UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Dale E. Klein
Kristine L. Svinicki

In the Matter of	)	
SHIELDALLOY METALLURGICAL CORP.	)	Docket No. 40-7102-MLA
(License Amendment Request for Decommissioning of the Newfield, New Jersey Site)	)	

CLI-10-08

MEMORANDUM AND ORDER

This memorandum and order responds to a motion by Shieldalloy Metallurgical Corp. (Shieldalloy) for a stay pending judicial review of the transfer of regulatory authority over the Newfield, New Jersey site to the State of New Jersey.[1] For the reasons set forth below, we deny Shieldalloy's motion.

I. BACKGROUND

As part of its smelting and alloy production at the Newfield site, Shieldalloy processed pyrochlore, a concentrated ore containing columbium (niobium). Because pyrochlore contains more than 0.05 percent weight uranium and thorium, it is subject to NRC regulation as a source

[1] *Shieldalloy's Amended Motion for Stay Pending Judicial Review of Commission Action Transferring Regulatory Authority over Newfield, New Jersey Facility to the State of New Jersey* (Oct. 14, 2009)(Shieldalloy Motion for Stay). Shieldalloy filed its original motion for a stay on October 13, 2009. Changes were made on two pages to reflect the finding of the New Jersey Department of Environmental Protection (NJDEP) that Shieldalloy's decommissioning plan does not meet the NJDEP's regulations. *See id.* at 1 n.1. All citations herein refer to Shieldalloy's amended motion.

material.[2] For this, Shieldalloy obtained a source material license under Part 40 of the Commission's regulations, which entitled it to ship, receive, possess, and store such material.

A. *Adjudicatory Proceeding on Proposed Decommissioning Plan*

In August 2001, Shieldalloy notified the NRC that it intended to decommission the Newfield site, and the license was amended in November 2002 to authorize only decommissioning activities. Shieldalloy then submitted a decommissioning plan requesting a long term control (LTC) license, proposing to bury the radioactive material under an engineered barrier onsite.[3] Upon the NRC Staff's determination that the decommissioning plan was acceptable for docketing and review, a notice of opportunity to request a hearing was published in the *Federal Register*,[4] and in response, seven petitioners filed petitions to intervene and requests for a hearing. The Atomic Safety and Licensing Board established to rule on the intervention petitions denied all but one – that submitted by the New Jersey Department of Environmental Protection (NJDEP).[5] The Board found that the NJDEP had demonstrated standing to intervene and had proffered at least one admissible contention, but deferred its ruling on the balance of the NJDEP's contentions pending the Staff's completion of its safety

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[2] *See* 10 C.F.R. § 40.4.

[3] *See* Letter from David R. Smith, Radiation Safety Officer, Shieldalloy Metallurgical Corp., to Kenneth L. Kalman, U.S. NRC, at 2 (June 30, 2006)(ADAMS Accession No. ML061980092); Decommissioning Plan for the Newfield Facility, Vol. 1, Rev. 1, at xxii to xxiii (Oct. 21, 2005)(ML053190220).

[4] *See* Notice of Consideration of Amendment Request for Decommissioning for Shieldalloy Metallurgical Corporation, Newfield NJ and Opportunity to Request a Hearing, 71 Fed. Reg. 66,986, 66,986 (Nov. 17, 2006).

[5] LBP-07-5, 65 NRC 341 (2007).

and environmental review.[6] The adjudicatory proceeding on the proposed decommissioning plan remains in a state of suspension.[7]

B. *Discontinuance of Commission Authority over Shieldalloy*

In a matter unrelated to the adjudicatory proceeding on Shieldalloy's proposed decommissioning plan, on October 16, 2008, the State of New Jersey (New Jersey) formally applied to become an Agreement State pursuant to section 274 of the Atomic Energy Act of 1954, as amended (AEA).[8] In accordance with that section, Governor Jon S. Corzine certified "that the State of New Jersey wishes to assume regulatory authority and oversight responsibility for [certain materials now under NRC jurisdiction], and that the State of New Jersey has an adequate program for the control of radiation hazards covered by this proposed agreement."[9] The NRC Staff reviewed the application, and determined that the New Jersey radiation protection program is both compatible with the Commission's program for regulation with respect to the proposed materials and adequate for the protection of public health and safety.[10]

In accordance with AEA section 274e., the NRC Staff published the proposed agreement in the *Federal Register* once a week for four consecutive weeks to provide an

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[6] *Id.* at 358-63.

[7] *See* Order (Oct. 21, 2009)(unpublished)(suspending the Staff's obligation to file status reports on the progress of its review).

[8] Letter from Jon S. Corzine, Governor, to Dale E. Klein, Chairman, U.S. NRC (Oct. 16, 2008)(ML090510713).

[9] *Id.* at 1.

