UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 06-540, 07-1559 and 07-1756

STATE OF NEW JERSEY,
Petitioner,

v.

U.S. NUCLEAR REGULATORY COMMISSION and
the UNITED STATES OF AMERICA,
Respondents.

On Petition For Review of Issuance of NUREG-1757 and
a Related Order by the U.S. Nuclear Regulatory Commission

BRIEF FOR THE FEDERAL RESPONDENTS

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STATEMENT OF RELATED CASES

The Federal Respondents are aware of two related cases within the meaning of Third Circuit Rule 28.1(a)(2).

First, the issues in this lawsuit have been raised in an administrative proceeding currently pending before the Nuclear Regulatory Commission. *See In re Shieldalloy Metallurgical Corporation*, (Licensing Amendment Request for Decommissioning of the Newfield, New Jersey Facility); Docket No. 40-7102-MLA (ASLBP No. 07-852-01-MLA-BD01).

Second, the issues in this lawsuit are also raised in a petition for rulemaking currently pending before the Nuclear Regulatory Commission.

GLOSSARY OF TERMS AND ACRONYMS

LTR -- License Termination Rule

POL -- Possession Only License

POL/LTC -- Possession Only License for Long Term Control

ALARA -- As Low As is Reasonably Achievable

DP -- Decommissioning Plan

EIS -- Environmental Impact Statement

GEIS -- Generic Environmental Impact Statement

JURISDICTION

This consolidated case consists of three petitions for review: Nos. 06-5140, 07-1559, and 07-1756. If this Court has jurisdiction over the petitions for review in this case, it lies under the Administrative Orders Review Act, 28 U.S.C. § 2341, *et seq.*, commonly known as the Hobbs Act. The Hobbs Act gives this Court jurisdiction over "*final orders* of the [Nuclear Regulatory] Commission" in licensing or rulemaking proceedings. 28 U.S.C. § 2342(4) (emphasis added). *See Florida Power & Light v. Lorion*, 470 U.S. 729 (1985). The Nuclear Regulatory Commission ("NRC") is an independent regulatory agency that regulates the civilian use of radioactive materials and protects the public health and safety under its authorizing statutes – the Atomic Energy Act ("AEA") of 1954, 42 U.S.C. § 2201, *et seq.*, and the Energy Reorganization Act ("ERA") of 1974, 42 U.S.C. § 5801, *et seq.*

As our already-filed Motion to Dismiss (January 30, 2007), and our Reply Memorandum (March 14, 2007) show, and as we reiterate below, *see* Argument I, *infra*, this Court lacks jurisdiction; in the alternative, this Court should withhold review under prudential considerations. Assuming *arguendo* that this Court has jurisdiction, the petitions for review were timely filed, *see* 28 U.S.C. § 2344, and venue is proper in this Court. *See* 28 U.S.C. § 2343.

ISSUES PRESENTED

1. Whether NUREG-1757, as a non-binding NRC guidance document, constitutes a "final order" within the meaning of the Hobbs Act, causes "injury-in-fact" sufficient for standing, or is ripe for judicial review, when it has not yet been applied and is still under challenge in an ongoing NRC adjudicatory process.

2. Whether this Court has jurisdiction over a decision not to hold a hearing on issuance of a non-binding guidance document; and if so, whether issuance of that document is an action that requires a hearing under the Atomic Energy Act.

3. Whether a non-binding agency guidance document that does not amend any rule or regulation of the NRC and is compatible with existing rules and regulations violates the Atomic Energy Act.

STATEMENT OF THE CASE

I. Nature of the Case.

New Jersey's petitions for review challenge NRC's revised version of "NUREG-1757: Consolidated Decommissioning Guidance." Two of the three petitions for review, Nos. 06-5140 (A1)[1] and 07-1559 (A7), directly challenge the NUREG's revisions. The third petition, No. 07-1756 (A21), challenges a Commission decision not to hold a formal hearing under Section 189a of the AEA,

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[1] "A" refers to the Joint Appendix.

42 U.S.C. § 2239(a), on New Jersey's request that NRC rescind the revised NUREG.

NUREG-1757 provides guidance on how NRC licensees may satisfy certain decommissioning requirements in NRC regulations; thus, licensees may incorporate that guidance when they submit license amendments proposing plans to decommission their facilities. But before it may approve a proposed decommissioning plan ("DP"), NRC must offer a hearing opportunity to persons affected by the plan. Those persons may challenge the proposed plan – and the guidance on which it is based – before NRC's Atomic Safety and Licensing Board Panel ("Licensing Board"), the agency's administrative tribunal. They may appeal any adverse decision to the Commission itself and challenge any Commission final order in Federal Court.

The Shieldalloy Metallurgical Corporation ("Shieldalloy") operated a facility in Newfield, New Jersey, where it manufactured speciality steel and alloy products and additives using ores that contained uranium and thorium. Shieldalloy has now ceased operations and has submitted a DP that proposes actions incorporating guidance in revised NUREG-1757. NRC's Licensing Board has convened an administrative hearing on Shieldalloy's request for a license amendment to approve the DP and has admitted New Jersey as a full party to the

proceeding. In that administrative proceeding, New Jersey has challenged, *inter alia*, the validity of the NUREG guidance. The Board also invited Gloucester County to participate as an interested governmental entity. The NRC proceeding is currently ongoing.

In this lawsuit, New Jersey again challenges NUREG-1757 and its applicability to the Shieldalloy site. At the outset of the case, we sought its dismissal as premature and outside this Court's jurisdiction. A motions panel of this Court referred our motion to the merits panel. Subsequently, this Court permitted Shieldalloy and Gloucester County to intervene in this case.

II. Statutory and Regulatory Background.

Administrative hearings on NRC actions are governed by Section 189a(1)(A) of the AEA, 42 U.S.C. § 2239(a)(1)(A). Section 189a provides interested members of the public an opportunity for a hearing in licensing and rulemaking proceedings. NRC Licensing Boards preside at licensing hearings and the Commission hears appeals of Board decisions. *See generally*, 10 C.F.R. Part 2 ("Rules of Practice"). Section 189b of the AEA, 42 U.S.C. § 2239(b), provides for judicial review of "final orders" in licensing proceedings.

This case involves questions about the criteria contained in the NRC's License Termination Rule, found at 10 C.F.R. § 20.1401, *et seq*. That rule sets out

standards and procedures for decontaminating and decommissioning facilities that are no longer operating.

The Addendum to this brief reproduces pertinent statutes and regulations.

III. Factual Background.

A. License Termination Rule.

Generally, NRC issues a license for use at a specified location for a specified term of years. The licensee can seek to amend the license for additional activities or extend the life of the license. NRC generally issues materials licenses (such as Shieldalloy's license) for 5-year periods and can renew them an indefinite number of times. A license also contains terms and conditions specifying how the license is to be used and a licensee may only use the license in accordance with the terms and conditions in it. NRC may, in response to new events or the discovery of new information, impose additional "conditions" or limitations on the license. New conditions are added as "amendments" to the license and the NRC must offer the public an hearing opportunity when amending the license. *See* AEA, § 189a, 42 U.S.C. § 2239(a).

When a materials licensee (such as Shieldalloy) advises the NRC that it has ceased operations under the license, the agency generally issues a license condition limiting the license to "possession only," with the resulting amended

license generally known as a "possession only license" or "POL." *See Shieldalloy Metallurgical Corporation*, LBP-07-05, 65 NRC 341, 343-44 (2007) ("LBP-07-05"). A POL usually allows limited decommissioning activities, but only to the extent that those activities will not foreclose any future decommissioning options for the licensed facility. The licensee then submits a DP describing how it proposes to remediate the facility and comply with the applicable requirements for license termination. NRC Staff reviews the plan, giving the public a chance to comment. Because the license is being amended, NRC offers the opportunity for an administrative hearing on its adoption. If the DP is approved, the license is amended to incorporate the approved DP by reference. The licensee then implements the approved DP. *See generally* NUREG-1757, Volume 1, Rev. 2, at Chapters 4, 5 and 6.[2]

Normally, a licensee will ask the NRC to terminate the license when it has completed actions in the approved DP and satisfactorily demonstrated compliance with it. The NRC established requirements for that process in the License Termination Rule ("LTR"), found in 10 C.F.R. § 20.1401, *et seq*. *See* 62 Fed.

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[2]Petitioner filed a complete copy of NUREG-1757 with this Court. *See* Petitioner's Brief at 1, n.1. This brief will provide only Appendix cites for those portions of NUREG-1757 included in Joint Appendix and will provide full citations for portions not included.

Reg. 39,058 (July 21, 1997). Many licensees seek termination for "unrestricted use," meaning that the site can be released for general use by the public without restrictions. *See* 10 C.F.R. § 20.1402. However, the regulations also provide for "termination under restricted conditions," meaning that controls remain in place to restrict use of the site. *See* 10 C.F.R. § 20.1403. The controls vary depending on the type of materials left at the site and specific site characteristics.

When seeking license termination with restricted conditions, the licensee must, *inter alia*, (1) reduce the radiation dose of the materials left on the site to a level "as low as is reasonably achievable" ("ALARA"), 10 C.F.R. § 20.1403(a); (2) provide institutional controls that will protect the public by restricting future land use, 10 C.F.R. § 20.1403(b); (3) provide "sufficient financial assurance to enable an independent third party" to ensure that the site is maintained if the licensee ceases to exist or goes bankrupt, 10 C.F.R. § 20.1403(c); and (4) reduce the dose levels to the public at the site. 10 C.F.R. §§ 20.1403(a) and (e).

The preamble for the final LTR rule states that for sites pursuing restricted release that have long-lived nuclides posing a hazard beyond a 100-year period,

> More stringent institutional controls will be required . . . such as legally enforceable deed restrictions and/or controls backed up by State and local government control or ownership, engineered barriers, and Federal ownership, as appropriate.

62 Fed. Reg. at 39,070. This statement is not included in the regulations and thus is not a requirement. But NRC has included it in the agency's guidance for implementing the LTR to recognize that some form of government control or even ownership might be appropriate in cases of restricted release for sites with long-lived nuclides. The guidance has consistently suggested "control *or* ownership" by a government entity, not "control *and* ownership." *Compare* NUREG-1727, A357, with NUREG-1757, A282.

B. Issuance of NUREG-1757.

The LTR does not provide rigid, specific requirements for license termination; instead, it provides dose criteria and general requirements only. Agency guidance documents, such as NUREG-1757, provide more detailed information and acceptable methods for licensees to demonstrate compliance. Licensees are not required to follow the guidance to gain approval for a proposed action. Furthermore, guidance documents are not binding in the agency's administrative hearing process. They lack the force of law and specifically disclaim any binding effect. *See* A66, A73. NRC's Licensing Board is free to reject application of the guidance in a particular case and the Commission, likewise, is not bound by it when reviewing a Licensing Board decision. *See, e.g.*,

International Uranium Corp., CLI-00-1, 51 NRC 9, 19-20 (2000) (declining to follow Staff guidance document and directing Staff to revise the document).

