State Relationships in the Atomic Energy Field: Hearings Before the Joint Committee on Atomic Energy*, 86th Cong., 1st Sess. at 294 (1959) ("*Joint Committee Hearings*") (emphasis added); *id.* ("[t]he bill includes criteria which would need to be met before the Commission *could* turn over any of its responsibilities to a State.") (emphasis added); *id.* at 299 ("Subsection (d) specifies the findings which the Governor of the State and the Commission must make before the Commission *can* enter into an agreement with the State under the bill.") (emphasis added).

In reporting its amended bill (H.R. 8755) to the House of Representatives, the Joint Committee on Atomic Energy used similar language of discretion:

> Subsection d. provides for certification by the Governor, and a finding by the Commission, before any agreement *may* be entered into. It is intended to protect the public health and safety by assuring that the State program is adequate before the Commission *may* withdraw its regulatory responsibilities.

H.R. Rep. No. 86-1125 at 11 (emphasis added). Notably, nowhere in their respective comments did the AEC or the Joint Committee indicate that Section 274d was intended to bind the Commission to make requested transfers of authority, in the precise manner requested by the state, if the specified conditions were met. Rather, this legislative history shows an intent by Congress that the Commission would be permitted to conclude such agreements with states if the

statutory factors are satisfied, but would have flexibility to craft such agreements to include or exclude particular categories of materials.

Other provisions in Section 274 of the AEA provide additional evidence that Congress intended for the NRC to retain flexibility in determining how to fashion and manage its agreement with a state. Section 274c(4), for example, authorizes the Commission to determine that a disposal scheme suggested by a state should not be permitted, by excluding from transfers to a state authority and responsibility with respect to:

> the disposal of such other byproduct, source, or special nuclear material as the Commission determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.

Section 274c(4) of the AEA, 42 U.S.C. § 2021(c)(4). This "authority reserved by Section 274(c) [is] exclusively for the Commission to exercise." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 209 (1983). In proposing the language of Section 274c(4) in 1959, the AEC explained that this provision "gives the Commission *authority and flexibility* for the continued exercise of Commission regulatory controls for such disposals as the Commission determines require the continued exercise of its controls… ." *Joint Committee Hearings* at 309 (emphasis added). Likewise, the NRC retains the authority to suspend or terminate the transfer of authority to a state if such termination is

necessary to protect public health or safety or if the state has failed to comply with the requirements of Section 274. Section 274j(1) of the AEA, 42 U.S.C. § 2021(j)(1). The Joint Committee viewed this language as a "reserve power" that the Commission could exercise under appropriate circumstances. H.R. Rep. No. 86-1125 at 12.

There is nothing in the legislative history of Section 274 of the AEA to suggest that the statute *requires* the NRC to transfer regulatory authority over particular categories of materials to a state just because the state requests such a transfer.[13] The NRC's "all or nothing" argument is inconsistent with the flexibility inherent in the Congressional scheme.

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[13] The NRC's position in this case that it is impotent to control what aspects of its authority it will relinquish to a requesting state is inconsistent with the agency's frequent assertion in other contexts of its unlimited supremacy over the states in the regulation of the possession and use of nuclear materials. *See, e.g.*, 10 C.F.R. § 8.4(b) (2011) ("The regulatory pattern [set forth by the AEA] requires, in general, that . . . the possession and use of byproduct material (radioisotopes), source material (thorium and uranium ores), and special nuclear material (enriched uranium and plutonium, used as fuel in nuclear reactors), be licensed and regulated by the Commission."); *see also Pac. Gas & Elec. Co.*, 461 U.S. at 207 (observing that the AEA granted to the Commission "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials"); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 250 (1984) (noting that enactment of Section 274 of the AEA "still precluded [states] from regulating the safety aspects of these hazardous [byproduct, source or special nuclear] materials").

The second part of the NRC's argument is that, while the agency has the power to authorize partial transfers of authority over a given category of materials, it can do so only at the behest of a requesting state and not if sought by a licensee. *See* CLI-11-12 at 19-20, JA19-20. The agency, however, implicitly recognizes that it has found nothing in the legislative history or in the statute itself that supports this view. *See id.* at 18, JA18. The NRC speculates that allowing licensees to seek that their facilities remain under the jurisdiction of the NRC would give them an incentive "to manipulate the license application process depending on which regulatory scheme they preferred." *Id.* at 19, JA19. But such speculation bears no connection to reality – an NRC licensee seeking to terminate its license cannot "manipulate" the application process, but must conform to the rigorous requirements of the NRC regulations, as the example of Shieldalloy's arduous efforts to gain NRC approval of its DP demonstrates. Further, the NRC is not obliged to accede to a licensee's request that authority for a facility remain with the agency, thus no "manipulation" by a licensee is possible.

The NRC also argues that Congress "desired states to assume authority either over all of the sites within a particular nuclear materials category or over none of the sites within that category." *Id.* at 18, JA18. The basis offered for this assertion is Congress's intent to "avoid any form of 'concurrent' or piecemeal federal-state jurisdiction over a specified nuclear materials category." *Id.* This

argument is refuted by the very actions the NRC took when it agreed to retain authority over certain facilities in Oklahoma, while transferring authority over others to that State. Moreover, a review of the legislative history on this issue shows that Congress was concerned not by the prospect of a subdivision of the nuclear material categories or facilities under federal and state authority in a given state, but rather by the dual regulation of the same facility by both federal and state authorities. Thus, during hearings by the Joint Committee, Robert Lowenstein of the AEC Office of General Counsel interpreted the term "concurrent jurisdiction" to mean "both the Federal Government and the States having fairly coextensive responsibilities." *Joint Committee Hearings* at 315. Mr. Lowenstein stated that the primary concerns associated with concurrent jurisdiction were that it would be wasteful of resources, would provide for controls by multiple levels of government without "centralized responsibility," and would "subject the users of these materials to the burdens of procedural dealing with a great many different agencies on the same questions." *Id.* at 315-16.