[10] State of New Jersey: Discontinuance of Certain Commission Regulatory Authority Within the State; Notice of Agreement Between the Nuclear Regulatory Commission and the State of New Jersey, 74 Fed. Reg. 51,882, 51,883 (Oct. 8, 2009).

opportunity for public comment.[11] Shieldalloy submitted comments on the proposed agreement.[12] After reviewing and responding to the comments, the NRC Staff determined that "[t]he comments did not affect [its] assessment" of the New Jersey program.[13]

Based on the Staff's assessment, we found that the New Jersey program is adequate to protect public health and safety and is compatible with the NRC's program.[14] Thereafter, Chairman Jaczko and Governor Corzine signed the agreement on behalf of the NRC and New Jersey, respectively, and the agreement became effective on September 30, 2009.[15] Thus, as of September 30, 2009, the NRC discontinued, and New Jersey assumed, regulatory authority over all categories of materials covered in the agreement – (1) byproduct materials as defined in section 11e.(1) of the AEA; (2) byproduct materials as defined in section 11e.(3) of the AEA; (3) byproduct materials as defined in section 11e.(4) of the AEA; (4) source materials; (5) special nuclear materials in quantities not sufficient to form a critical mass; and (6) the regulation of the land disposal of byproduct, source, or special nuclear waste materials received from other

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[11] State of New Jersey: NRC Staff Assessment of a Proposed Agreement Between the Nuclear Regulatory Commission and the State of New Jersey, 74 Fed. Reg. 25,283 (May 27, 2009); 74 Fed. Reg. 26,739 (June 3, 2009); 74 Fed. Reg. 27,572 (June 10, 2009); 74 Fed. Reg. 28,728 (June 17, 2009).

[12] Letter from Hoy E. Frakes, Jr., President, Shieldalloy Metallurgical Corp., to Michael T. Lesar, Chief, Rulemaking, Directives and Editing Branch, U.S. NRC (June 11, 2009)(ML091700382 and ML091680491).

[13] 74 Fed. Reg. at 51,883. The NRC Staff's response to comments is available as an attachment to the Memorandum from R. W. Borchardt, Executive Director for Operations, to the Commissioners, SECY-09-0114 (Aug. 18, 2009)(Enclosure 2 – Staff Analysis of Public Comments)(ML091950400)(SECY-09-0114, Enclosure 2).

[14] 74 Fed. Reg. at 51,883.

[15] *Id.* at 51,884 (Article IX).

persons.[16] Because the transfer included authority over source material, New Jersey assumed regulatory authority over Shieldalloy's Newfield site. With the discontinuance of NRC authority, the NRC Staff terminated its review of Shieldalloy's proposed decommissioning plan, and forwarded the files associated with its environmental and safety review of Shieldalloy's proposed decommissioning plan to New Jersey.[17]

On October 8, 2009, the NJDEP, which implements the New Jersey program, informed Shieldalloy that it had rejected Shieldalloy's proposal for an LTC license.[18] The NJDEP directed Shieldalloy to submit a decommissioning plan proposing offsite disposal – specifically, removal of the material and disposal in a licensed facility out of state.[19] The NJDEP determined that Shieldalloy "will remain in compliance if a revised [plan] is submitted by January 31, 2010."[20]

After the agreement between New Jersey and the NRC became effective, Shieldalloy filed, pursuant to 10 C.F.R. § 2.323(a), the motion at issue here. In its motion, Shieldalloy states that it intends to seek judicial review of the NRC's decision to enter into the agreement with New Jersey.[21] Shieldalloy therefore requests that we issue a stay of the effectiveness of

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[16] *Id.* at 51,883 (Article I).

[17] *See NRC Staff's Fifteenth Status Report* (Oct. 1, 2009) at 2.

[18] Letter from Patricia Gardner, Manager, Bureau of Environmental Radiation, NJDEP, to Hoy Frakes, President, Shieldalloy Metallurgical Corporation (Oct. 8, 2009)(attached as Exhibit B to Shieldalloy Motion for Stay)(October 8 NJDEP Letter).

[19] *See id.* (citing N.J. Admin. Code §§ 7:28-12.1 *et seq.*, 7:28-58.1).

[20] *Id.* By letter dated December 11, 2009, the NJDEP extended the deadline for submitting a revised decommissioning plan to July 31, 2010. Letter from Jill Lipoti, Director, NJDEP, Division of Environmental Safety and Health, to Dennis J. Krumholz, counsel for Shieldalloy (Dec. 11, 2009) at 2 (ML093490230)(December 11 NJDEP Letter).