NRC published guidance on possible methods of compliance with LTR in 2000. *See* NUREG-1727, A338. In 2001, NRC announced that it would prepare consolidated decommissioning guidance, including revised guidance on LTR compliance, *see* 66 Fed. Reg. 21,793 (May 1, 2001), and later issued draft Volume 1 of NUREG-1757 (primarily applicable to NRC materials licensees) for public comment. 67 Fed. Reg. 4,764 (Jan. 31, 2002). NRC issued Volume 1 in final form in 2002, while the drafts of Volumes 2 (generally applicable to all NRC licensees) and 3 were being prepared. *See* 67 Fed. Reg. 60,706 (Sept. 26, 2002). NRC then revised Volume 1 and issued Volumes 2 and 3 in final form, together with the revised Volume 1. *See* 68 Fed. Reg. 54,503 (Sept. 17, 2003).

C. Revision of NUREG-1757.

Initial efforts to implement the regulations and guidance for restricted release proved difficult for both NRC and licensees. States and other government entities generally have not been receptive to taking responsibility for institutional controls or undertaking independent third party responsibilities. In addition, NRC was not able to reach an agreement with the Department of Energy to provide federal ownership or control of the sites. A467-69. Thus, in June, 2002, shortly

before publication of NUREG-1757, Volume 1, the Commission directed NRC Staff to undertake a comprehensive review of the restricted release criteria and other LTR implementation issues. *See* A483. The Commission also directed the Staff to consider ways to involve the NRC as a durable entity to monitor compliance with a deed restriction or to allow a license to remain in force indefinitely. *Id.*

The Staff prepared a full analysis of restricted release and institutional control issues and other LTR implementation issues and recommended new options. A482-527. The analysis and recommendations were based on a thorough review of information about institutional controls from other Federal agencies, States, and the National Academy of Sciences. One of the recommendations was the use of a "possession-only" amendment to the existing license for "long term control" ("POL/LTC"). A514-16, 519. Under this option, NRC would view the license as an "institutional control, similar to EPA's orders or permits, that provide the necessary restrictions on access or future land use. NRC would monitor, inspect, and enforce under the license authority." A515. NRC would act as the "independent third party" to activate the trust fund if the licensee went "bankrupt or out of business." *Id.*

The Commission approved the recommendations to move forward on the LTR implementation issues, including the POL/LTC, and the use of guidance on the approved options. A907. However, the Commission also directed the Staff to seek public comment on the draft guidance for the restricted release/institutional control issue and the POL/LTC. *Id.* The Staff summarized this process in a 2004 Regulatory Issue Summary, RIS-2004-08, A810, which informed all licensees and other stakeholders of the issues, the Staff analysis, and opportunities to provide feedback. In 2005, NRC held a workshop with over 200 attendees to obtain early public input on these issues. In addition, NRC invited all states to participate in the review process. Neither New Jersey nor Gloucester County attended the workshop nor participated in the review process.

Instead of including the new guidance in the initial version of NUREG-1757 then under development (thereby delaying issuance of that document), NRC used this separate process to develop the revised version at issue in this case. In September, 2005, NRC published the results of the separate guidance development process for public comment as "Draft Supplement 1" to NUREG-1757. This draft included the concept of a POL/LTC. NRC posted the draft on its public website and announced that the draft was available for public comment. *See* 70 Fed. Reg.

56,940 (Sept. 29, 2005). New Jersey submitted comments, A432-40; Gloucester County did not.

After analyzing the comments, the Staff advised the Commission of major comments (A909-13) and the Commission approved the Staff's recommendation to issue a POL/LTC by amendment instead of terminating the operating license and issuing a new license. A914. The Staff then prepared the final revisions of Volumes 1 and 2 of NUREG-1757, *i.e.*, Volume 1, Rev. 2 and Volume 2, Rev. 1. Those volumes were published in late September/early October of 2006 and bear a publication date of "September 2006." A67. NRC posted the revised versions of the NUREG on the agency's website on or about October 27, 2006, and notified New Jersey of the availability of the NUREG. NRC formally announced the availability of the revised NUREG on December 28, 2006, *see* 71 Fed. Reg. 78,234 (Dec. 28, 2006), when it had completed responses to the public comments on the draft revisions. *See* Responses to Stakeholder Comments, A829.

D. Guidance in Revised NUREG-1757.

The revised NUREG added two NRC institutional control options for a licensee to consider for decommissioning under restricted conditions. The two options, described below, are (1) a POL/LTC, and (2) an NRC Legal Agreement and Restrictive Covenant ("LA/RC"). *See generally* A227-51. *See also* A284-92

(POL/LTC); A292-97 (LA/RC). The addition of the POL/LTC and LA/RC options as "institutional controls" and NRC's willingness to act as the "independent third party" are the major changes from previous decommissioning guidance.

These options would be available only for sites seeking decommissioning under restricted conditions, but which are unable to establish satisfactory institutional controls or unable to find an independent third party to ensure the controls and maintenance at the site. A229, A286-87. The options would provide acceptable institutional controls because the NRC, as a Federal government entity, would enforce the controls and act as the independent third party. NRC intends these options to be used as a "last resort." A227.

Under the LA/RC option, after the licensee satisfies the other LTR requirements, the licensee and NRC would enter into a legal agreement on the restrictions and controls needed for license termination under restricted conditions. The agreement would include a restrictive covenant that would contain restrictions on site use and any maintenance, monitoring, and reporting. The licensee would have to record the covenant with the appropriate legal office before the license was terminated and the site released for restricted use. Because the legality of the LA/RC would depend on the laws of the local jurisdiction, the licensee would

have to demonstrate that the LA/RC would be legally enforceable before NRC would approve it. A227. NRC would then terminate the license.

Under the POL/LTC option, the NRC would *not* terminate the license. A286. Instead, if the licensee demonstrates in the DP that it will satisfy the other LTR criteria, *e.g.*, dose criteria, advice from affected parties, and sufficient financial assurance, at the time of DP approval, the NRC would amend the existing license to "possession only" with specific conditions for decommissioning as well as restrictions for "long term control." After the licensee completes decommissioning activities and satisfies the LTR requirements, NRC would again amend the license to remove the completed decommissioning conditions but retain or update the LTC conditions for restrictions, monitoring and maintenance. A286.

The amended license would specify requirements for: restricted site access and land use; permitted site access and land use; physical controls such as fences and signs; surveillance; groundwater monitoring if needed; corrective actions; maintenance; reporting; and records retention and availability. A292. NRC would monitor, inspect, and enforce under its licensing authority. A285. The POL/LTC would act as an "institutional control" to maintain the land use restrictions on the site that are necessary to comply with the LTR dose criteria to satisfy 10 C.F.R. § 20.1403(b). A286. NRC would act as the independent third party in accordance

with 10 C.F.R. § 20.1403(c) to ensure control and maintenance of the site if the licensee becomes unavailable. A290, A300.

E. The Shieldalloy Site.

Shieldalloy has operated the Newfield facility since approximately 1951. Shieldalloy holds NRC License No. SMB-743, issued in 1963, which authorizes it to ship, receive, possess, use and store "source material" as defined by the AEA for use at the Newfield facility. During operation of the Newfield facility, Shieldalloy manufactured specialty steel and alloy products and additives, which resulted in an accumulation of radioactive slag and baghouse dust, currently stored at the Newfield site. *See* LBP-07-05, 65 NRC at 343-44.

In 2001, Shieldalloy notified NRC that it had ceased production activities and planned to decommission the facility. A458. In 2002, NRC amended the Shieldalloy license to limit authorized activities to "possession only" and to decommissioning activities previously authorized under the original license. A789-90. Shieldalloy submitted a DP, which NRC rejected. A375-83. In 2003, Shieldalloy informally proposed that NRC issue a "possession only" license for temporary storage, *i.e.*, without decommissioning the site to LTR criteria as envisioned by the POL/LTC option then under discussion by the NRC Staff. NRC Staff advised Shieldalloy that this proposal was unacceptable. A390-91.

In 2005, Shieldalloy submitted another DP proposing a POL/LTC based on the September, 2005 Draft of revised NUREG-1757. NRC rejected that plan because it lacked sufficient information. A461-65. In 2006, Shieldalloy submitted a revised DP, which responded to NRC's comments on its prior submission. A539.

After reviewing the revised plan, NRC Staff accepted the plan for docketing and issued a Notice of Opportunity for a Hearing on the requested license amendment.[3] *See* 71 Fed. Reg. 66,986 (Nov. 17, 2006). Under that notice, any person "whose interest may be affected" could request to intervene in the proceeding and to participate as a party. *Id.* NRC received seven petitions to intervene in the proceeding, including petitions from New Jersey, which filed this lawsuit, and Gloucester County, which intervened in this lawsuit.

NRC's Licensing Board reviewed those petitions and granted formal intervention to New Jersey. *See* LBP-07-05, 65 NRC at 353-59 (2007). The Board specifically admitted for an NRC hearing a contention challenging the DP's "dose modeling" assumptions and deferred ruling on New Jersey's other contentions, including its facial and as-applied challenges to NUREG-1757,

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[3]Acceptance of a proposed amendment for docketing is not approval. It simply means that the proposed amendment addresses the appropriate factors and can be evaluated in detail by NRC Staff. *See* NUREG-1757, Volume 1, at 5-9.

pending completion of NRC Staff's review of the DP and its completion of the Safety Evaluation Report and the Environmental Impact Statement. *Id.* at 359-61. The Board found that, based on prior experience, the "DP might undergo significant revision," *id.* at 360, which could require New Jersey "to withdraw, to amend, or to supplement" its contentions. *Id.* at 361.

The Board denied Gloucester County's petition to intervene as a party, finding its contentions inadmissible. *Id.* at 346-49. Specifically, the Board found the County's contention that approval of the plan would have a serious negative economic impact on the County's residents, including a loss of property values, inadmissible because it did not identify a portion of the proposed plan that was deficient. *Id.* at 346-47. Gloucester County did not appeal the Board's decision to the Commission.

However, the Board invited the County to participate in the hearing as a governmental entity under 10 C.F.R. § 2.315(c). *Id.* at 363. That provision gives governmental entities significant participation rights, including the right to introduce evidence and appeal Board decisions to the Commission, even if not admitted as a formal party. The County has not yet accepted the invitation.

F. Retraction of Portions of NUREG-1757.

While reviewing Shieldalloy's proposed DP, NRC Staff became aware that portions of the revised guidance were incorrect. The Staff has now issued public notice retracting portions of the guidance. 72 Fed. Reg. 46,102 (Aug. 16, 2007). The Staff corrected a printing error and retracted portions of guidance in NUREG-1757, Volume 2, Appendix N. *Id.* The retracted guidance deals with the discount rate, which is challenged by New Jersey in this lawsuit.