In this context, the Commission's retention of jurisdiction over designated facilities despite its relinquishment of authority over others in a material category would not present the concurrent jurisdiction problems that Congress attempted to avoid, for licensees would not face uncertainty concerning which agency had authority over their licenses. Thus, so long as the agreement identified the

respective federal or state jurisdiction over a specified category of material, the problem of concurrent jurisdiction would not arise.

The NRC itself came to the conclusion that the problem of potential concurrent jurisdiction could be avoided by defining the circumstances under which retention of jurisdiction over discrete categories of materials would be allowed. The criteria it developed in SECY-97-087 in connection with Oklahoma's request that the NRC retain jurisdiction over certain facilities 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.

R2 (SECY-97-087) at 3, JA65.

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.* Neither of the two criteria is based on

who requests that the NRC retain jurisdiction over a site or a category of sites. All that matters is whether such a class of activity or category of material (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.[14]

Both conditions are met in this case. As New Jersey acknowledges, 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 in that State. R23 (NJ Agreement Application), Section 4.3.1 at 2, JA444. Therefore, jurisdiction over the Facility could be retained by the NRC by excluding the particular subcategories of source material existing at the Facility from the transfer of authority to New Jersey.[15] Retention of jurisdiction over the Materials at the Facility would not result in any concurrent exercise of jurisdiction by the NRC and New Jersey and would satisfy the criteria set forth in SECY-97-087.

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[14] The development of criteria for authorizing partial transfers of authority is a vivid example of the NRC's ability to tailor the terms of its transfer of authority to a requesting state, contrary the NRC's protestations that it is precluded from doing so by the AEA. The NRC does not disagree. CLI-11-12 at 20 n.53, JA20.

[15] Thus, although the NRC at first refused Oklahoma's request to exclude five named facilities, the NRC and Oklahoma eventually 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. *See Shieldalloy*, 624 F.3d at 494.

As the Court found in *Shieldalloy,* such an approach was endorsed by the NRC and applied to exclude certain sites from the transfer of regulatory authority to the State of Oklahoma:

> 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 494 (emphasis in original). The NRC's refusal to apply this option renders its reinstatement of the transfer of authority over the Facility to New Jersey arbitrary and capricious.

III. THE NRC ERRED IN REINSTATING THE TRANSFER OF REGULATORY AUTHORITY BECAUSE NEW JERSEY'S PROGRAM DISRUPTS THE EVALUATION OF SHIELDALLOY'S PROPOSED DECOMMISSIONING PLAN

In prior proceedings before this Court, Shieldalloy argued that the NRC's transfer of authority over the Facility to New Jersey did not satisfy Compatibility Criterion 25 because, at the time of the transfer, there was a pending licensing application under review by the NRC to which Compatibility Criterion 25 applied. Criterion 25 provides as follows:

> *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.

46 Fed. Reg. at 7,543, JA56. Shieldalloy contended that it was arbitrary and capricious for the NRC to transfer authority over the Facility because the transfer would inevitably result in the interruption, indeed the abrupt termination, of the processing of Shieldalloy's license application. Shieldalloy had worked for many years at significant expense to develop a decommissioning plan for the Facility that would be acceptable to the NRC. Multiple revisions of the DP were prepared to address the comments of the Staff, and at the time authority was transferred to New Jersey, the Staff was reviewing that plan. New Jersey had made clear that if it obtained regulatory authority over the Facility it would refuse to even consider the approach set forth in the DP. The NRC was aware of New Jersey's intent to terminate the processing of Shieldalloy's licensing application when it agreed to transfer authority to the State. The NRC's action approving the transfer of regulatory authority over the Facility to New Jersey, therefore, was in direct contradiction of Compatibility Criterion 25.

In *Shieldalloy,* the Court found that the NRC did not adequately respond to Shieldalloy's position:

> Other elements of the NRC's response as to criterion 25 were equally dismissive. The NRC staff said that New Jersey's regulatory scheme recognized existing NRC licenses and would continue "any licensing actions that are in progress" at the time of the agreement. NRC Staff

> Comments at 8. The NRC thus concluded that there would be a "smooth transition" and that New Jersey would make decisions on pending licensing actions. *Id.*
>
> This hardly answered Shieldalloy's contention that its license termination process would be disrupted and that no appropriate arrangements had been made. Although the fact of New Jersey's participation in prior or concurrent NRC regulatory proceedings does not necessarily prejudice a transfer agreement, the formal existence of New Jersey provision for transfer seems in no way an assurance that the transfer would satisfy criterion 25's intended preclusion of "interference with or interruption of licensed activities or the processing of license applications." 46 Fed.Reg. at 7543. Obviously the NRC need not automatically consider every single pending licensing action individually when it considers transfer to a state. But in this case the NRC had a long history of dialogue and cooperation regarding the termination of a license, the state has been consistently hostile to those termination proceedings, and the regulated entity alerted the NRC not only to the likely interference with decommissioning but also to partial transfer as a possible solution. At the very least, the NRC should have explained how Shieldalloy's decommissioning process could proceed under the New Jersey regime free of the interference and interruption sought to be avoided by criterion 25 and why the partial transfer was not an appropriate alternative arrangement.

Shieldalloy, 624 F.3d at 494-95.

The NRC's response to the Court's finding is to claim that both Shieldalloy and the Court wrongly interpret Criterion 25 as imposing substantive obligations on the NRC with respect to the transfer of pending licensing applications. In CLI-11-12, the NRC declares that Criterion 25 is merely a "housekeeping" criterion, without any substantive effect. CLI-11-12 at 30, JA30. All that Criterion 25 requires, in the NRC's interpretation, is that the NRC ensure that "licensing

records are transferred to and received by the new agreement state in an orderly manner that ensures that no pending licensing actions will be significantly delayed or that no records will be lost or misplaced as a result of the transition of authority." *Id.*

There are at least two problems with the NRC's explanation. *First*, it is a revisionist view of the reach of the Criterion. The NRC had multiple opportunities, both while evaluating Shieldalloy's comments on New Jersey's application and before this Court, to state that Criterion 25 confers no rights to a license applicant because the Criterion only deals with records transfers. Instead, in each case, the NRC has addressed Criterion 25 in a different light.