[21] Shieldalloy Motion for Stay at 2. Shieldalloy has since filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit, requesting that the court overturn the (continued ...)

the transfer of regulatory authority over the Newfield site pending judicial review.[22] Citing 10 C.F.R. § 2.342(e) and NRC case law, Shieldalloy asserts that it has satisfied all of the relevant criteria for issuance of a stay.[23]

II. DISCUSSION

A. *Shieldalloy's Motion*

Given that Shieldalloy's filing is associated with a challenge to the New Jersey Agreement, and not with the adjudicatory proceeding on Shieldalloy's proposed decommissioning plan, it does not fit cleanly into our procedural rules. Shieldalloy has filed its stay application pursuant to 10 C.F.R. § 2.342. That section, by its terms, applies to a stay *of a decision or action of a presiding officer or licensing board*.[24] The movant must be a "party to the proceeding," which, in the context of section 2.342, refers to an adjudicatory proceeding presided over by a presiding officer or board. Here, Shieldalloy challenges our approval of New Jersey's application to become an Agreement State. As stated above, our approval of the New Jersey Agreement is a matter separate from, and unrelated to, the pending adjudicatory proceeding before the Board on Shieldalloy's proposed decommissioning plan. Because Shieldalloy's motion involves a challenge to Commission action outside of the adjudicatory proceeding to which Shieldalloy is a party, section 2.342 does not apply. However, we have entertained requests for stays of final agency action in anticipation of judicial review in other

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(… continued)
agreement and direct the NRC to revoke its transfer of regulatory authority over the Newfield site to New Jersey, and resume its regulatory authority over the site. Shieldalloy Metallurgical Corp. v. NRC, No. 09-1268 (D.C. Cir. filed Nov. 2, 2009).

[22] Shieldalloy Motion for Stay at 1-2.

[23] *Id.* at 2, 5.

[24] 10 C.F.R. § 2.342(a).

proceedings.[25] Here, we will exercise discretion and consider Shieldalloy's request as a stay application.

A question has been raised regarding our authority to grant the stay requested by Shieldalloy.[26] We need not reach this question, however, because, as discussed below, Shieldalloy has not made the requisite showing to warrant issuance of a stay in any event.

B. *Analysis*

By way of background, we begin with a brief summary of the review and approval process for a Section 274 Agreement.

Section 274 of the AEA governs cooperation between the Commission and a state. That section authorizes the Commission, if certain conditions are met, to discontinue its regulatory authority over certain categories of material, which authority then is assumed by the state. First, the Governor must "certif[y] that the State has a program for the control of radiation hazards

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[25] *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69, 80-82 (1992)(analyzing whether movant had met showing of stay factors in request for administrative stay of a license transfer pending anticipated challenge in state court); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177, 178-80 (1985)(declining to issue stay of issuance of full-power authorization because stay factors had not been met); *cf. Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 n.4 (2006)("[w]hile technically not applicable to a request for a stay of NRC Staff action, the section 2.342(e) standards simply restate commonplace principles of equity universally followed when judicial (or quasi-judicial) bodies consider stays or other forms of temporary injunctive relief").

[26] In particular, the Staff argues that we lack authority to provide the relief that Shieldalloy requests. *See NRC Staff's Response to Shieldalloy's Motion for a Stay* (Oct. 23, 2009)(NRC Staff Response). In the Staff's view, our authority ended with the discontinuance of NRC authority over the Newfield site. Based on the Staff's interpretation of section 274, the only means to suspend or terminate an agreement is through an action triggered under the circumstances, and taken in accordance with the procedures, enumerated in AEA section 274j. *Id.* at 1. According to the Staff, Shieldalloy has not shown that any of the circumstances necessary for triggering action under that section are present here and therefore we cannot grant the stay application. *Id.* at 7-8.

adequate to protect the public health and safety with respect to the materials within the State covered by the proposed agreement, and that the State desires to assume regulatory responsibility for such materials."[27] Second, the Commission must "find[] that the State program is in accordance with the requirements of subsection o. and in all other respects *compatible* with the Commission's program for regulation of such materials, and that the State program is *adequate* to protect the public health and safety with respect to the materials covered by the proposed agreement."[28] If the Commission determines that the state's regulatory program is compatible with the Commission's corresponding program and adequate to protect the public health and safety, then "[t]he Commission shall enter into [the] agreement."[29]

Section 274 is implemented via policy statements and agency guidance documents. Two policy statements provide guidance on the NRC Staff's review of a proposed or amended agreement.[30] The first policy statement, implemented in 1981, outlines thirty-six criteria that "are intended to indicate factors which the Commission intends to consider in approving new or amended agreements."[31] However, as stated in the policy statement, these criteria are not

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[27] AEA § 274d.(1), 42 U.S.C. § 2021(d)(1).

[28] *Id.* § 2021(d)(2) (emphasis added).

[29] *Id.* § 2021(d).

[30] As a general matter, a policy statement announces what the Commission seeks to establish as policy, and does not bind either the agency or the public. *See Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974).