G. Commission Order of January 12, 2007.

When it filed No. 06-5140 in this Court, New Jersey also filed a Hearing Request with the Commission. The State asked NRC to hold a formal hearing to rescind portions of the revisions. New Jersey also filed a separate petition for rulemaking under 10 C.F.R. 2.802(a), asking the Commission to rescind the revised NUREG. Finally, New Jersey asked the Commission to stay the administrative hearing on Shieldalloy's proposed DP pending disposition of the petition for rulemaking. *See* 10 C.F.R. 2.802(d).

The Commission denied the request for a hearing and the request for a stay in an Order dated January 12, 2007, A327-29, and referred the Rulemaking Petition to NRC Staff for action in accordance with the NRC's normal practices. A327. NRC Staff responded to the Petition on June 22, 2007, advising New

Jersey that the petition was deficient and inviting the State to submit additional information. *See* 10 C.F.R. § 2.802(f).

With regard to the request for a hearing, the Commission first noted that NUREG-1757 was a guidance document and not binding on NRC licensees.

> NUREG-1757 does not establish "binding" agency requirements; instead, it simply provides guidance on how a licensee may comply with various provisions of the Commission's decommissioning regulations. *See* NUREG-1757, Vol. 1, Rev.2, xvii. No NRC licensee is required to comply with NUREG-1757.

A327-28. Second, the Commission pointed out that New Jersey had received notice of the revised NUREG, had submitted comments on the proposed revisions, and NRC had responded to those comments. A328.

The Commission further held that New Jersey could challenge the application of NUREG-1757 to the proposed Shieldalloy decommissioning plan in any hearing held to consider whether to grant a license amendment allowing Shieldalloy to implement the decommissioning plan.

> [I]f a person successfully petitions to intervene in the proceeding to review [Shieldalloy's] proposed decommissioning plan, that person may contest [Shieldalloy's] attempt to rely on the disputed portions of NUREG-1757 in that proceeding.

A328. Accordingly, the Commission denied the request for a hearing.

Finally, the Commission denied New Jersey's request for a stay of the administrative proceeding. The Commission noted that, under its regulations, a petitioner could only request a stay pending disposition of a rulemaking "of a proceeding to which the petitioner is a *party* . . .." A328 (emphasis in original). *See* 10 C.F.R. § 802(d). At that time, New Jersey had not been admitted as a party to the proceeding and was ineligible invoke this provision. A328-29.

SUMMARY OF ARGUMENT

A. This Court lacks jurisdiction over New Jersey's Petitions to review the revised NUREG. The Hobbs Act, 28 U.S.C. § 2341, *et seq.*, gives this Court jurisdiction over "final orders" issued by the Commission in licensing or rulemaking proceedings. But revised NUREG-1757 is not "final" and is not an "order" issued in a licensing or a rulemaking proceeding.

1. To be "final," an agency action must mark the "consummation" of a decision-making process; it must not be "tentative or interlocutory." It must also determine legal "rights and obligations." NUREG-1757 does not determine any "rights and obligations," and does not consummate any process. No licensee is required to follow it, and anyone who does, must obtain a license amendment – which allows interested persons a hearing opportunity on the guidance and its application. New Jersey is in fact challenging NUREG-1757 in an ongoing NRC

hearing on the Shieldalloy decommissioning. Furthermore, NUREG-1757 is "tentative or interlocutory" because NRC Staff is free to modify it at any time and, in fact, has already retracted part of the revised guidance as incorrect. Thus, the NUREG is not a "final" agency action.

The Hobbs Act gives this Court jurisdiction over NRC orders in licensing or rulemaking proceedings. New Jersey alleges that the NUREG "has the effect of a binding rule." But New Jersey never explains what that "effect" is and even concedes that the NUREG is not a "binding norm." The NUREG does not change any NRC regulations. Under factors established by this Court, the NUREG is non-binding agency guidance, not a substantive rule, and thus outside Hobbs Act jurisdiction.

2. Moreover, the NUREG does not require New Jersey (or any other person) to do anything and does not harm New Jersey. It is simply *guidance* whose validity and proper application remain to be tested. Thus, New Jersey has suffered no "injury in fact" from the NUREG and lacks standing to challenge it.

3. New Jersey's real challenge is to Shieldalloy's request for a license amendment incorporating the revised NUREG's guidance. But that challenge is premature. Under factors established by this Court, New Jersey's claims are unripe because they are not yet "fit for review," and because postponing review

would cause no "undue burden" on New Jersey. The burden of ongoing agency litigation is not a judicially cognizable burden.

4. New Jersey has also not exhausted its administrative remedies. New Jersey has been admitted into the NRC proceeding reviewing Shieldalloy's request for a license amendment incorporating guidance in the revised NUREG. In that proceeding New Jersey has filed a claim challenging whether the revised NUREG's guidance complies with the NRC's organic statutes and formal regulations. If granted, that claim would moot this entire case; thus, this Court should require New Jersey to complete that litigation. This Court would then have a complete NRC decision to review.

B. This Court also lacks jurisdiction over the petition for review challenging the Commission's denial of New Jersey's request for a hearing on the NUREG. As noted above, this Court has jurisdiction over Commission orders in licensing or rulemaking proceedings. But the NUREG was not issued in a rulemaking proceeding and is outside the grant of jurisdiction in the Hobbs Act. Moreover, "hearings" on rulemakings are held by notice and comment. Assuming *arguendo* the NUREG is a "rule," New Jersey had the hearing to which it was entitled because it had notice of the revised guidance and filed comments on it.

C. This Court ought not reach the merits of New Jersey's NUREG challenge, but if it does, it should reject New Jersey's arguments. New Jersey has failed to demonstrate that, on the current record, the NUREG is illegal or "arbitrary or capricious."

1. Contrary to New Jersey's claims, NRC does not need to conduct a rulemaking to amend a license in accord with the NUREG's guidance. A POL/LTC is not a "new license;" instead, it is the same license with additional restrictions on its use. NRC's organic statutes allow the agency to amend a license to reflect new conditions without formal rulemaking. Furthermore, contrary to New Jersey's claim, the POL/LTC option is consistent with the LTR's criteria. NRC has never suggested that government "ownership *and* control" is necessary for an approved "institutional control" under the LTR. Instead, NRC has stated that government "control *or* ownership" is sometimes appropriate. Finally, New Jersey is wrong in claiming NRC "insulated itself" from the public when adopting the revised NUREG. NRC appropriately involved the public, including New Jersey, during the revision process.

2. The NUREG is not substantively arbitrary or capricious. First, contrary to New Jersey's claim, NRC did not have an improper relationship with Shieldalloy when issuing the document. NRC recognized that a class of licensees

was experiencing a problem implementing the LTR and took appropriate action to determine if a solution was available. Second, nothing in the LTR or its preamble supports New Jersey's claim that the 1,000-year modeling does not apply to long-lived nuclides. NRC has always used 1,000-year modeling for decommissioning. Finally, the NUREG reasonably adopted the financial assurance guidelines from NRC regulations at 10 C.F.R. Part 40, and reduced the previous guidance to ensure that any trust fund would provide adequate funds for future maintenance and control at a POL/LTC site.

3. The NUREG did not require review under the National Environmental Policy Act because it was covered by a "categorical exclusion" covering non-binding agency guidance. Moreover, contrary to New Jersey's view, there is no "program" that NRC has "segmented" or "tiered." Finally, NRC's Generic Environmental Impact Statement associated with the LTR explicitly found that it was impossible to do a generic study of environmental impacts of restricted release sites because the potential sites are so different.

4. Gloucester County's arguments are not properly before the Court and lack merit. First, the County is an intervenor and can raise only arguments raised by the main parties. The County's arguments were not raised by New Jersey. Second, contrary to the County's claim, the NUREG expects an analysis of the

economic impacts of a licensee's DP. Finally, the County's claim that NUREG-1757 violates the Resource Conservation and Recovery Act is barred because that statute explicitly does not apply to NRC-regulated materials.

STANDARD OF REVIEW

In our view, this case should be dismissed as premature and outside the Court's jurisdiction. This Court reviews jurisdictional issues *de novo*. *See, e.g., Nugent v. Ashcroft*, 367 F.3d 162, 165 (3d Cir. 2004).

Assuming *arguendo* that NUREG-1757 is a reviewable "order," the standard of review of an NRC order "is deferential; that order may not be overturned unless it is found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Three Mile Island Alert, Inc. v. NRC*, 771 F.2d 720, 727 (3d Cir. 1985) (citation omitted). The NRC regulatory scheme is "virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." *Westinghouse Electric Corp. v. NRC*, 598 F.2d 759, 771 (3d Cir.1979), *quoting Siegel v. AEC,* 400 F.2d 778, 783 (D.C.Cir.1968).

Insofar as this Court reviews NUREG-1757 on the merits, it owes great deference to NRC's interpretation of its own statutes and regulations. *See*

generally Chevron, U.S.A., Inc., v. NRDC, 467 U.S. 837, 843-44 (1984); *Sommer v. Vanguard Group*, 461 F.3d 397, 399 n.2 (3d Cir. 2006). Insofar as New Jersey attacks NUREG-1757 "on its face," it must demonstrate that the NUREG is invalid in all possible applications, not just at one site. *See, e.g., Reno v. Flores*, 507 U.S. 292, 301 (1993).

ARGUMENT

I. THIS COURT SHOULD DISMISS THE CHALLENGE TO NUREG-1757 FOR JURISDICTIONAL AND PRUDENTIAL REASONS.

Whether this Court analyzes this case in terms of finality, standing, ripeness, or exhaustion of administrative remedies, the result is the same: the first two petitions in this consolidated case are premature. The third petition, while not premature, challenges an Order that was not issued in a licensing or rulemaking proceeding under the Atomic Energy Act; thus, this Court lacks jurisdiction over it under the Hobbs Act.

Under the Hobbs Act, this Court has jurisdiction to review "final orders" issued by the Commission in licensing or rulemaking proceedings. 28 U.S.C. § 2342(4). The Petitions in Nos. 06-5140 and 07-1559 challenge the revised NUREG-1757. But NUREG-1757 is neither a "final" agency action nor a final "order" under the Hobbs Act. And as mere guidance it causes no "injury-in-fact"

to the State, so New Jersey lacks "standing" to challenge it. Both the final order requirement and standing are jurisdictional; thus, this Court lacks jurisdiction over Nos. 06-5140 and 07-1559. Moreover, New Jersey's claims are not "ripe" for review and it has not exhausted its administrative remedies. Thus, this Court should dismiss these two Petitions for prudential reasons as well.

The Petition in No. 07-1756 challenges an Order that was not issued in a licensing or rulemaking proceeding; thus, this Court also lacks jurisdiction over that Petition as well.

A. The Revised NUREG-1757 Is Not a "Final Order."

1. The Supreme Court has defined "final" agency action as action that completes the agency's process and has binding effects:

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process, . . . it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."

Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (citations omitted). *See Pinho v. Gonzales*, 432 F.3d 193, 200 (3d Cir. 2005). The revised NUREG does not satisfy those criteria. First, the NUREG determines no "rights or obligations;" no legal consequences flow from its issuance. NUREG-1757 states that it is a "guidance

document," not a regulation, and explicitly disclaims any legal effect. "Legally binding regulatory requirements are stated only in laws; NRC regulations; licenses[;] or orders, not in NUREG-series publications." A66. "This NUREG is not a substitute for NRC regulations, and compliance with it is not required." A73. In fact, New Jersey concedes as much when it describes the NUREG as *not* being a rule or regulation. *See* Petitioner's Brief ("Pet. Br.") at 31.

New Jersey's central challenge in this case is to Volume 1, Appendix M, which describes how, in unusual cases, NRC licensees may seek to decommission their sites and retain a possession-only license, with radioactive materials remaining onsite under specified restrictions. An NRC licensee may *choose* to follow the guidance in this document, but no licensee *must*.

Furthermore, NUREG-1757 is not self-executing, *i.e.*, compliance does not guarantee that a proposed license amendment will be granted. Instead, any interested person may argue that action in accordance with NUREG-1757 does not comply with the applicable statutory and regulatory requirements, as New Jersey itself is doing in the ongoing administrative proceeding.

Second, the revised NUREG did not consummate the NRC's decision-making process at any facility seeking to follow the guidance in the NUREG. That decision-making process is consummated only with the issuance of a license

amendment approving a DP, which may or may not adopt the guidance contained in the NUREG. Here, it is Shieldalloy's decommissioning that concerns New Jersey and it is certainly not final. In fact, the Licensing Board deferred further consideration of the proposed DP precisely because it may well be changed after NRC Staff's technical review and environmental analysis. LBP-07-05, 65 NRC at 360-61.

Moreover, guidance documents such as NUREG-1757 are not "final" because they may be modified at any time without an NRC order or notice-and-comment rulemaking. In fact, NRC Staff has already retracted part of the revised NUREG-1757 based on experience in applying it to Shieldalloy's DP. *See* 72 Fed. Reg. at 46,102.

In sum, no "rights or obligations" are conclusively determined by revised NUREG-1757 and no "legal consequences" flow from it. Moreover, it does not "consummate" an NRC decision-making process. Thus, the revised NUREG is neither "final" nor an "order." *Bennett v. Spear*, *supra*.

2. Even if the revised NUREG-1757 were a "final" order, it is not the type of "order" that is reviewable under the Hobbs Act. The Hobbs Act gives this Court jurisdiction over "all final orders of the Atomic Energy Commission [now

NRC][4] made reviewable by section 2239 of title 42." 28 U.S.C. § 2342(4). In turn, 42 U.S.C. § 2239(b), makes reviewable, as relevant here, "(1) Any final order entered in any proceeding of the kind specified in subsection (a) . . .." 42 U.S.C. § 2239(b)(1). Subsection (a) proceedings include the "granting, suspending, revoking, or amending of any license" and "the issuance or modification of rules or regulations dealing with the activities of licensees . . .." 42 U.S.C. § 2239(a)(1)(A). Thus, for Hobbs Act jurisdiction, the Commission order must be final and issued in either a licensing or rulemaking proceeding. *See generally Florida Power & Light v. Lorion*, 470 U.S. 729 (1985).

New Jersey argues that NUREG-1757 "has the effect of a substantive rule or regulation . . .." Pet. Br. at 2-3; *see also* Opposition by the State of New Jersey to Federal Respondents' Motion to Dismiss ("Opposition"), filed February 22, 2007, at 2.[5] But New Jersey never explains its argument. New Jersey's semantic struggles are necessary because NUREG-1757 is plainly not a "substantive rule." The revised NUREG does not make a single change to any rule or regulation. As

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[4]In the Energy Reorganization Act of 1974, Congress transferred the Atomic Energy Commission's power to regulate civilian uses of nuclear energy to the newly-formed NRC. *See* 42 U.S.C. § 5841.

[5]New Jersey's Opposition to our Motion to Dismiss presents its jurisdictional arguments in full; its brief is nearly silent on the point. Hence, when referring to New Jersey's position, our brief refers to its "Opposition."

explained above, no licensee is required to comply with the guidance in NUREG-1757. Indeed, NUREG-1757 explicitly says so. A66, A73. In fact, New Jersey admits that "[a] rule or regulation imposes rights and obligations. . . . In contrast, NUREG-1757 explicitly states that it is a guidance document that does not establish a binding norm." Pet. Br. at 31 (citations omitted). New Jersey contradicts its own position.

New Jersey cannot have it both ways. If NUREG-1757 is not a binding norm, as the state concedes, it is not subject to judicial review under the Hobbs Act. The document is simply a non-binding statement by the agency that has no legal impact on any party.

3. New Jersey claims (Opposition at 4, 7-8) that NUREG-1757 is reviewable as a substantive rule under the criteria used in *Limerick Ecology Action v. NRC*, 869 F.2d 719 (3d Cir. 1989), where this Court found an NRC policy statement non-binding and unreviewable. *See id.* at 735. But *Limerick* actually shows that NUREG-1757 is not a substantive rule.

First, like the policy statement considered in *Limerick*, NUREG-1757 is not "finally determinative of . . . the rights to which it is addressed." *Limerick*, 869 F.2d at 734. The NUREG does not "determine" *any* rights; it simply provides licensees with options for seeking NRC approval of DPs. Second, the NUREG is

"subject to challenge in particular cases," *id.* at 735, consistent with longstanding NRC practice. *See, e.g., International Uranium Corp.*, CLI-00-01, 51 NRC at 19-20. In fact, New Jersey has already challenged both the application of the NUREG to the proposed decommissioning of the Shieldalloy site, and NRC Staff's alleged lack of compliance with the NRC's organic statute and regulations in issuing the revised NUREG. Thus, NUREG-1757 does not meet the standards for a substantive rule set by this Court in *Limerick*.[6]

New Jersey relies on *Citizens Awareness Network v. NRC*, 59 F.3d 284 (1st Cir. 1995), and *Public Citizen v. NRC*, 845 F.2d 1105 (D.C. Cir. 1988), for the proposition that NRC "Policy Statements" are sometimes subject to challenge under the Hobbs Act. *See* Pet. Br. at 3-4; Opposition at 4. But NUREG-1757 is not a Policy Statement; even if it were, it would not be automatically reviewable. As the *Limerick* Court noted, "[g]eneral policy statements, because they are ineffective except as applied and defended in specific proceedings, are often insulated from judicial review at the time of issuance." 869 F.2d at 735-36.

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[6]This Court had jurisdiction in *Limerick* because that case involved review of a final order issuing an operating license, not review of a "Policy Statement," but a Commission Policy Statement was an issue in the case. Applying the factors cited above, this Court held the Policy Statement was not a binding substantive rule. 869 F.2d at 733-35.

Additionally, both *Citizens Awareness Network* and *Public Citizen* are inapposite here. In *Public Citizen*, the Commission (as opposed to NRC Staff) issued an across-the-board Policy Statement implementing Section 306 of the Nuclear Waste Policy Act of 1982. That Policy Statement was final and established guidelines and standards for training of nuclear plant personnel that were generally applicable to the nuclear industry. *See* 50 Fed. Reg. 11,147 (Mar. 20, 1985).

Likewise, in *Citizens Awareness Network*, the Commission (not NRC Staff) issued a binding, across-the-board policy change, re-interpreting its regulations to hold the agency was not required to grant hearings to review proposed DPs. 59 F.3d at 289. The Commission denied a hearing request by Citizens Awareness Network based on the policy change. *Id.* at 290. Thus, the agency decision under review denied a request for a hearing, based upon a *de facto* change in a regulation.

In both cases the Commission (as opposed to NRC Staff) issued a binding, across-the-board ruling that was a "final" agency action and was applied as such. Here, by contrast, the Commission has yet to apply NUREG-1757 at all – much less issue a "binding rule."

B. New Jersey Lacks Standing For A Facial Challenge To Revised NUREG-1757.

In the context of this case, the doctrines of "finality" and "standing" are inextricably intertwined. Because the revised NUREG is not a "final action" and lacks the force of law, New Jersey is not harmed by it. Thus, New Jersey lacks standing to challenge the NUREG.

To challenge NRC action in this Court, New Jersey must show that it has suffered an "injury in fact" from the action "likely" to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 74 (3d Cir. 1998). The Supreme Court has defined an "injury in fact" as "an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. at 560 (citations omitted, footnote omitted). *See also Township of Piscataway v. Duke Energy*, 488 F.3d 203, 208 (3d Cir. 2007).

The revised NUREG, in and of itself, does not require New Jersey to do anything or authorize any other person to do anything that will harm New Jersey. The NUREG is not binding and does not (and could not) change any NRC regulations. It thus causes New Jersey no "injury in fact."

The harm alleged by New Jersey is NRC's potential *future* approval of a DP for the Shieldalloy facility based on the revised NUREG. But that alleged harm is not "concrete," *i.e.*, "real or direct," or "imminent," because Shieldalloy cannot implement the DP, either in whole or in part, until it has been approved by NRC's administrative process – a process where the NUREG's guidance can be challenged and where New Jersey is a participant.

New Jersey will have ample opportunity to contest Shieldalloy's application for approval of its DP based on the disputed portions of the revised NUREG-1757 in NRC's administrative proceeding – including an appeal to the Commission and judicial review of any adverse decision. In the meantime, the cost or burden of participating in ongoing agency litigation is not a judicially cognizable "injury." *See, e.g., In re Briscoe*, 448 F.3d 201, 214 (3d Cir. 2006). New Jersey's lack of such injury deprives it of standing to challenge the NUREG.

C. New Jersey's Claim Is Not Ripe And The State Has Not Exhausted Available Administrative Remedies.

While New Jersey claims that it has filed a "facial" challenge to the revised NUREG-1757, it is apparent that New Jersey's actual goal is to challenge applying the revised NUREG to the proposed Shieldalloy DP. Any such challenge is premature. As we have stressed, NUREG-1757 is not a "binding" agency rule or

requirement. Moreover, New Jersey has been admitted into the NRC administrative proceeding reviewing Shieldalloy's proposed DP. There, New Jersey has raised many of the same claims that it raises here – and could have raised the rest. Thus, not only is this case not ripe for judicial review, but New Jersey also has failed to exhaust its administrative remedies.

"Ripeness and exhaustion are complementary doctrines . . . designed to prevent unnecessary or untimely judicial interference in the administrative process." *John Doe, Inc., v. DEA*, 484 F.3d 561, 567 (D.C.Cir. 2007) (quotation marks omitted) (citations omitted). Although the doctrines overlap, they have distinct purposes. *Id.* "Exhaustion focuses on the process a litigant must follow; ripeness describes the fitness of the issues for review." *Id.* These pragmatic doctrines protect "the agency's interest in crystallizing its policy before that policy is subject to judicial review" and "the court's interests in avoiding unnecessary adjudication and in deciding cases in a concrete setting." *Id.* (quotation marks omitted) (citations omitted).