For instance, in responding to Shieldalloy's claim that New Jersey's Program violates Criterion 25, the NRC stated, at the time it first approved New Jersey's Agreement State application:

> Criterion 25 addresses the transition between 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 intent of this criterion is to ensure that licensees can continue to operate without interference with or interruption of licensed activities after the effective date of the Agreement.
>
> NRC's review confirmed that State Statute N.J.S.A. 26:2D-9(k) contains a provision that provides for recognition of existing NRC and Agreement State licenses. NJDEP BER Procedure 3.08, "License Transition from NRC to New Jersey," addresses the transfer of NRC licenses to the State. Upon completion of the Agreement, all active NRC licenses issued to facilities in NJ will be recognized as NJDEP

> licenses. This will ensure a smooth transition in authority from NRC to NJ so that licensees can continue to operate without interference with or interruption of licensed activities. NJ will continue any licensing actions that are in progress at the time of the Agreement and make the final decision on all pending licensing actions.

R48 (SECY 09-0114), Encl. 2 at 8, JA664. Likewise, in rejecting Shieldalloy's motion for a stay pending this Court's consideration of its initial review petition, the NRC stated:

> New Jersey law provides for recognition of NRC licenses, and NJDEP procedures provide that upon the effective date of the agreement, all active NRC licenses issued to facilities in New Jersey will be recognized as NJDEP licenses. Consistent with Criterion 25, the NJDEP recognized Shieldalloy's source material license at the Newfield site. Furthermore, in rejecting its proposed decommissioning plan, the NJDEP acknowledged that Shieldalloy met the timeliness requirements of 10 C.F.R. § 40.42 when it submitted the plan to the NRC. It used this as a basis for granting Shieldalloy an extension of time to file a revised decommissioning plan. These actions appear to be consistent with an orderly transfer of authority between the NRC and New Jersey.

Shieldalloy Metallurgical Corp. (Newfield, New Jersey Site), CLI-10-08, 71 NRC 142, 162 (2010), JA698 (footnotes omitted). None of the NRC pronouncements previous to CLI-11-12 characterized Criterion 25 as a mere "housekeeping" provision.[16]

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[16] This and other current NRC attempts at providing justifications inconsistent with the agency's prior explanations should be given no weight. It is well established that the agency must have articulated a rational explanation for its action at the time of its decision, not in revisionist positions in after-the-fact

Second, the other problem with the NRC's litigation-driven interpretation of Criterion 25 is that there is far more to the Criterion than just record collection and transfer (although that is an aspect of any transfer of authority). The very excerpts quoted above indicate that the NRC seeks to ensure a smooth transition in authority from NRC to the applying state so that licensees can continue to operate without interference with or interruption of licensed activities, that the state will continue any licensing actions in progress at the time of the Agreement and make the final decision on all pending licensing actions, and that gaps or lapses in regulation are to be prevented. Contrary to the NRC's newly minted explanation, Criterion 25 requires far more than collecting licensing records and tossing them over the transom to the applying state. As the very text of the Criterion prescribes, the NRC must "ensure that there will be no interference with or interruption of licensed activities or the processing of license applications, by reason of the transfer." 46 Fed. Reg. at 7,543, JA56. Mere records turnover does not satisfy this requirement.

In CLI-11-12, the NRC insists that Shieldalloy (and the Court) would require the NRC to retain authority over sites for which a license termination application was pending, or compel a state to take a regulatory approach identical to the NRC's with respect to pending applications. CLI-11-12 at 29 & 33-34,

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litigation. *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006).

JA29 & JA33-34. Shieldalloy has never sought to impose such requirements on the NRC. What Shieldalloy has argued, and a fair reading of Criterion 25 compels, is the notion that under the unique circumstances of this case, in which transfer of authority over the Facility to New Jersey would signify the immediate termination of the long-pending licensing proceeding, the NRC, with full knowledge of the situation, had an obligation to consider alternatives to such a transfer, particularly after the relevant factors and potential alternatives were pointed out by Shieldalloy long in advance of the agency's action. The NRC had such an obligation in this case under Criterion 25, and the failure to discharge it was arbitrary and capricious.

The NRC's failure to give due consideration of potential alternatives to the transfer of authority over the Facility to New Jersey was also inconsistent with the requirements of the APA, which commands that federal agencies act with "due regard for the rights and privileges of all the interested parties" when presented with license applications. 5 U.S.C. § 558(c) (2006). The APA includes such a provision to fulfill its design of "promot[ing] general fairness and regularity in administrative action." *Pan-Atl. S.S. Corp. v. Atl. Coastline R.R. Co.*, 353 U.S. 436, 442-43 (1957). The NRC itself acknowledges that, as the APA commands, it has an obligation to treat participants to its licensing proceedings fairly. *See Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 343 n.4 (1998). It has not met its obligation here.

IV. THE NRC ERRED IN REINSTATING THE TRANSFER OF AUTHORITY OVER THE FACILITY TO NEW JERSEY DESPITE THE FAILURE OF NEW JERSEY'S PROGRAM TO MEET SEVERAL COMPATIBILITY CRITERIA

In CLI-11-12, the NRC advances novel arguments in an effort to bolster its previous erroneous determination that New Jersey's Program is compatible with the NRC's. As the discussion below demonstrates, the NRC's arguments in defense of its compatibility determination are unsound and often unprecedented and provide no support for the agency's decision to reinstate its transfer of authority over the Facility to New Jersey.