[31] Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption thereof by States through Agreement, 46 Fed. Reg. 7540, 7540 (Jan. 23, 1981)(as amended by policy statements published at 46 Fed. Reg. 36,969 (July 16, 1981)(revising Criterion 29f.) and 48 Fed. Reg. 33,376 (July 21, 1983)(revising Criterion 9))(collectively, 1981 Policy Statement).

intended to limit Commission discretion in reviewing individual agreements, or amendments thereto.[32]

A second policy statement was implemented in 1997 to describe the respective roles and responsibilities of the NRC and the states in the administration of Section 274 agreements. In particular, the policy statement establishes "principles, objectives, and goals" that the Commission expects to be reflected in the implementing guidance and programs of the NRC and Agreement States, in order for each to meet their respective responsibilities. Further, the Commission explained:

> In order to relinquish its authority to a particular State, the Commission must find that the program is compatible with the Commission's program for the regulation of radioactive materials and that the State program is adequate to protect public health and safety.[33]

To that end, the policy statement provides guidance on what it means for an Agreement State program to be "compatible" with that of the NRC and "adequate" to protect public health and safety.[34] Among other things, the 1997 Policy Statement creates a scheme of five "compatibility categories" that are assigned to all NRC regulations. Each compatibility category requires a different degree of compatibility for the corresponding state standard or program element under review. For example, for NRC regulations that are designated as compatibility category "A," the corresponding state standard should be "essentially identical to those of the

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[32] *Id.*

[33] Statement of Principles and Policy for the Agreement State Program; Policy Statement on Adequacy and Compatibility of Agreement State Programs, 62 Fed. Reg. 46,517, 46,519 (Sept. 3, 1997)(1997 Policy Statement).

[34] *Id.* at 46,517-25.

Commission, unless Federal statutes provide the State authority to adopt different standards."[35] Likewise, for NRC regulations that are designated as compatibility category "B," the "State program elements should be essentially identical to those of the Commission."[36] However, for NRC regulations that are designated as compatibility category "C," the state has greater flexibility in the standards it sets. Compatibility category "C" regulations are "other Commission program elements" considered to be "important for an Agreement State to have in order to avoid conflicts, duplications, gaps, or other conditions that would jeopardize an orderly pattern in the regulation of agreement material on a nationwide basis."[37] The Agreement State program elements for compatibility category C "should embody the essential objective of the corresponding Commission program elements."[38] Unlike NRC regulations that are designated as compatibility category "A" or "B," an Agreement State program element need not be "essentially identical" to an NRC category "C" regulation.

The NRC's Office of Federal and State Materials and Environmental Management Programs (FSME) administers the Agreement State program. It follows detailed standardized

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[35] *Id.* at 46,524.

[36] *Id.*

[37] *Id.*

[38] *Id.* The two remaining categories are "NRC," which represents program elements that cannot be relinquished to Agreement States, and "H&S," which represents program elements that are not required for the purposes of compatibility. However, states should adopt program elements in the H&S category that embody the essential objectives of the NRC program elements in order to maintain an adequate program for the protection of public health and safety. *Id.* at 46,524-25; *see also* Office of Federal and State Materials and Environmental Management Programs Internal Procedure SA-200, "Compatibility Categories and Health and Safety Identification for NRC Regulations and Other Program Elements" (June 5, 2009) at 6-7 (replacing the designations for categories "D" and "E" as "H&S" and "NRC," respectively)(ML091190055)(SA-200).

procedures for reviewing Agreement State applications.[39] For example, NRC Management Directive 5.9 provides guidance on the assignment of compatibility categories to NRC regulations.[40] FSME also has implemented guidance for use by NRC and Agreement State staff on the compatibility category scheme.[41] In addition, the FSME website offers a "section-by-section summary" of the compatibility categories assigned to certain Parts of Title 10 of the Code of Federal Regulations.[42] These summaries are provided in chart form, and provide a standardized template for use by NRC Staff reviewers when evaluating Agreement State regulations or program elements.[43]

We consider the Shieldalloy stay application with this background in mind. In our review of a stay application, we consider four factors:

(1) [w]hether the moving party has made a strong showing that it is likely to prevail on the merits;

(2) [w]hether the party will be irreparably injured unless a stay is granted;

(3) [w]hether the granting of a stay would harm other parties; and

(4) [w]here the public interest lies.[44]

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[39] *See generally* Office of Federal and State Materials and Environmental Management Programs, http://www.nrc.gov/about-nrc/organization/fsmefuncdesc.html (last visited Nov. 25, 2009).

[40] Adequacy and Compatibility of Agreement State Programs, Directive 5.9 (Feb. 27, 1998)(ML041770094)(MD 5.9).

[41] *See generally* SA-200.

[42] *Id.* at 3 (citing Regulation Toolbox: Review Summary Sheets for Regulation Adoption for New Agreement States/Programs (10 CFR_), http://nrc-stp.ornl.gov/regsumsheets_newregs.html (last visited Nov. 25, 2009)).

[43] *See id.* at 3-5.

[44] 10 C.F.R. § 2.342(e).