1. New Jersey's Claims Are Not Ripe.

The basic rationale of the ripeness doctrine

> is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to

> protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Laboratories, Inc. v. Gardner, 387 U.S. 136, 148-49 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977). *See also Ohio Forestry Association v. Sierra Club*, 523 U.S. 726, 732-37 (1998). When assessing the ripeness of a claim, "the court should examine whether the issues are fit for judicial resolution and whether withholding judicial resolution will result in hardship to the parties." *New Hanover Township v. U.S. Army Corps of Engineers*, 992 F.2d 470, 472 (3d Cir. 1993). *See also CEC Energy Co. v. Public Service Commission of the Virgin Islands*, 891 F.2d 1107, 1109-10 (3d Cir. 1989).

Under the fitness prong, courts look to whether the dispute is purely legal and whether the agency action is final. *CEC Energy*, 891 F.2d at 1110. "Awaiting the termination of agency proceedings may obviate all need for judicial review." *Id.* at 1109 (citations omitted). This furthers "the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting." *Venetian Casino Resort, L.L.C. v. EEOC*, 409 F.3d 359, 364 (D.C. Cir. 2005). Under the hardship prong, the court will consider "the plaintiff's interest in prompt consideration of allegedly unlawful agency action," *id.*, and "whether *postponing* judicial review would impose an undue burden on [the plaintiff] or would benefit

the court." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 440 F.3d 459, 464 (D.C.Cir. 2006) (emphasis in original).

a. New Jersey's Claims are Not Fit For Review.

This Court has held that "[f]inal agency actions involving purely legal questions satisfy the fitness requirement[,]" *CEC Energy*, 891 F.2d at 1110, but "finality is to be interpreted in a pragmatic way." *Id.* (citations omitted). This Court has enumerated five factors that should be reviewed in assessing finality:

> 1) whether the decision represents the agency's definitive position on the question; 2) whether the decision has the status of law with the expectation of immediate compliance; 3) whether the decision has immediate impact on the day-to-day operations of the party seeking review; 4) whether the decision involves a pure question of law that does not require further factual development; and 5) whether immediate judicial review would speed enforcement of the relevant act.

Id.

Here, these finality factors cut strongly against finding New Jersey's challenge to NUREG-1757 "fit for review." We have already shown that NUREG-1757, as mere agency guidance, is not "definitive," lacks the "status of law," and has "no immediate impact" on New Jersey. And New Jersey's suit does not raise a "pure question of law," but rather a fact-specific Shieldalloy grievance. Finally, it is not self-evident that immediate judicial review of NUREG-1757,

which perforce would interfere in the orderly NRC licensing (and judicial review) process established by statute, would "speed enforcement" of NRC decommissioning regulations; disruption and delay are equally likely.

In similar cases, this Court has found that the agency action under review was not "final" and thus, not fit for review. For example, in *CEC Energy*, this Court declined to review an agency assertion of jurisdiction to review a proposed contract because the agency had not ordered any specific action with regard to the contract. 891 F.2d at 1110. Likewise, in *Solar Turbines, Inc. v. Seif*, 879 F.2d 1073 (3d Cir. 1989), this Court found an order by the Environmental Protection Agency directing a company to "cease and desist" a construction project not final because the order carried no adverse consequences for non-compliance. 879 F.2d at 1080. This Court held that "the determinative factor on finality in this case is that the administrative order has no operative effect on Solar Turbines." *Id.* at 1080-81.

Other courts have reached similar conclusions. For example, the D.C. Circuit dismissed as unripe a challenge to an NRC Policy Statement because NRC had not yet applied the Statement and its meaning and effect were as yet unclear. *See Public Citizen v. NRC*, 940 F.2d 679 (D.C.Cir. 1991). Likewise, the Ninth Circuit dismissed as unripe a challenge to Forrest Service regulations because the

regulations had not yet been applied. *Earth Island Institute v. Ruthenbeck*, 490 F.3d 687, 695 (9th Cir. 2007).

b. Postponing Review Would Impose No Undue Burden on New Jersey.

Postponing review leaves New Jersey to challenge the guidance in NUREG-1757 in NRC's administrative process. No other burden is apparent or even claimed. But participating in an administrative proceeding is not an "undue" burden sufficient to make this dispute "ripe" for judicial review. "[T]he burden of participating in further administrative and judicial proceedings does not constitute sufficient hardship to overcome the agency's challenge to ripeness." *AT&T Corp. v. FCC*, 349 F.3d 692, 702 (D.C. Cir. 2003) (citations omitted). *See also Ohio Forestry Association v. Sierra Club*, *supra*; *FTC v. Standard Oil*, 449 U.S. 232, 244 (1980).

New Jersey claims that radioactive materials are escaping from the Newfield facility and contaminating the surrounding community. *See* Pet. Br. at 6-7. While omitting the issue from its brief, New Jersey implied in its Opposition that if this Court vacates the NUREG, the contamination might be removed sooner than if exhaustion of the administrative proceeding is required. *See* Opposition at 16. But New Jersey did not object to deferral of the proceeding (making the proceeding

last longer); in fact, the State recently advised the Board that deferral was "appropriate."[7]

Furthermore, there is no connection between the issuance of the NUREG and any contamination allegedly leaving the Newfield facility. If New Jersey believes that the contamination leaving the facility is a threat to the public health and safety, or results from a violation of Shieldalloy's license, it should report this matter, so that NRC can take appropriate enforcement action. New Jersey can either do that with a letter or an enforcement petition under 10 C.F.R. § 2.206. But NRC has no record of any claim by New Jersey to the NRC that Shieldalloy is in violation of its license or that any contamination that presents a threat to public health and safety is escaping the Newfield site.

Moreover, New Jersey does not allege, much less show, that application of the contested guidance will not resolve any alleged contamination. In other words, assuming *arguendo* that contaminated material *is* escaping the Newfield site, New Jersey does not argue that approval of a POL/LTC would allow the contamination to continue escaping. In fact, approval of Shieldalloy's DP might well stop any additional alleged contamination from escaping the Newfield site.

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[7]*See* http://www.nrc.gov/reading-rm/adams.html, "web-based access," at ML072360192

In sum, there is no connection between the revised NUREG and the alleged contamination.

Finally, the Supreme Court has stated that "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States,* 523 U.S. 296, 300 (1998) (internal quotation marks omitted) (citations omitted). New Jersey's claim rests upon a 'contingent future event," *i.e.*, the possible future NRC approval of a POL/LTC for the Shieldalloy facility. But as we show in the next section, New Jersey has challenged the application of NUREG-1757 to the Shieldalloy facility. If that challenge is upheld, New Jersey's claim will be resolved.

2. New Jersey Has Not Exhausted Available Administrative Remedies.

New Jersey seeks to by-pass the ongoing NRC administrative hearing and proceed directly to this Court. But it is a well-settled principle of administrative law that

> [a] reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented, and deprives that Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action.

Unemployment Compensation Commission of Alaska v. Aragon, 329 U.S. 143, 155 (1946). "[T]he purposes of the exhaustion requirement are to promote

administrative efficiency, 'respect[ ] executive autonomy by allowing an agency the opportunity to correct its own errors,' provide courts with the benefit of an agency's expertise, and serve judicial economy by having the administrative agency compile the factual record." *Robinson v. Dalton*, 107 F.3d 1018, 1020 (3d Cir. 1997), quoting *Heywood v. Cruzan Motors, Inc.*, 792 F.2d 367, 370 (3d Cir.1986).

1. New Jersey challenges NUREG-1757 in this Court before completion of the NRC's administrative process. But New Jersey could have presented to the NRC's Licensing Board every argument that it makes here. In fact, it already presented many of the exact same arguments to the Board in its Petition for Hearing that it raises in this lawsuit.[8]

Specifically, New Jersey argues before this Court that the NRC will violate the AEA if it issues a POL/LTC without first promulgating formal regulations governing the "new" license. *See* Pet. Br. at 30-34; Opposition at 6. But New Jersey's Contention 17 before the Licensing Board is entitled "[t]he NRC may not issue a LTC license until it promulgates rules and regulations to establish its terms

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[8]Compare, *e.g.*, Pet. Br. at 54-57 with Contention 6, A791-95. The State's Petition for Hearing, with all 33 Contentions, is a public document and available on the NRC's website. *See* http://www.nrc.gov/reading-rm/adams.html, "web-based access," at ML070290433.

and conditions." A804. And its supporting argument before the Board is essentially the same argument it makes here. *See generally* A804-07.

This is the key issue raised by New Jersey in this case and all other claims flow from it. If the Licensing Board and the Commission accept New Jersey's arguments on this point, this case will become moot because the NRC will retract the contested guidance in NUREG-1757 and no POL/LTC could be issued. Thus, allowing the Commission to decide this issue in the first instance may moot this entire case. At the least, it would enable to Commission to respond to New Jersey's claims in the first instance, and when the time for judicial review comes, give this Court a full record and reasoned Commission decision to review.

2. New Jersey argues that exhaustion would be "futile," alleging that the agency will treat the NUREG as a rule or regulation that cannot be challenged in an administrative proceeding. As evidence, New Jersey cites to statements made in an NRC Staff filing before the Licensing Board. *See, e.g.*, Opposition at 19-20. However, those statements were made in a Staff pleading as an advocate before the Board; they should not be confused with decisions rendered by the Licensing Board or by the Commission on review of a Licensing Board decision. The Commission has repeatedly made clear that "NRC guidance documents are routine agency policy pronouncements that do not carry the binding effect of regulations."

International Uranium Corp., CLI-00-01, 51 NRC at 19. Moreover, while the Commission has approved the POL/LTC concept as a general matter, it has not issued a considered decision on the issue in the context of a contested case.

New Jersey also claims that it cannot challenge NUREG-1757 "on its face" in the administrative proceeding, but is limited to an "as applied" challenge. *E.g.*, Opposition at 20-21. But New Jersey has *already* filed a facial challenge to the NUREG before the Licensing Board. *See, e.g.*, Contention 17, A804-07. If that challenge succeeds before NRC, New Jersey will have no need for judicial relief. New Jersey should await the outcome of NRC's administrative hearing before coming to this Court.

II. THIS COURT LACKS JURISDICTION OVER NO. 07-1756 AND NEW JERSEY WAS NOT ENTITLED TO AN ADJUDICATORY HEARING ON RESCINDING REVISED NUREG-1757.

In case number 07-1756, New Jersey challenges a 2007 Commission Order (A327) denying a request for an adjudicatory hearing on NUREG-1757 seeking to rescind portions of it. This Court lacks jurisdiction over that petition; assuming this Court has jurisdiction, the Commission reasonably denied the request.

A. This Court Lacks Jurisdiction Over New Jersey's Challenge.

As demonstrated above, NUREG-1757 was not entered in a proceeding for the issuance of a license or a rule – a prerequisite to Hobbs Act jurisdiction. *See*

28 U.S.C. § 2342; 42 U.S.C. § 2239(a)(1)(A). Therefore, this Court lacks jurisdiction to review NUREG-1757's procedural lineage, just as it lacks jurisdiction to review NUREG-1757's substantive validity. *See* Argument I, *supra*. New Jersey's challenge to NUREG-1757 should follow the orderly route of NRC adjudication (already underway), followed by judicial review as prescribed in the Hobbs Act.