A. New Jersey's Program fails to implement the provisions of the NRC's regulations at 10 C.F.R. Part 20, Subpart E, which require compliance with the ALARA principle

The Commission has stated in numerous contexts that the purpose of the ALARA standard is to ensure that there will not be radiological exposures to the public or releases to the environment beyond the minimum amount that cannot be reasonably avoided, regardless of the absolute value of the dose limit set forth in a regulation. ALARA "means 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 (2011). "The ALARA concept means that all doses are to be reduced below required levels to the lowest reasonably achievable level considering economic and societal factors. Determination of levels that are ALARA must consider any

detriments, such as deaths from transportation accidents, that are expected to potentially result from disposal of radioactive waste." NUREG-0586, Final Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities, Supplement 1 (Nov. 2002), at 2-6 n.(a) (available at http://adamswebsearch.nrc.gov/idmws/ViewDocByAccession.asp?AccessionNumber=ML023500395).[17]

The unsoundness of the NRC's new compatibility arguments is evident in its discussion of the ALARA principle. The NRC professes not to understand Shieldalloy's "diffuse," "summary," and "conclusory" ALARA argument. CLI-11-12 at 34-36, JA34-36.[18] The NRC then seeks to refute what it terms

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[17] The ALARA principle is invoked in four provisions relevant to the termination of NRC licenses: 10 C.F.R. §§ (1) 20.1402 (Radiological Criteria for Unrestricted Use); (2) 20.1403 (Criteria for License Termination Under Restricted Conditions); (3) 20.1404 (Alternate Criteria for License Termination); and (4) 20.2002 (Method for Obtaining Approval of Proposed Disposal Procedures). ALARA requirements are also imposed in over a dozen additional NRC regulatory provisions in 10 C.F.R.: (1) § 20.1003; (2) § 20.1101; (3) §20.1206; (4) §20.1301; (5) §10.1601; (6) §20.1702; (7) §20.1704; (8) §20.2105; (9) §20.2203; (10) §34.3; (11) §34.42; (12) Appendix A to Part 40; (13) §50.34; (14) §50.66; and (15) §72.3. Thus, it cannot be gainsaid that the NRC regards application of the ALARA standard as a fundamental radiation protection principle.

[18] This Court had no difficulty in understanding, and aptly summarizing, Shieldalloy's position: Shieldalloy argued "that while New Jersey's standards may be more stringent, they are actually less safe. Because of the higher stringency, Shieldalloy states that it is prevented from using on-site disposal and will be forced to ship the materials to a facility in Utah. The consequence is that the doses of radiation to the public resulting from removing the

Shieldalloy's "fundamentally inaccurate" assertion that there is a need to compare the radiological doses that would result from the decommissioning of a facility under unrestricted release and restricted release approaches and to apply the ALARA principle to select the option that results in the lowest doses. CLI-11-12 at 36, JA36.[19]

The NRC's ALARA argument (nowhere expressed before, even in the agency's previous brief before this Court) has three parts. *First*, the NRC claims that, in determining whether decommissioning under restricted release criteria pursuant to 10 C.F.R. §20.1403 should be permitted at a particular site, it need not compare the levels of public health and safety protection afforded by the unrestricted versus restricted release decommissioning options. *Id.* at 37, JA37. *Second*, the NRC claims that, if such a comparison were made, the estimated dose to the public from implementing the restricted decommissioning approach at the

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radioactive materials from the site and relocating them in Utah will actually be *greater* than the public health and environmental harms that accompany on-site disposal of the materials." *Shieldalloy,* 624 F.3d at 496 (citations omitted; emphasis in original).

[19] The LTR "provides criteria for license termination for both 'unrestricted use' and 'restricted use.' Terminating a license for unrestricted use would allow no dependence on 'institutional controls,' *i.e.*, governmental monitoring of engineered barriers and land-use restrictions, to achieve a maximum dose of 25 mrem per year to a member of the public upon termination of the license. Terminating a license for restricted use would rely on legally enforceable institutional controls to achieve the 25 mrem dose limit." CLI-11-12 at 24-25, JA24-25 (footnotes omitted).

Facility would, under certain circumstances, exceed those resulting from decommissioning to unrestricted criteria. *Id.* at 38-39, JA38-39. *Third*, the NRC argues that New Jersey's Program does adopt the ALARA principle, and its failure to allow the use of ALARA in the license termination context is immaterial to the compatibility of the Program with NRC's criteria. *Id.* at 42-44, JA42-44.

The first (and principal) NRC argument is clearly erroneous and inconsistent with the agency's own regulations and guidance and even its licensing communications with Shieldalloy. In establishing decommissioning subject to restricted release criteria as a permissible option, the Statement of Considerations for the LTR calls for a comparison of the radiological impacts associated with the two (restricted and unrestricted release) decommissioning approaches. It states that

> [t]o support a request for restricted use, a licensee would perform an ALARA analysis of the risks and benefits of all viable alternatives and include consideration of any detriments. This could include estimated fatalities from transportation accidents that might occur as the result of transport of wastes from cleanup activities, and societal and socioeconomic considerations such as the potential value to the community of unrestricted use of the land.

62 Fed. Reg. at 39,069.

Likewise, 10 C.F.R. § 20.1403 requires a comparison between the two decommissioning approaches because it states that a licensee is eligible for

restricted release if it can either show *that pursuing the unrestricted release option would result in net harm or that the restricted release decommissioning option is ALARA*. 10 C.F.R. § 20.1403. This provision calls for a comparison of the doses associated with the two different decommissioning approaches because the restricted release option is only available if the radiation levels it produces are ALARA or the unrestricted release option would result in radiological harm.

The NRC's own guidance on license termination confirms that consideration of the restricted release option calls for comparing the restricted and unrestricted release options, and choosing the one with the lowest radiological impact. The NRC's main decommissioning guidance document (NUREG-1757, (Consolidated Decommissioning Guidance (Sept. 2006)), JA162), points to certain benefits to be taken into consideration in ALARA cost-benefit calculations, which are important primarily in "*comparisons between restricted and unrestricted release*." R9 (NUREG 1757), Vol. 2 at 6-3, JA253 (emphasis added). In addition, that guidance document refers to "regulatory costs avoided" as a "benefit [that] usually manifests in *ALARA analyses of restricted release versus unrestricted release decommissioning goals*" because "[b]y releasing the site with no restrictions, the licensee may avoid the various costs associated with restricted release." *Id.* at N-6, JA263 (emphasis added).