1. Irreparable Injury Unless a Stay is Granted

As Shieldalloy notes,[45] when evaluating a motion for a stay we place the greatest weight on the second factor – irreparable injury to the moving party unless a stay is granted.[46] We require a showing of a "threat of immediate and irreparable harm" that will result absent a stay.[47]

With respect to irreparable injury, Shieldalloy states that under New Jersey's regulatory oversight it will be required to ship offsite the contaminated materials present at the Newfield site in lieu of Shieldalloy's desired method of consolidating them in a restricted-access area under an engineered barrier onsite (i.e., the LTC approach). Implementation of New Jersey's approach of shipping and disposing of the material offsite, Shieldalloy claims, will force Shieldalloy "to seek protection under the bankruptcy laws, as it had done before, and potentially liquidate."[48] According to Shieldalloy, it "cannot defray" what it estimates to be "a $70 million cost of removal of the materials from the site," as compared "to the less than $15 million cost to implement the LTC [approach]."[49]

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[45] Shieldalloy Motion for Stay at 5.

[46] *David Geisen*, CLI-09-23, 70 NRC __ (Nov. 17, 2009)(slip op. at 2)(citing *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006)); *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

[47] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 400 (2008).

[48] Shieldalloy Motion for Stay at 7.

[49] *Id.* at 7 (citing Affidavit of Hoy E. Frakes, Jr. ¶ 10 (Oct. 9, 2009)(attached as Exhibit A to Shieldalloy Motion for Stay)(Frakes Affidavit)).

In addition, Shieldalloy asserts other harms that will result from offsite disposal of the materials. Noting that exposures under either approach "would be expected to be within NRC regulatory limits," Shieldalloy maintains that removal and transportation of the material will result in a larger dose to workers at the Newfield site and members of the public than what would result from burial onsite.[50] Therefore, Shieldalloy argues, even though radiation doses would not exceed NRC limits, removal offsite "contravenes the principle of keeping radiation doses to the public resulting from the decommissioning process as low as is reasonably achievable [(ALARA)]."[51]

Shieldalloy fails to show that it will suffer the requisite injury without a stay of the effectiveness of the transfer of authority over the Newfield site to New Jersey. Shieldalloy's claimed harm is neither imminent nor irreparable. As New Jersey explains in its response to Shieldalloy's motion, Shieldalloy's liability for any amount paid to remove and dispose of the materials is "contingent upon the [NJDEP's] final decision on a decommissioning plan. . . . Shieldalloy will not be required to conduct any decommissioning activities until the [NJDEP] approves a plan."[52] Shieldalloy has until July 31, 2010 to submit a revised plan to remain in compliance with NJDEP regulations.[53] Thus, Shieldalloy has not submitted, nor has NJDEP reviewed (let alone approved), a decommissioning plan for the Newfield site. Even assuming that Shieldalloy were correct that it will cost $70 million to remove and transport the waste, Shieldalloy's claim of irreparable injury is speculative because it is contingent upon future

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[50] *Id.* at 7-8 (citing Frakes Affidavit ¶ 11).

[51] *Id.* at 7.

[52] New Jersey Response at 3.

[53] *See* December 11 NJDEP Letter at 2.

NJDEP action after review of a not-yet-submitted revised decommissioning plan.[54] Likewise, as New Jersey points out, "it is premature to argue that additional exposures will be caused by offsite disposal before Shieldalloy proposes offsite disposal in a decommissioning plan. . . . New Jersey would review the plan to ensure that it meets all regulatory standards [for protection of workers and the environment against radiation hazards]."[55]

Moreover, Shieldalloy is not without remedy if it wishes to challenge the compatibility of New Jersey's radiation protection program during the NJDEP's review of its revised decommissioning plan.[56] For example, Shieldalloy may request that the NRC take action under

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[54] This case can be distinguished from *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), one of the cases on which Shieldalloy relies to support its assertion that it will suffer irreparable injury. In *Holiday Tours*, the action that had been stayed pending appeal was a permanent injunction prohibiting a then-recently-transformed bus tour company from operating bus tours. There, the D.C. Circuit found that "the absence of a stay would [mean the] destruction [of the business] in its current form as a provider of bus tours." *Id.* at 843. Accordingly, in conjunction with the application of the other stay factors, the D.C. Circuit found that the district court did not abuse its discretion in staying its permanent injunction pending appeal. *Id.* at 845. Here, the action to be stayed does not have the immediacy of that in *Holiday Tours*. Any claimed financial harm to Shieldalloy's business from offsite disposal would not occur until the NJDEP approves offsite disposal after review of a revised decommissioning plan. The second case that Shieldalloy cites, *Goldstein v. Miller*, 488 F. Supp. 156 (D. Md. 1980) also is distinguishable for this reason. In that case, plaintiffs sought a permanent injunction against the implementation of a federal regulation establishing limits on liquor bottle sizes. After the court entered judgment for the defendants, plaintiffs sought a stay pending appeal. The district court found that at least one of the plaintiffs had shown "serious and seemingly irreparable" injury because it would have been forced out of business if a stay were not granted. Unlike here, the absence of a stay in that case likely would have resulted in immediate harm because the plaintiff would have been required to change its liquor bottling operations without delay in order to comply with the federal regulation.