B. The Commission Reasonably Denied New Jersey's Hearing Request.

Assuming *arguendo* that this Court has jurisdiction over New Jersey's hearing claim, it should find that the Commission reasonably denied the request for a hearing.

1. In its Petition for Hearing to the Commission, New Jersey admitted that its interest was based on Shieldalloy's application for approval of the DP. "NJDEP has an interest in rescinding these NUREG-1757 provisions because this guidance document has been utilized by Shieldalloy in developing their [decommissioning plan] for their facility in Newfield." Petition at 2.[9] Thus, New Jersey's challenge to the NUREG was based solely on Shieldalloy's use of the NUREG's guidance in its proposed DP. The Commission pointed out that the propriety of applying NUREG-1757 to the Shieldalloy DP is a proper subject for

[9]This Record document was omitted from the Joint Appendix.

hearing before an NRC Licensing Board. A327-28. This is now being done. Thus, the Commission properly denied New Jersey's request for a *separate* hearing on the revised NUREG.

2. Furthermore, even if NUREG-1757 were considered a binding rule, New Jersey has actually had the pre-approval "hearing" to which it would be entitled. Under the NRC's Rules of Practice, "hearings" in rulemaking proceedings are conducted by notice and comment. *See* 10 C.F.R. § 2.805; *see generally* 10 C.F.R. §2.800, *et seq*. New Jersey not only had notice of the proposed revisions to NUREG-1757, but it also commented on them. *See* A432-440. Under long-established precedent, no further rulemaking "hearing" is necessary. *See, e.g.*, *Siegel v. AEC*, 400 F.2d 778, 785-86 (D.C.Cir. 1968).

III. ON THE CURRENT RECORD, REVISED NUREG-1757 IS LAWFUL AND NOT ARBITRARY OR CAPRICIOUS.[10]

Despite our strong view that jurisdictional and prudential doctrines bar New Jersey's lawsuit, we cannot leave New Jersey's challenge to NUREG-1757

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[10] New Jersey did not challenge the guidance related to the discount rate (Pet. Br. at 45), the investment rate (*id.* at 49), or the lack of an environmental review (*id.* at 50), when filing its comments on the revised NUREG in 2005. *See generally* A432-40. Thus, New Jersey has waived these arguments and this Court should not consider them. *E.g.*, *National Wildlife Federation v. EPA*, 286 F.3d 554, 562 (D.C.Cir. 2002) (collecting cases).

unanswered. But New Jersey cannot claim that by defending the NUREG, we render NRC's ongoing hearing process biased or futile. Obviously, our arguments in this Court constitute a litigating position responding to New Jersey's claims. As the D.C. Circuit noted when facing an analogous situation, agency counsel must be given latitude to present arguments supporting the agency's actions without binding the agency itself to any ultimate result on the merits.

> The Department's litigating position at this stage does not necessarily reflect a deliberative adjudication of appellant's claims. Were we to decide otherwise the Department, faced with such a complaint and not certain whether a court would "waive" the exhaustion requirements, would be in a difficult litigating position. The Department cannot be disadvantaged for contesting [the] claim that the Department's interpretation of its regulation is unreasonable.

Career Education v. Department of Education, 6 F.3d 817, 820 (D.C.Cir. 1993).

Like the Department of Education, NRC cannot be "disadvantaged for contesting the claim" that the NUREG's provisions are unlawful or "arbitrary and capricious." It is possible that after a full review, NRC's independent Licensing Board, or the Commission itself, ultimately will view NUREG-1757 differently, but as we argue below, it is far from self-evident that New Jersey's challenge to the NUREG will – or should – succeed.

A. The POL/LTC Does Not Require A Formal Rulemaking.

New Jersey argues that adopting the POL/LTC option requires NRC to conduct a formal rulemaking. Pet. Br. at 30. New Jersey characterizes the POL/LTC as a "new license" and says that NRC can adopt a "new license" only by a rulemaking establishing the "terms and conditions" of that license. *Id.* at 31.

1. But the POL/LTC is not a "new license." Instead, it is the *original* license amended to authorize "possession only" of the same radioactive materials authorized under the current license at the same site, those activities in any DP approved by the NRC administrative hearing process, and conditions to protect the public during the term of possession. In fact, one comment on the revised NUREG suggested that NRC terminate the original license and issue a POL/LTC as a "new license." A533. The Commission explicitly approved NRC Staff's recommendation to issue a POL/LTC by amendment, not by a "new license." A914.

For example, Shieldalloy currently holds NRC License SMB-743. If the NRC grants the requested POL/LTC at the end of the administrative process, Shieldalloy will still have License SMB-743, which will be the same license amended to contain greater restrictions on Shieldalloy's authority than currently provided. Neither the AEA, 42 U.S.C. § 2011, *et seq.*, nor the ERA, 42 U.S.C.

§ 5801, *et seq.*, limits the NRC's power to amend an existing NRC license's authority. Likewise, nothing in either statute limits the number of times NRC can extend the term of a materials license.

2. Next, New Jersey argues that issuing a POL/LTC without requiring government ownership is a "major policy reversal for the NRC." Pet. Br. at 31. But NRC has approved alternative approaches similar to a POL/LTC on several occasions in cases that involve government "control," but not government "ownership," of sites with long-lived nuclides. For example, NRC approved Ohio's plans to use a similar POL process at a Shieldalloy facility in Cambridge, Ohio when that facility ceases operations. A496-97; *see also* 64 Fed. Reg. 15837, 15838-39 (April 1, 1999).

In addition, the Staff has approved Wisconsin's adoption of the "possession only" license approach for restricted use termination. A496. NRC also approved a reclamation plan for a uranium mill tailings site in Wyoming that contained an easement and a restrictive covenant giving the Department of Energy access to the site and authority to enforce restrictions. A501. In sum, the POL/LTC process is not unprecedented.

3. New Jersey also argues that NRC's decision lacked "rational analysis," and that NRC changed its policy of requiring "Federal or state ownership and

control" to one of merely exercising "control" when it developed the POL/LTC. Pet. Br. at 32-33. But New Jersey misstates NRC policy as well as the guidance, and fails to demonstrate a "contradictory" analysis.

No NRC regulation or guidance document says that government "ownership *and* control" are necessary for approval of restricted release under the LTR. Instead, as we noted on page 8, *supra*, the preamble to the LTR suggested that, in some situations, government "control *or* ownership" may be appropriate. 62 Fed. Reg. at 39,070. The guidance provides flexibility in meeting the general LTR requirements for "legally enforceable institutional controls." A232-40.

In the case of a POL/LTC, NRC will exercise Federal "control" over the license by inspecting the facility, requiring formal license renewals at five-year intervals, and exercising enforcement throughout the duration of the license. A285. The licensee cannot sell or transfer the property without NRC approval. A289. If the licensee becomes bankrupt, NRC could oversee use of the trust fund, which cannot be reached in bankruptcy, to hire the necessary contractors to ensure controls and maintenance of the facility. A290. This "institutional control" is in accordance with the restricted release provisions of the LTR. A284.

Moreover, contrary to New Jersey's claim, Pet. Br. at 32-33, there is no "contradiction" between the need for a "durable institutional control" and NRC

providing that control by licensing, inspection and enforcement. NRC agrees that "a private entity cannot be expected to endure for millions . . . of years[.]" Pet. Br. at 33. It is precisely for that reason that NRC will oversee control of the site. NRC will ensure that the site is inspected and maintained and that the trust fund is adequately maintained and expended appropriately. As long as there is a Federal government, it is reasonable to expect that there will be an NRC – or a similar agency – responsible for enforcing the terms and conditions of the POL/LTC.

4. Finally, New Jersey argues that by failing to conduct a rulemaking process, "NRC insulated itself from obvious public health and safety concerns." Pet. Br. at 33. This argument approaches the frivolous. NRC's documents analyzing these issues, including SECY-03-0069 (A482-527) and the 2004 RIS (A810-28), were all publicly available. In addition, NRC noticed the 2005 draft revisions of the NUREG in the Federal Register for public comment, just as it had the drafts of the original NUREG. *See* 70 Fed. Reg. at 56,940. NRC conducted a public workshop which was announced in the Federal Register. 70 Fed. Reg. 19,109 (April 12, 2005). NRC also established a special state working group to review these issues, but New Jersey did not participate in this group and did not attend the workshop.

NRC's efforts to involve the public in issuing the revised NUREG were the functional equivalent of a full notice-and-comment rulemaking. During this process, New Jersey had both notice and a chance to comment. *See generally* 10 C.F.R. § 2.800, *et seq*. And New Jersey submitted comments, A432-40, to which the NRC responded. A829-906. NRC has not "insulated itself."

B. The NUREG's Guidance Is Not Arbitrary or Capricious.

1. Ownership and Control.

New Jersey argues that the options for POL/LTC and "legal agreement and restricted covenant" as institutional controls are arbitrary and capricious. Pet. Br. at 36-43.[11] But New Jersey simply repeats many of the questionable arguments that we addressed above.

1. New Jersey again refers to the mistaken mantra of "ownership *and* control." *E.g.*, Pet. Br. at 36, 38. But New Jersey cites no authority for requiring "both" government ownership *and* government control. As we noted above, the LTR's preamble suggests there may be either "control *or* ownership" in certain

[11]New Jersey's brief mentions but does not address the LA/RC option; we have focused our response on the POL/LTC.

situations, not necessarily both. *See, e.g.*, 62 Fed. Reg. at 39,070 (emphasis added).[12]

And contrary to New Jersey's assertion, NRC does not expect private entities to "endure . . . in perpetuity." Pet. Br. at 36. Instead, NRC must assume that the Federal government, which will exercise "control" through NRC's monitoring and oversight of the license, will endure to protect the public health and safety.

2. New Jersey implies that NRC had an improper relationship with Shieldalloy, which influenced its decision. Pet. Br. at 41-43. But NRC – like any regulatory agency – must maintain an open relationship with its licensees. If a licensee or class of licensees has a problem, a regulatory agency must review the problem and determine whether a solution is available.

Here, NRC recognized that a few licensees were encountering problems that were delaying decommissioning and undertook a very public review to address those problems – as befits any government agency. But Shieldalloy received no special treatment. In fact, in 2003 NRC denied an Shieldalloy request for a POL

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[12]New Jersey's frequent use of the misleading phrase "control *and* ownership" (Pet. Br. at 14, 15, 16, 21, 32, 36, 38, 52) appears deliberate as New Jersey occasionally uses the correct wording, "control *or* ownership," but only when forced to quote NRC documents accurately. *E.g.*, Pet. Br. at 14, 15, 18, 39.

for temporary storage precisely because Shieldalloy's proposal would not decommission the site to the limits specified in the LTR. A390-91. There was no "improper" relationship with Shieldalloy.