Finally, the NRC asserts that some of the Requests for Additional Information ("RAIs") issued by the Staff to Shieldalloy support the agency's assertion that Shieldalloy has misunderstood application of the ALARA principle in evaluating the restricted release decommissioning option. CLI-11-12 at 35 & n.112, JA35 (citing RAI Nos. 27, 28, 29, and 30). However, each of these RAIs asked Shieldalloy to demonstrate its eligibility for license termination under the restricted release option, but did not touch on the need to compare the restricted and unrestricted release options. On the other hand, another of the Staff requests – RAI number 31, not cited by the NRC – in fact supports Shieldalloy's position that the ALARA principle calls for a comparison between the doses associated with the restricted and unrestricted release options. That request stated that "[b]ased on the wording of 10 CFR 20.1403(a), the NRC staff considers that the demonstration of compliance should evaluate incremental measures that could be taken to comply with the unrestricted use criteria…If the amount of remediation work is overestimated, then the cost of the [unrestricted use] alternative would also be overestimated, which would bias the net harm *or ALARA comparison* away from the unrestricted use option." *Request for Additional Information for Safety Review of Proposed Decommissioning Plan for Shieldalloy Metallurgical Corporation, Newfield, New Jersey* (License No. SMB-743), Enclosure, request number 31(July 5, 2007) (incorporated into record by R57 (CLI-11-12)), JA393 (emphasis added).

Thus, there can be no doubt that dose comparisons between the unrestricted and restricted release options are not only permissible, but *required* by the NRC regulations and guidance.[20] The NRC argues, however, that such comparisons are impossible because the restricted option is complex and subject to many uncertainties that are not present if the site is decommissioned to unrestricted use criteria. CLI-11-12 at 37-38, JA37-38. The NRC cites a potential scenario in which all institutional controls that are part of the restricted release option are assumed to fail and the protective cover isolating the Materials is assumed to degrade, and points out that in such a scenario the resulting doses from the Facility would be 86 mrem per year, a dose in excess of the 1 to 25 mrem per year resulting from the unrestricted release option. *Id.* at 38-39, JA38-39. The NRC fails to point out, however, that its regulations require licensees proposing to decommission a site under restricted release criteria to demonstrate by analysis that "[r]esidual radioactivity at the site has been reduced so that if the institutional

[20] While the NRC argues that the unrestricted release option is favored under the LTR, (CLI-11-12 at 39, JA39), this argument proves nothing. The restricted release option was established precisely for situations in which such an option could be preferable. As explained in the Statement of Considerations for the LTR: "Experience with decommissioning of facilities since 1988 has indicated that for certain facilities, 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." 62 Fed. Reg. at 39,069, JA77.

controls were no longer in effect, there is reasonable assurance that the TEDE from residual radioactivity distinguishable from background to the average member of the critical group is as low as reasonably achievable and would not exceed . . . 100 mrem (1 mSv) per year." 10 C.F.R. § 20.1403(e) (2011). Such an analysis does not reflect either the intent or the expectation of exercising the restricted release option, nor does it provide a fair comparison to the results of implementing the unrestricted release option. What the regulations require is that a licensee "has made provisions for legally enforceable institutional controls that provide reasonable assurance that the TEDE from residual radioactivity distinguishable from background to the average member of the critical group will not exceed 25 mrem (0.25 mSv) per year." 10 C.F.R. § 20.1403(b) (2011). As the NRC acknowledges, Shieldalloy's analysis shows that under the restricted release option implemented in accordance with 10 C.F.R. § 20.1403(b) releases from the remediated Facility would be "infinitesimally small," i.e., "0.0000004 mrem per year," well below those resulting from implementation of the unrestricted release option. CLI-11-12 at 38, JA38. A fair comparison between the two options is possible and in fact shows that, for the Facility, the restricted release option is preferable from the ALARA standpoint.

The NRC's third ALARA argument is that New Jersey has "incorporat[ed] by reference" 10 C.F.R. § 20.1101(b) into its regulations and has adopted the

ALARA principle for "its entire regulatory program." CLI-11-12 at 42, JA42.[21] This argument is erroneous, for adherence to the general provisions of 10 C.F.R. § 20.1101(b) says nothing as to whether compliance with ALARA will be required in the process of terminating a license. Indeed, as the NRC concedes, New Jersey does not permit application of ALARA to the license termination process, by excluding the license termination provisions of Subpart E of 10 C.F.R. Part 20 from its regulations. By contrast, the NRC requires compliance with the ALARA principle in three provisions relating to license termination: (1) 10 C.F.R. § 20.1402 (Radiological Criteria for Unrestricted Use); (2) 10 C.F.R. § 20.1403 (Criteria for License Termination Under Restricted Conditions); and (3) 10 C.F.R. § 20.1404 (Alternate Criteria for License Termination). New Jersey's Program excludes all three. N.J. Admin. Code § 7:28-6.1(c) (2011).

Thus, New Jersey's Program does not permit application of the ALARA principle to determine the most suitable option for decommissioning a facility and terminating its license. The failure of the Program to allow the ALARA principle to be applied to the termination of facility licenses renders the Program incompatible with the NRC regulatory scheme because it fails to achieve the

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[21] 10 C.F.R. § 20.1101(b) (2011) reads: "The licensee shall use, to the extent practical, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable (ALARA)."

essential objective of the LTR, that is, "to ensure that decommissioning will be carried out without undue impact on public health and safety and the environment." 62 Fed. Reg. at 39,058, JA66.

B. New Jersey's Program fails to permit license termination subject to restricted release criteria

Shieldalloy has repeatedly asserted that the New Jersey regulations do not allow the termination of a license based on remediation to restricted release criteria, and would refuse to permit materials to remain on-site if remediation is to be followed by long-term control by a government agency. *See*, *e.g.*, R53 (Shieldalloy's Response to the Commission's January 3, 2011 Order (Feb. 4, 2011)) at 16, JA715. In CLI-11-12, the NRC seeks to refute Shieldalloy's argument by stating that New Jersey has two restricted-release options that permit license termination under specified soil concentration levels, and that the regulations also allow for a licensee to petition for restricted release using alternative remediation standards. CLI-11-12 at 44-45, JA44-45. The NRC cites provisions in New Jersey Administrative Code § 7:28-12 in support of its position. *Id.* The NRC accuses Shieldalloy of complaining that the New Jersey license termination regulations are just more conservative than the NRC's, a situation the NRC finds permissible given the Category C designation of the LTR. *Id.* at 45-46, JA45-46.