[55] New Jersey Response at 4.

[56] *See Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."). *Cf. Oyster Creek*, CLI-08-13, 67 NRC at 400 (noting that "[i]n any case, [movant] would not be irreparably harmed even if the license were at (continued ...)

AEA section 274j.[57] Alternatively, if it wishes to challenge the compatibility category that is assigned to a particular regulation (including the license termination rule), it may do so at any time through submission of a petition for rulemaking under 10 C.F.R. § 2.802.[58] In the absence

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(… continued)
the point of issuance" because "[a] license renewal may be set aside (or appropriately conditioned) even after it has been issued, upon subsequent administrative or judicial review"). In essence, the immediate "injury" that would result in the absence of a stay is the submission of a revised decommissioning plan. This does not amount to irreparable harm. *See Virginia Petroleum Jobbers Ass'n*, 259 F.2d at 925. If Shieldalloy were to perceive difficulty in meeting the July 31, 2010 deadline for submission of a revised decommissioning plan, it appears that Shieldalloy could request an extension of time from the NJDEP. *See* N.J.A.C. § 7:28-58.1 (incorporating by reference 10 C.F.R. § 40.42(g)(2)); December 11 NJDEP Letter at 2 (extending deadline for submitting a revised decommissioning plan by six months).

[57] We have, in the past, responded to challenges to an Agreement State's program raised in a section 2.206 petition. *See Envirocare of Utah, Inc.* (Salt Lake City, Utah), DD-98-9, 48 NRC 173, 176 (1998)(explaining that the Director responded to Agreement State program-related claims raised in 2.206 petition by letter); *Utah* (Agreement Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended), DD-95-1, 41 NRC 43, 43-44 (1995)(analyzing 2.206 petition challenging Agreement State program).

[58] *See infra* note 67 and accompanying text. In addition, the NRC Staff is required by law to conduct periodic reviews of the adequacy and compatibility of an Agreement State's regulatory program. *See* AEA § 274j., 42 U.S.C. § 2021(j)("The Commission shall periodically review such agreements and actions taken by the States under the agreements to ensure compliance with the provisions of this section."). Implemented through FSME guidance documents, this periodic review is called the Integrated Materials Performance Evaluation Program (IMPEP). The first IMPEP review generally takes place approximately 18 months after an agreement is signed, and thereafter, every four or five years. IMPEP reviews are conducted onsite at the Agreement State program's offices by a team of NRC Staff, as well as a representative from another Agreement State. Depending on the findings made during that review, the NRC Staff might recommend action to be taken, which is then referred to a Management Review Board for further review. *See generally* SA-100, "Implementation of the Integrated Materials Performance Evaluation Program (IMPEP)" (Feb. 1, 2007)(ML070360578). Of note, a "special review" might be scheduled "if NRC staff learns of special problems with a licensee or group of licensees or of an event requiring special attention" rather than waiting until the next scheduled periodic review. *Id.* at 4.

of either immediate or irreparable harm, Shieldalloy fails to make the requisite showing with respect to this factor.[59]

2. Strong Showing of Likelihood of Success on the Merits

Without a showing of irreparable harm, Shieldalloy must show that success on the merits is a "virtual certainty" to warrant issuance of a stay.[60]

With respect to its likelihood of success, Shieldalloy argues that there is a strong likelihood that it will prevail in the court of appeals on the merits of its challenge to our approval of the New Jersey Agreement. According to Shieldalloy, various aspects of New Jersey's regulatory program are incompatible with the NRC's program, in contravention of one of the conditions precedent to approval of a state agreement.[61] In support of this argument, Shieldalloy repeats a selection of the claims it made in comments on the proposed agreement when it was published in the *Federal Register*. It takes issue with the Staff's resolution[62] of its comments, and summarizes "some of the errors in the Staff's [assessment] that will warrant

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[59] We also note that Shieldalloy has initiated an action in the U.S. District Court for the District of New Jersey seeking declaratory and injunctive relief to preclude the application of the NJDEP regulations to the Newfield site. *See* Letter from Matias F. Travieso-Diaz, Counsel for Shieldalloy, to Licensing Board, (Oct. 5, 2009) at 1-2 (Shieldalloy October 5 Letter); Shieldalloy Metallurgical Corp. v. New Jersey, Civil Action No. 09-04375 (D.N.J. filed Aug. 25, 2009). In addition, Shieldalloy has "filed suit against the State of New Jersey in the Appellate Division of the New Jersey Superior Court, challenging the validity of the [NJDEP regulations]." Shieldalloy October 5 Letter at 2; In re N.J.A.C. 7:28, Dkt. No. A-278-09 (N.J. Sup. Ct., App. Div. filed Sept. 14, 2009).