2. One Thousand-Year Modeling.

New Jersey argues that the guidance in NUREG-1757 is arbitrary and capricious because it requires licensees seeking any form of restricted release "to model the health and safety risks for *only* 1,000 years, regardless of whether the materials remain a radioactive hazard well after 1,000 years." Pet. Br. at 43 (emphasis added).

1. The guidance challenged by New Jersey is consistent with the LTR's requirements, which specify only that modeling be done for a 1,000-year period. *See* 10 C.F.R. § 20.1401(d). In fact, NRC regulations have *never* required modeling for more than 1,000 years in the decommissioning process. Thus, New Jersey is actually challenging NRC's LTR regulation, which is not at issue in this litigation. In fact, if the NUREG's guidance had suggested modeling for *more* than 1,000 years it would have been outside the regulation.

2. New Jersey also claims that "NRC stated . . . that [the LTR] is intended to apply only to short-lived nuclides." Pet. Br. at 43. There is no such statement in the LTR or any NRC guidance; in fact, there are several statements in the LTR

preamble that explicitly support the application of 1,000 years to long-lived nuclides. The LTR, as proposed, contained the 1,000-year modeling requirement. 59 Fed. Reg. 43,200, 43,212-13 (Aug. 22, 1994). The proposed rule noted that 1,000-year modeling was the current staff practice. 59 Fed. Reg. at 43,224. The final rule reaffirmed the agency's position. 62 Fed. Reg. at 39,083. *See also id.* at 39,070 (institutional controls should be established with the objective of lasting 1,000 years); *id.* at 39,059 (total effective dose equivalent should be calculated for 1,000 years to show compliance with standard).

Checking the citation provided by New Jersey in support of its assertion that the LTR was to be applied only to "short-lived nuclides," 62 Fed. Reg. at 39,083, Pet. Br. at 44, the closest discussion on point is:

> Unlike analyses of situations where large quantities of long-lived radioactive material may be involved (e.g., a high-level waste repository) and where distant future calculations may provide some insight into consequences, in the analysis for decommissioning, where the consequences of exposure to residual radioactivity at levels near background are small and peak doses for radionuclides of interest in decommissioning occur within 1000 years, long term modeling thousands of years into the future of doses that are near background may be virtually meaningless.

62 Fed. Reg. at 39,083. If this is the statement to which New Jersey refers, it has been misinterpreted. The statement merely says that decommissioning is different

from high-level waste disposal, and that for decommissioning (as opposed to high-level waste disposal, such as at Yucca Mountain), the dose consequences are small and peak doses generally occur within 1,000 years. That is not equivalent to "the LTR is intended to apply only to short-lived nuclides."

3. Finally, New Jersey relies on *Nuclear Energy Institute v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004), for the proposition that this Court should overturn the NRC's 1,000-year modeling period as that Court overturned the EPA's 10,000-year modeling assessment. Pet. Br. at 44. But that case turned on EPA's failure to adopt modeling "consistent with" a study conducted by the National Academy of Science, as required by Section 801(a) of the Energy Policy Act of 1992. *See* 373 F.3d at 1273. Here, there is no similar statutory requirement.

3. Discount Rate.

New Jersey alleges that the revised NUREG's use of a discount rate for the monetary value of averted radiation doses in the future is "arbitrary and capricious." Pet. Br. at 45-48. This claim is moot, because NRC has recently retracted the guidance challenged by New Jersey. During the processing of the Shieldalloy DP, NRC found that the revised guidance was incorrect. Accordingly, NRC has retracted the NUREG guidance on the discount rate and will issue new guidance in the future. 72 Fed. Reg. at 46,102. This action confirms that the

revised NUREG is not a regulation but a flexible guidance document that can be adjusted promptly and informally.

4. Financial Assurance.

NUREG-1757 provides that applicants seeking the restricted release option (and, by implication, a POL/LTC) may assume a 1% rate of return to determine the amount of the trust fund to assure adequate maintenance and control of the site. A244. The licensee may reduce the amount of money it initially deposits in the trust fund by the amount of the interest calculated. New Jersey alleges that the guidance in the revised NUREG regarding financial assurance for restricted release – not just for a POL/LTC – violates 10 C.F.R. § 20.1403(c) because it does not provide "sufficient financial assurance" to allow a third party to carry out responsibility for control and maintenance of a site. Pet. Br. at 49. Specifically, New Jersey claims that NRC has not justified allowing the 1% rate. Pet. Br. at 50.

The guidance in the revised NUREG does not violate Section 1403(c) of the LTR. As New Jersey concedes, the NUREG uses the value adopted for uranium mill tailings sites in notice-and-comment rulemakings in both 1980 and 1985. *See* 10 C.F.R. Part 40, Appendix A, Criterion 10; 45 Fed. Reg. 65,521 (Oct. 3, 1980); 50 Fed. Reg. 41,862 (Oct. 16, 1985). Thus, the revised NUREG applied the investment rate for the class of sites with the longest-lived nuclides, *i.e.*, uranium

and thorium, to all restricted release sites, regardless of the nuclides involved. NRC took the "conservative" approach, *i.e.*, applying the provision for long-lived nuclides to all sites, to ensure that there will be sufficient financial assurance for future maintenance operations.

Moreover, the revised NUREG *reduced* the allowed investment rate from the previous allowance of not greater than 2%, *see* NUREG-1757, Vol. 3 at p. 4-17,[13] down to 1%. Thus, the revisions make it *more* likely that there will be sufficient funds for site maintenance because a lower assumed rate of return requires a larger initial trust fund to cover estimated future expenses. Moreover, the 1% rate is a "real" rate, meaning that it is a the rate obtained after subtracting inflation. And the 1% rate is a conservative rate in view of the research performed for the Social Security Administration that shows that the rate of return for stocks over the past 200 years has been 7%. *See Social Security Bulletin*, Vol. 63, No. 2, 38 (2000).[14] The Staff's suggested investment rate, in short, has a basis and is not unreasonable.

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[13]NRC regulations governing funding for power reactor decommissioning explicitly allow a 2% annual real rate of return on decommissioning funds set aside in external sinking funds. 10 C.F.R. § 50.75(e)(1)(ii).

[14]*See* http://www.ssa.gov/policy/docs/ssb/v63n2/v63n2p38.pdf

C. NUREG-1757 Did Not Require Review Under The National Environmental Policy Act.

New Jersey claims that the NRC violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, when it failed to issue an Environmental Impact Statement ("EIS") for the revised NUREG. Pet. Br. at 50-57.

1. NRC's NEPA regulations contain a categorical exclusion from the requirements to prepare an EIS for:

> Issuance or amendment of guides for the implementation of regulations in this chapter [i.e., 10 C.F.R.], and issuance or amendment of other informational and procedural documents that do not impose any legal requirements.

10 C.F.R. § 51.22(c)(16). New Jersey concedes that the revised NUREG is a guidance document, *i.e.*, an "amendment of [a] guide[] for the implementation of regulations in this chapter," *supra*, and is not a "binding norm." Pet. Br. at 31. Thus, by New Jersey's own admission, the document is covered by a categorical exclusion under NRC's regulations, and NRC was not required to prepare an EIS for it.

2. NRC will conduct an environmental review for each application of the NUREG, which New Jersey concedes. Pet. Br. at 53. Still, New Jersey argues that only conducting environmental reviews of each application of the NUREG

amounts to a "segmentation" of the "program." *Id.*, citing *Sierra Club v. U.S. Forest Service*, 843 F.2d 1190 (9th Cir. 1988). New Jersey claims that the revised NUREG authorizes a "program" to license "facilities all over the country to store long-lived nuclides . . ." Pet. Br. at 55.

But *Sierra Club* and similar cases are inapposite here because there is no "program" that has been segmented. New Jersey's "programmatic EIS" argument presumes that there will be a flood of POL/LTCs. In fact, NUREG-1757 states that POL/LTCs are a "last resort," and few are expected. A227.

In *Sierra Club*, by contrast, the Forest Service let nine specific contracts to cut timber in a single national forest. The Court held that the nine projects were part of a consolidated "whole" which required a comprehensive environmental review. 843 F.2d at 1191-92. Here, the only licensee that is seeking a POL/LTC is Shieldalloy and NRC is not aware of any other licensee actively planning to exercise this option. If there are future applications, they would not be part of a "program," but independent actions. Even if NUREG-1757 receives broader applicability than currently anticipated, there will be time enough for NRC to act. An "agency must have considerable discretion in picking the right moment" to prepare an EIS. *Public Citizen v. NRC*, 940 F.2d at 684.

For the same reason, New Jersey's claim that NRC should provide a "tiered" NEPA analysis is misplaced. *See* Pet. Br. at 55, citing *Nevada v. DOE*, 457 F.3d 78, 91-92 (D.C. Cir. 2006). A "tiered" approach is appropriate where there is a project "with many sub-projects [that] will take many years." *Id.* at 91. Here there is no "project" with "sub-projects" to be separated.

3. In addition, conducting individual, case-by-case, environmental reviews of restricted release sites, including POL/LTC sites, is supported by the Generic Environmental Impact Statement ("GEIS") issued by NRC in conjunction with the LTR. There, NRC found it was impossible to do a generic study of the environmental impacts of sites released for "restricted" use because the institutional controls would have to be specifically targeted to the particular characteristics of each case, *i.e.*, the nature of the nuclides involved and the geology of each site. Thus, the GEIS concluded that the environmental impacts of these cases cannot be analyzed on a generic basis and an independent environmental review should be conducted for each site-specific decommissioning decision. *See* 62 Fed. Reg. at 39,086.

In sum, even if there were a "program," which there is not, the sites at which a POL/LTC would be used are so different that it would be impossible to provide a generic or "programmatic" environmental analysis of them.

D. Gloucester County's Arguments Are Impermissible and Lack Merit.

Gloucester County raises two arguments in its brief: (1) that the NUREG does not require an evaluation of the economic impact of the POL/LTC on the community, Gloucester County ("GC") Brief at 9; and (2) that the NUREG does not require compliance with guidelines in the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901, *et seq.*, for the siting of new solid and hazardous waste landfills GC Brief at 23.

1. The County is an intervenor in this case and may only raise arguments raised by the Petitioner. *Southwestern Pennsylvania Growth Alliance v. Browner*, 121 F.3d 106, 121 (3d Cir. 1997) (citing cases). New Jersey did not raise either argument raised by the County. Thus, this Court should summarily reject the County's arguments. Moreover, the County's arguments focus exclusively on implementing the revised NUREG at the Shieldalloy facility in Newfield. Thus, they are more appropriate for the NRC's hearing process, not for the threshold review that New Jersey claims to seek here.

2. The County's arguments, in any event, are not well-taken. The County accuses Shieldalloy of creating a "waste landfill" at the Newfield facility. *E.g.*, GC Brief at 9, 18, 25, 26. But while not defined by statute or regulation, the term "waste landfill" is generally used for a facility where materials are brought into the

facility from the outside. The only materials to be present at the Newfield facility are materials that originated there.