The NRC confuses the New Jersey *site remediation* standards with the State's requirements for *license termination.* Such confusion leads the NRC to argue that it would be possible for a licensee to terminate its license after remediating its site to meet restrictive release criteria. That is not the case.

The New Jersey regulations do reference "restricted use" remedial actions, thus implying that remediation to a restricted-release condition is permissible under certain, limited circumstances. Among the regulations referring to restricted use remediation are the Remediation Standards for Radioactive Materials definitions, which include definitions for "limited restricted-use remedial action" (a remedial action that relies upon institutional controls but not engineering controls) and "restricted use remedial action" (a remedial action that relies upon both engineering controls and institutional controls to meet the established health risk or environmental standards). N.J. Admin. Code § 7:28-12.3 (2011). In addition, another regulation provides the relevant radiation dose standards and dictates that all sites, whether remediated under an unrestricted use, limited restricted-use, or restricted use remedial action, must be remediated such that the applicable dose is less than 15 mrem per year. N.J. Admin. Code § 7:28-12.8 (2011).

However, the New Jersey regulations do not allow for the *termination* of a license if restricted-use conditions are satisfied. While New Jersey may allow a site to be remediated to a restricted-use status, the licensee retains responsibility for the site under a "remedial action permit" issued by the State, and must continue to take such remedial actions as are necessary to comply with the remedial action permit terms. *See* N.J. Admin. Code § 7:26C-7 (2011). A remedial action permit can be terminated only if the permittee demonstrates in writing that engineering or institutional controls (or the other remedial actions implemented for a site) are no longer required to be protective of public health and safety and the environment. N.J. Admin. Code § 7:26C-7.10(b) (2011). Thus, a remedial action permit would continue in effect, and the licensee would retain responsibility for a site, as long as engineering or institutional controls need to be maintained.

Termination of a materials license in New Jersey is governed by N.J. Admin. Code § 7:28-58. That regulation requires that, to obtain license termination, a licensee must provide evidence demonstrating that the site meets the radiation dose standards set forth in N.J. Admin. Code § 7:28-12. *See* N.J. Admin. Code § 7:28-58.1; 10 C.F.R. § 40.42(j)(2) & (k)(3) (2011). In addition, the licensee must provide a disposition certificate attesting to disposal of radioactive

material.[22] This certificate requires that the licensee certify that all radioactive materials have been disposed of in some manner and that a radiation survey has confirmed the absence of licensed radioactive materials at the site. Such a certification could not be made (and thus the license could not be terminated) if radioactive materials were to be capped and remain on-site.

The unavailability of license termination under restricted release conditions is further confirmed by the fact that New Jersey does not allow for long-term control of a remediated site by a government agency. Although N.J. Admin. Code § 7:28-58.1 largely incorporates by reference the NRC's source material regulations at 10 C.F.R. Part 40, it does not incorporate 10 C.F.R. § 40.27, the NRC regulation that provides a license for custody and long-term care of residual radioactive material disposal sites by a federal government agency.[23]

The NRC does not explain how it could find New Jersey's Program compatible with its regulations in the area of facility decommissioning when the Program fails to implement an important aspect of the LTR – terminating a license

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[22] NJRAD Form 314, *available at* http://www.state.nj.us/dep/rpp/rms/forms.htm ("Termination"), JA446-47.

[23] Likewise, the New Jersey Department of Environmental Protection has made clear in its written communications to Shieldalloy that the New Jersey regulations do not allow for issuance of a long-term care and control license. *See* R53 (Shieldalloy's Response to the Commission's January 3, 2011 Order (Feb. 4, 2011)) at 16 n.26, JA715.

under "restricted conditions" pursuant to which radioactive materials are allowed to remain at a site subject to specified controls, including supervision by a government agency. The inconsistency is glaring since the NRC had devoted much effort to developing this particular licensing mechanism as a way to meet the essential objective of the LTR: minimizing public exposures to radiation.

C. New Jersey's Program fails to implement numerous requirements of the NRC regulations

The NRC seeks to justify the numerous departures of New Jersey's Program from the NRC regulations by invoking the LTR's status as a "Compatibility Category C" regulation and finding that, despite those departures, New Jersey's approach "embodies the 'essential objective' of [its] license termination rule." CLI-11-12 at 47, JA47.

The "essential objective" of a regulation or program element is the "action that is to be achieved, modified, or prevented by implementing and following the regulation or program element. In some instances, the essential objective may be a numerical value (e.g., restriction of exposures to a maximum value) or it may be a more general goal (e.g. access control to a restricted area)." NRC Directive 5.9 "Adequacy and Compatibility of Agreement State Programs," (Feb. 1998) at 17 (available at http://pbadupws.nrc.gov/docs/ML0417/ML041770094.pdf). The NRC itself has identified the essential objective of the LTR as "to provide specific

radiological criteria for the decommissioning of lands and structures…to *ensure that decommissioning will be carried out without undue impact on public health and safety and the environment*." CLI-11-12 at 47, JA47 (quoting 62 Fed. Reg. at 39,058; emphasis added).

As discussed earlier, the NRC program for the regulation of radioactive materials calls for an ALARA comparison between restricted and unrestricted release decommissioning options, which New Jersey's Program prohibits. The Program also does not allow for license termination under a restricted release option, which the NRC program permits. In these respects, the Program does not fulfill the essential objective of the LTR, because these failures of the Program increase the likelihood of licensed activities having an undue impact on public health and the environment.