[60] *Geisen*, CLI-09-23, 70 NRC __ (slip op. at 3); *Oyster Creek*, CLI-08-13, 67 NRC at 400; *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 (1994)(citing *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269 (1990)).

[61] Shieldalloy Motion for Stay at 9-10.

[62] *See generally* SECY-09-0114, Enclosure 2.

overturning by a reviewing court."[63] Shieldalloy's arguments are diffuse and difficult to follow. In its motion, Shieldalloy alternates, sometimes within the same paragraph, between challenging the compatibility category assigned to the license termination rule – compatibility category "C" – and challenging the compatibility of the New Jersey program itself. We discuss each challenge separately.

a. "The New Jersey Program fails to implement the ALARA principle, as required by NRC regulations"

First, Shieldalloy argues that New Jersey "violated" Criterion 9 of the 1981 Policy Statement because the New Jersey program failed to "include adherence to ALARA as one of the radiological criteria for license termination."[64] Criterion 9 states that an Agreement State's standards for disposal of radioactive materials "shall be in accordance with [10 C.F.R.] Part 20."[65] ALARA is one of the principles incorporated in Part 20.

As an initial matter, Shieldalloy misunderstands the nature of the numbered criteria in our 1981 Policy Statement. As discussed above, they serve as guidelines for matters to be considered when reviewing an agreement, and they do not limit the agency's discretion. Thus, a state cannot "violate" any of the criteria. Moreover, Criterion 9 concerns the disposal of low-level waste, not license termination, and is inapplicable here.[66] Nonetheless, as discussed below, the NJDEP's license termination regulations are "in accordance with" Part 20 because,

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[63] Shieldalloy Motion for Stay at 10.

[64] *Id.* at 11.

[65] 48 Fed. Reg. at 33,377.

[66] SECY-09-0114, Enclosure 2, at 5.

as evaluated against the compatibility category "C" license termination rule, they embody the essential objective of the rule.

Again, each NRC regulation is assigned a particular compatibility category. The compatibility category is determined as part of the rulemaking process, and is set forth in the statements of consideration for the proposed and final rules, and as such, may be commented on in the rulemaking proceeding.[67] Relevant here, when we issued the proposed license termination rule, we solicited public comment on the designation of the compatibility category. We received divided responses: some commenters stated that states should have the authority to implement stricter radiation protection standards; others stated that a state should be required to adopt the NRC's standards without revision.[68] When the final rule was promulgated, we assigned to it what is now the equivalent of compatibility category "C" after consideration of the comments that were submitted. In doing so, we explained:

> Because the dose criterion in the rule is not a "standard" in the sense of the public dose limits of 10 CFR part 20 but is a constraint within the public dose limit that provides a sufficient and ample margin of safety below the limit, it is reasonable that the rule would be a [C] level of compatibility under the current policy. This means that the Agreement States would be required to adopt the regulation but would have *significant flexibility in language, and would be allowed to adopt more stringent requirements*.[69]

Therefore, a state's license termination regulations may be more stringent than the NRC license termination rule, with "significant flexibility in language," provided they embody the "essential objective" of the NRC's license termination rule.

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[67] *See, e.g.*, Radiological Criteria for License Termination, 62 Fed. Reg. 39,058, 39,079-80, 39,086 (July 21, 1997).

[68] *Id.* at 39,079.

[69] *Id.* at 39,080 (emphasis added).

The essential objective of the license termination rule is set forth in the statements of consideration to the final rule. It is "to provide specific radiological criteria for the decommissioning of lands and structures. . . . to ensure that decommissioning will be carried out without undue impact on public health and safety and the environment."[70] The NJDEP's license termination regulations are permissibly more restrictive than the NRC's. They require a licensee to show that members of the public will not be exposed to a total effective dose equivalent of more than 15 mrem per year as compared to the 25 mrem limit established in Part 20.[71] Because New Jersey's program lowers the maximum permissible radiation exposure to members of the public, this aspect of New Jersey's program embodies the license termination rule's essential objective of ensuring that decommissioning will be carried out without undue impact on public health and safety and the environment.

Shieldalloy argues that "if the NJDEP Regulations are applied to the Newfield Facility," it will result in "higher doses to workers and the public and a lower level of protection of public

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[70] *Id.* at 39,058.