The County complains that the NUREG does not require an analysis of the economic impacts of leaving waste in a community for a POL/LTC. GC Brief at 13-22. But that complaint is simply wrong; NUREG-1757 explicitly recommends that licensees address the consequences of changes in land values, aesthetics, and reduction in public opposition in preparing its cost-benefit analysis of each decommissioning option. A314.

Moreover, the County raised the identical claim before the Licensing Board, where it was rejected. *See* LBP-07-05, 65 NRC at 346-47. The County did not appeal that decision to the Commission; thus, it failed to exhaust its administrative remedies. It should not be heard to raise the same argument here.

3. The County argues that NUREG-1757 violates RCRA, 42 U.S.C. § 6901, *et seq.*, and associated New Jersey regulations because it does not require the licensee to consider RCRA siting criteria for solid waste landfills. *See* GC Brief at 23. But the NUREG does not advise licensees on compliance with all possible requirements; instead, it provides guidance on possible methods to comply with AEA requirements. Moreover, Congress explicitly provided that RCRA does not apply to NRC-licensed activities. *See* 42 U.S.C. § 6905(a). *See generally U.S. v.*

Commonwealth of Kentucky, 252 F.3d 816, 822-25 (6th Cir.), *cert. denied*, 534 U.S. 973 (2001); *State of Missouri v. Westinghouse*, 487 F.Supp. 2d 1076, 1080 n.2 (E.D. Mo. 2007). NRC has exclusive jurisdiction over radiological materials at the Shieldalloy site and neither the State nor the County have demonstrated that New Jersey's RCRA regulations apply here.

CONCLUSION

For the foregoing reasons, this Court should dismiss the petitions for review for lack of jurisdiction or, alternatively, deny them.

Respectfully submitted,

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STATUTORY AND REGULATORY ADDENDUM

42 U.S.C. § 2239(a) and (b)

10 C.F.R. § 20.1401
10 C.F.R. § 20.1402
10 C.F.R. § 20.1403

SECTION 189 of the ATOMIC ENERGY ACT

42 U.S.C. § 2239. Hearings and judicial review

(a)(1)(A)In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 2133 or 2134(b) of this title for a construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

* * * * *

(b) The following Commission actions shall be subject to judicial review in the manner prescribed in chapter 158 of Title 28 and chapter 7 of Title 5:

(1) Any final order entered in any proceeding of the kind specified in subsection (a) of this section.

(2) Any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license.

(3) Any final order establishing by regulation standards to govern the Department of Energy's gaseous diffusion uranium enrichment plants,

including any such facilities leased to a corporation established under the USEC Privatization Act.

(4) Any final determination under section 2297f(c) of this title relating to whether the gaseous diffusion plants, including any such facilities leased to a corporation established under the USEC Privatization Act, are in compliance with the Commission's standards governing the gaseous diffusion plants and all applicable laws.

The License Termination Rule

10 C.F.R. § 20.1401 General provisions and scope.

(a) The criteria in this subpart apply to the decommissioning of facilities licensed under Parts 30, 40, 50, 60, 61, 63, 70, and 72 of this chapter, and release of part of a facility or site for unrestricted use in accordance with § 50.83 of this chapter, as well as other facilities subject to the Commission's jurisdiction under the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, as amended. For high-level and low-level waste disposal facilities (10 CFR Parts 60, 61, 63), the criteria apply only to ancillary surface facilities that support radioactive waste disposal activities. The criteria do not apply to uranium and thorium recovery facilities already subject to Appendix A to 10 CFR Part 40 or to uranium solution extraction facilities.

(b) The criteria in this subpart do not apply to sites which:

(1) Have been decommissioned prior to the effective date of the rule in accordance with criteria identified in the Site Decommissioning Management Plan (SDMP) Action Plan of April 16, 1992 (57 FR 13389);

(2) Have previously submitted and received Commission approval on a license termination plan (LTP) or decommissioning plan that is compatible with the SDMP Action Plan criteria; or

(3) Submit a sufficient LTP or decommissioning plan before August 20, 1998 and such LTP or decommissioning plan is approved by the Commission before August 20, 1999 and in accordance with the criteria

identified in the SDMP Action Plan, except that if an EIS is required in the submittal, there will be a provision for day-for-day extension.

(c) After a site has been decommissioned and the license terminated in accordance with the criteria in this subpart, or after part of a facility or site has been released for unrestricted use in accordance with § 50.83 of this chapter and in accordance with the criteria in this subpart, the Commission will require additional cleanup only, if based on new information, it determines that the criteria of this subpart were not met and residual radioactivity remaining at the site could result in significant threat to public health and safety.

(d) When calculating TEDE to the average member of the critical group the licensee shall determine the peak annual TEDE dose expected within the first 1000 years after decommissioning.

10 C.F.R. § 20.1402 Radiological criteria for unrestricted use.

A site will be considered acceptable for unrestricted use if the residual radioactivity that is distinguishable from background radiation results in a TEDE to an average member of the critical group that does not exceed 25 mrem (0.25 mSv) per year, including that from groundwater sources of drinking water, and that the residual radioactivity has been reduced to levels that are as low as reasonably achievable (ALARA). Determination of the levels which are ALARA must take into account consideration of any detriments, such as deaths from transportation accidents, expected to potentially result from decontamination and waste disposal.

10 C.F.R. 20.1403 Criteria for license termination under restricted conditions.

A site will be considered acceptable for license termination under restricted conditions if:

(a) The licensee can demonstrate that further reductions in residual radioactivity necessary to comply with the provisions of § 20.1402 would result in net public or environmental harm or were not being made because the residual levels associated with restricted conditions are ALARA. Determination of the levels which are ALARA must take into account consideration of any detriments, such as traffic accidents, expected to potentially result from decontamination and waste disposal;

(b) The 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;

(c) The licensee has provided sufficient financial assurance to enable an independent third party, including a governmental custodian of a site, to assume and carry out responsibilities for any necessary control and maintenance of the site. Acceptable financial assurance mechanisms are–

(1) Funds placed into an account segregated from the licensee's assets and outside the licensee's administrative control as described in § 30.35(f)(1) of this chapter;

(2) Surety method, insurance, or other guarantee method as described in § 30.35(f)(2) of this chapter;

(3) A statement of intent in the case of Federal, State, or local Government licensees, as described in § 30.35(f)(4) of this chapter; or

(4) When a government [FN1] entity is assuming custody and ownership of a site, an arrangement that is deemed acceptable by such governmental entity.

(d) The licensee has submitted a decommissioning plan or License Termination Plan (LTP) to the Commission indicating the licensee's intent to decommission in accordance with §§ 30.36(d), 40.42(d), 50.82(a) and (b), 70.38(d), or 72.54 of this chapter, and specifying that the licensee intends to decommission by restricting use of the site. The licensee shall document in the LTP or decommissioning plan how the advice of individuals and institutions in the community who may be affected by the decommissioning has been sought and incorporated, as appropriate, following analysis of that advice.

(1) Licensees proposing to decommission by restricting use of the site shall seek advice from such affected parties regarding the following matters concerning the proposed decommissioning–

(i) Whether provisions for institutional controls proposed by the licensee:

(A) Will 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) TEDE per year;

(B) Will be enforceable; and

(C) Will not impose undue burdens on the local community or other affected parties.

(ii) Whether the licensee has provided sufficient financial assurance to enable an independent third party, including a governmental custodian of a site, to assume and carry out responsibilities for any necessary control and maintenance of the site;

(2) In seeking advice on the issues identified in § 20.1403(d)(1), the licensee shall provide for:

(i) Participation by representatives of a broad cross section of community interests who may be affected by the decommissioning;

(ii) An opportunity for a comprehensive, collective discussion on the

issues by the participants represented; and

(iii) A publicly available summary of the results of all such discussions, including a description of the individual viewpoints of the participants on the issues and the extent of agreement or disagreement among the participants on the issues; and

(e) Residual radioactivity at the site has been reduced so that if the institutional 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 either–

(1) 100 mrem (1 mSv) per year; or

(2) 500 mrem (5 mSv) per year provided that the licensee–

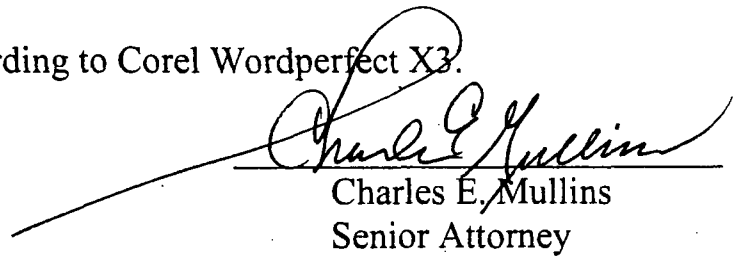
(i) Demonstrates that further reductions in residual radioactivity necessary to comply with the 100 mrem/y (1 mSv/y) value of paragraph (e)(1) of this section are not technically achievable, would be prohibitively expensive, or would result in net public or environmental harm;

(ii) Makes provisions for durable institutional controls;

(iii) Provides sufficient financial assurance to enable a responsible government entity or independent third party, including a governmental custodian of a site, both to carry out periodic rechecks of the site no less frequently than every 5 years to assure that the institutional controls remain in place as necessary to meet the criteria of § 20.1403(b) and to assume and carry out responsibilities for any necessary control and maintenance of those controls. Acceptable financial assurance mechanisms are those in paragraph (c) of this section.

CERTIFICATE OF COMPLIANCE

Counsel for Respondent hereby certifies that the foregoing Brief for the Federal Respondents satisfies the requirements of Rule 32(a)(7) of the federal Rules of Appellate Procedure. The Brief was prepared in proportional Times New Roman font of 14 characters per inch, and, excluding the parts of the brief exempted by Rule 32(a)(7)(iii) of the Federal Rules of Appellate Procedure, contains 13,996 words, according to Corel Wordperfect X3.



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CERTIFICATE OF SERVICE

I declare under penalty of perjury that I filed the "Federal Respondents' Brief" in consolidated Case Nos. 06-5140, 07-1559, and 07-1756 by causing ten (10) paper copies to be sent to this Court by overnight delivery service, and an electronic copy in PDF format via electronic mail. I hereby certify that the electronic brief served on this Court has been scanned for viruses using Symantec AntiVirus Program 10.1.5.5010 and is virus-free, and that the text of the electronic brief and the paper briefs are identical.

I also served two paper copies of the brief on the following counsel by overnight delivery service:

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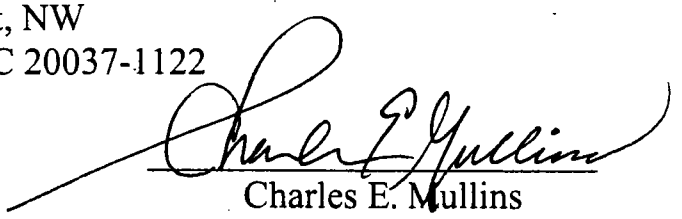

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Dated: August 27, 2007.