In addition, in its comments on New Jersey's Program, Shieldalloy pointed out other respects in which the facility decommissioning elements of the Program deviate from the provisions of the LTR. As acknowledged by the NRC, those deviations include: "(1) New Jersey's 15 mrem per year dose limit, versus our 25 mrem per year dose limit; (2) New Jersey's calculation of doses to the longer of the time of peak dose or 1000 years, versus our calculation limited to the first 1000 years of decommissioning; (3) New Jersey's failure to allow for potential doses

over 100 mrem per year, versus our allowance of 500 mrem under certain circumstances; and (4) New Jersey's requirement that radioactively contaminated ground and surface water be remediated in accordance with New Jersey water quality requirements, versus our 'all pathways' approach without a separate release standard for water." CLI-11-12 at 46-47, JA46-47 (footnote omitted). Despite acknowledging that "[t]he New Jersey variances cited by Shieldalloy are aspects of the state's regulations that are more stringent than ours on the same technical subject areas," (*id.* at 47), and that New Jersey's Program "is considerably more stringent than ours, (*id.* at 49), the NRC dismisses these differences as permissible given the Category C classification of the LTR. *Id.* at 47, JA47.[24]

Invoking the Category C classification of the LTR, however, is insufficient justification for accepting the Program's "considerably more stringent" approach to

[24] The Court in *Shieldalloy* noted that, while the LTR is part of the NRC's regulatory program, it is not included in the NRC Criteria Document (R1, JA53). *Shieldalloy,* 624 F.3d at 496. The Court found this "odd," given that the Criteria Document otherwise tracks the various subparts of 10 C.F.R. Part 20 quite closely and that the Staff seems to follow the Criteria Document "religiously" in assessing the compatibility of the state and federal programs. *Id.* Although the LTR was issued after the Criteria Document, the Court stated that it was not clear "that a simple temporal distinction would justify deviation from § 2021(d)'s apparent statutory requirement to ensure the compatibility of the state program with the federal." *Id.* at 497. The Court suggested that "the NRC may have an account of the role of the LTR in its regulatory scheme that it had no occasion to present." *Id.* However, in CLI-11-12 the NRC failed to provide an explanation for this anomaly.

license termination. In adopting the LTR, the NRC spent three years developing "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." 62 Fed. Reg. at 39,058, JA66. The rule, as it emerged, took into account the comments of over 100 organizations and individuals representing a wide range of views. *Id.* at 39,059, JA67. In fact, each aspect of New Jersey's Program that is at odds with the LTR was suggested to the NRC in comments on the proposed LTR and, after being analyzed in depth, was explicitly rejected by the NRC.

Because of these differences, the facility decommissioning elements of New Jersey's Program are not only "considerably more stringent," but in fact inconsistent and incompatible with those in the NRC regulations.

V. THE NRC ERRED IN REINSTATING THE TRANSFER OF AUTHORITY OVER THE FACILITY BECAUSE NEW JERSEY'S PROGRAM FAILS TO ASSURE THE FAIR AND IMPARTIAL ADMINISTRATION OF REGULATORY LAW

Compatibility Criterion 23 states in relevant part:

> 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.

46 Fed. Reg. at 7,543, JA56. It is uncontested that, in the area of facility license termination, the regulations that implement New Jersey's Program apply only to

the Facility. Indeed, numerous aspects of the New Jersey regulations apply only to the Facility, including among others: (a) the refusal to apply the ALARA standard; (b) the refusal to allow the use of restricted release criteria for license termination; (c) the requirement of peak dose computation beyond 1,000 years; (d) the requirement to calculate potential doses using only specific exposure scenarios and input parameters; and (e) the failure to allow credit for the rate of degradation of engineering controls over time. Their combined effect is to preclude any possibility that the Facility could be decommissioned in accordance with standards similar to those in Subpart E of 10 C.F.R. Part 20.

The NRC, however, does not "see anything unfair or unlawful in state regulations that may apply to just one licensee in a state at any given time." CLI-11-12 at 48, JA48. Of course, what is involved here is not just a happenstance. There is only one site in New Jersey to which these provisions will ever apply: the Facility. There are no other "legacy sites" in New Jersey containing source materials to which these regulations would apply at some future time. It is also extremely improbable, if not impossible, that a new facility where source materials are used will in the future be licensed under New Jersey's radiation control rules. New Jersey acknowledges as much in its Agreement State application: "Presently, New Jersey has only one Source Material licensee that is undergoing decommissioning and does not expect any applications for new source material

licenses." R23 (NJ Agreement Application), Section 4.3.1 at 2, JA444. Seen in that light, the unique nature of the target of these regulations should have caused the NRC to focus on their fairness and their potential inconsistency with Criterion 23.

The NRC claims that "New Jersey's program incorporates all of the regulatory components specified in Criterion 23," including that it set rules of general applicability. CLI-11-12 at 48, JA48. A review of the NJDEP regulations, however, reveals that they were not formulated to be "rules of general applicability." Instead, they were developed as special provisions targeted at the Facility, intended to force the removal of the Materials stored there. Again, the NRC finds nothing wrong with this. It does not "view a state's regulations as inherently unfair because they may be designed to effectuate a state-desired regulatory outcome." *Id.* The outcome-oriented nature of the regulations, however, should have triggered increased scrutiny by the NRC to verify that the Program will be administered fairly and impartially. This is particularly the case where the proposed program applies only to one licensee and is considerably more stringent than the NRC's own standards.

Criterion 23 requires that New Jersey's Program "assur[e] the fair and impartial administration of regulatory law." 46 Fed. Reg. at 7,543, JA56. In

making a determination that would seal the fate of the Facility, the NRC had the duty to ensure that the Program incorporated the requisite fairness. *See Hannah v. Larche*, 363 U.S. 420, 442 (1960) ("[W]hen governmental agencies adjudicate or make binding determinations which directly affect legal rights of individuals, it is imperative that those agencies use procedures which have traditionally been associated with judicial process."); *see also Amos Treat & Co. v. SEC*, 306 F.2d 260, 264 (D.C. Cir. 1962) (noting that "with respect to agency adjudicatory proceedings, due process might be said to mean at least 'fair play'"). Instead of demonstrating "fairness and impartiality" in developing "rules of general applicability" to implement its proposed Program, New Jersey stacked the deck against Shieldalloy in a manner that departs from notions of fair play and substantial justice.

Thus, the NRC action in turning a blind eye to the provisions in New Jersey's Program aimed at the Facility was arbitrary and capricious.

VI. THE COMBINED EFFECT OF ALL OF THE DEPARTURES OF THE NEW JERSEY PROGRAM FROM THE NRC'S REGULATORY SCHEME RENDERS THE NRC'S REINSTATEMENT OF THE TRANSFER OF AUTHORITY OVER THE FACILITY ARBITRARY AND CAPRICIOUS

Each of the instances of incompatibility between New Jersey's Program and the NRC regulations is sufficient in itself to invalidate the NRC's transfer of regulatory authority over the Facility to New Jersey. In addition, it is well settled

that in reviewing agency action under the "arbitrary or capricious" standard, a court will consider the record as a whole. *See*, *e.g.*, *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008); *Carpenters & Millwrights Local Union 2471 v. NLRB*, 481 F.3d 804, 808-09 (D.C. Cir. 2007). Examining the totality of the NRC actions in disregard of this Court's directive in *Shieldalloy*, its own regulations, its Compatibility Criteria, and the requirements of the AEA compels the conclusion that the NRC acted in an arbitrary and capricious manner when it reinstated its transfer of authority over the Facility to New Jersey instead of retaining jurisdiction over it.

The arbitrary and capricious actions of the NRC, individually and taken together, warrant that the Court invalidate the NRC's reinstatement of the transfer of authority. Consequently, the matter should be again remanded to the NRC with instructions that the agency rescind the transfer and reinstate its authority over the Facility.[25]

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[25] The NRC posits that, despite its reinstatement of regulatory authority over the Facility to New Jersey, Shieldalloy is not without recourse. "If a regulated entity believes that a state's program, as implemented, is unlawful or contrary to public health and safety, it may raise its agreement-state performance concerns with us. NRC will address agreement-state performance concerns through our Integrated Materials Performance Evaluation Program (IMPEP) process or through an independent agreement-state performance concern evaluation, depending on the performance concern raised. We retain power under AEA section 274j., to revoke

CONCLUSION

In *Shieldalloy*, this Court agreed with Shieldalloy's two central challenges to the NRC's original transfer of regulatory authority to New Jersey: (1) that "New Jersey's program is incompatible with the federal scheme" and (2) that "the transfer of authority was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Shieldalloy*, 624 F.3d at 491 (quotation and citation omitted). In CLI-11-12, the NRC ignored both findings, failed to adequately explain the applicability of Criterion 25, and persisted in trying to justify its prior erroneous actions.

The NRC's recalcitrance warrants that the Court again remand the case with instructions that the agency rescind its transfer of regulatory authority over the Facility to New Jersey and reinstate its authority over it.

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agreements with states and to restore NRC regulatory authority." CLI-11-12 at 49, JA49 (footnotes omitted). However, Shieldalloy has already raised its objections to the transfer of authority – before the original transfer took place in 2009, in a motion to the NRC for a stay of the transfer pending judicial review, again before this Court leading to the *Shieldalloy* decision, and one more time in submittals to the NRC after the case was remanded to the agency. Each time, the NRC rejected Shieldalloy's objections and concerns. The NRC has been on notice that, once given regulatory authority over the Facility, New Jersey will force the removal of the Materials from the Facility. Thus, the post-transfer actions that the NRC suggests Shieldalloy take would be an exercise in futility. Pursuing an administrative remedy is futile where an "agency has articulated a very clear position on the issue which it has demonstrated it would be unwilling to reconsider." *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 105 (D.C. Cir. 1986); *see also James v. HHS*, 824 F.2d 1132, 1139 (D.C. Cir. 1987).

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

Respectfully submitted,

/S/ Matias F. Travieso-Diaz
Jay E. Silberg
Matias F. Travieso-Diaz
Alison M. Crane
Stephen L. Markus

PILLSBURY WINTHROP
SHAW PITTMAN LLP
2300 N Street, NW
Washington, DC 20037
(202) 663-8000
Counsel for Shieldalloy Metallurgical Corporation
E-mail: matias.travieso-diaz@pillsburylaw.com

Dated: July 26, 2012

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 "Brief of Petitioner Shieldalloy Metallurgical Corporation" complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B)(i) in that it contains, exclusive of the certificate as to parties, rulings and related cases; corporate disclosure statement; table of contents; table of authorities; glossary; statement with respect to oral argument; the addendum containing statutes, rules or regulations; and the certificates of counsel, 13,963 words of proportionally spaced, 14 point Times New Roman font text.

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

Respectfully submitted,

/S/ Matias F. Travieso-Diaz
Jay E. Silberg
Matias F. Travieso-Diaz
Alison M. Crane
Stephen L. Markus

PILLSBURY WINTHROP
SHAW PITTMAN LLP
2300 N Street, NW
Washington, DC 20037
(202) 663-8000
Counsel for Shieldalloy Metallurgical Corporation
E-mail: matias.travieso-diaz@pillsburylaw.com

Dated: July 26, 2012

CERTIFICATE OF SERVICE

I hereby certify, in accordance with Circuit Rule 31, that the electronic original and five paper copies of the foregoing Brief of Petitioner Shieldalloy Metallurgical Corporation (the "Brief") were filed with the Clerk of the Court this 26th day of July 2012. In addition, on this 26th day of July 2012, paper copies of the Brief were served on the following participants in the case by United States first class mail, postage prepaid:

John Cordes, Jr., Solicitor
Grace H. Kim, Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike,
Rockville, MD 20852

Lane N. McFadden
U.S. Dept. of Justice - Environment & Natural Resources Div.,
Appellate Section
PO Box 23795, L'Enfant Station
Washington, DC 20026

Paula T. Dow, Esq.
Attorney General of New Jersey
Andrew D. Reese, Esq.
Deputy Attorney General
New Jersey Office of the Attorney General
25 Market Street
P.O. Box 093
Trenton, NJ 08625-0093

/S/ Matias F. Travieso-Diaz
Matias F. Travieso-Diaz
e-mail: matias.travieso-diaz@pillsburylaw.com