[71] *Compare* N.J. Admin. Code § 7:28-12.8(a)(1) ("Sites shall be remediated so that the incremental radiation dose to any person from any residual radioactive contamination at the site above that due to natural background radionuclide concentration, under either an unrestricted use remedial action, limited restricted use remedial action, or a restricted use remedial action, shall be as specified below: 1. For the sum of annual external gamma radiation dose (in effective dose equivalent) and intake dose (in committed effective dose equivalent), including the groundwater pathway: 15 millirem (0.15 milliSievert) total annual effective dose equivalent (15 mrem/yr TEDE)."), *with* 10 C.F.R. § 20.1402 ("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 . . . the residual radioactivity has been reduced to levels that are as low as reasonably achievable (ALARA).").

health and safety than that provided by the NRC regulations."[72] This, Shieldalloy asserts, is caused by the "[f]ailure [of the regulations] to observe the ALARA principle."[73]

ALARA is defined as "every reasonable effort to maintain exposures to radiation as far below the dose limits in this part as is practical consistent with the purpose for which the licensed activity is undertaken."[74] A cost benefit analysis is employed to determine a practicable dose limit.[75] The ALARA principle, as applied in the license termination rule, defines the maximum permissible annual dose as 25 mrem TEDE, but directs further that exposures should be minimized, such that they will be "as low as is reasonably achievable" below the 25 mrem limit.[76] As we understand Shieldalloy's argument, Shieldalloy would have it that "as low as is reasonably achievable" in the context of the NJDEP's decommissioning regulations means that a permissible dose would be above 15 mrem, but below 25 mrem. This is a misunderstanding of the ALARA principle. ALARA is defined by the dose limit delineated in the regulations. The NJDEP's dose limit is 15 mrem. Consequently, if the NJDEP expressly had incorporated the ALARA principle into its license termination regulations, Shieldalloy's

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[72] Shieldalloy Motion for Stay at 12 (citing Frakes Affidavit ¶ 11).

[73] *Id.* at 11-12.

[74] 10 C.F.R. § 20.1003.

[75] *Id.* ("taking into account the state of technology, the economics of improvements in relation to state of technology, the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to utilization of nuclear energy and licensed materials in the public interest").

[76] *See, e.g.*, 62 Fed. Reg. at 39,065 (listing various reports that "all suggest that, in addition to setting a constraint value for an individual source, achievement of exposures that are ALARA should continue to be considered as a means of optimization. For this reason and because the generic analysis . . . tends to indicate that achieving doses below 0.25 mSv/y (25 mrem/y) may be ALARA for some cases, the rule continues to require an ALARA evaluation below the unrestricted dose criterion").

decommissioning plan would then have to show that the maximum annual dose to any person is "as low as is reasonably achievable" below 15 mrem.[77]

The gravamen of Shieldalloy's complaint, as we understand it, is that it would prefer the dose limit in the NJDEP's decommissioning regulations to be 25 mrem rather than 15 mrem. This argument fails because New Jersey is permitted to establish more stringent decommissioning standards than the NRC's. This is consistent with the NRC Staff's response to Shieldalloy's comment concerning this issue – an assessment with which we agreed in our approval of the New Jersey Agreement.[78] Viewed another way, Shieldalloy appears to challenge the license termination rule's compatibility category designation.[79] As discussed above, the compatibility designation is made as part of the rulemaking process. Submission of a petition for rulemaking under 10 C.F.R. § 2.802 is the appropriate mechanism for challenging the compatibility category of the license termination rule. For all of these reasons, it is unlikely that Shieldalloy will succeed on the merits of this challenge to the New Jersey program.

b. "The New Jersey Program is also incompatible with other aspects of the 10 C.F.R. Part 20 regulations"

Aside from its complaint concerning the 15 mrem dose limit in the NJDEP regulations, in its motion Shieldalloy cites two examples of the "[n]umerous" "other departures from the Part 20

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[77] *See* N.J.A.C. § 7:28-6.1(d)(2).

[78] *See* SECY-09-0114, Enclosure 2, at 5 ("A state is permitted to establish more stringent dose limits as long as those limits "*provide a sufficient and ample margin of safety to ensure compliance with the public dose limits of 10 CFR Part 20*." (emphasis added)).

[79] *See* Shieldalloy Motion for Stay at 11 (referencing guideline that NRC uses when designating a particular regulation as compatibility category "A," Shieldalloy asserts that "NRC radiation protection regulations are 'basic radiation protection standards'"). *See also id.* at 11-12 n.9 (referencing category "B" program elements).

regulatory requirements."[80] Shieldalloy asserts that New Jersey's program is incompatible because: (1) NJDEP regulations do not permit license termination under restricted release criteria, while restricted release is permitted under NRC regulations; and (2) NJDEP regulations require decommissioning-related dose calculations up to the point of peak dose or 1000 years, whichever is longer, while NRC regulations only require calculation up to 1000 years after decommissioning.[81]

The NRC's restricted release criteria are provided in 10 C.F.R. § 20.1403. The NRC dose calculation period is provided in 10 C.F.R. § 20.1401(d). Both regulations are part of the license termination rule, and, as such, have been designated as compatibility category "C." As discussed above, a state is permitted to establish standards that are more stringent than the NRC's for category "C" regulations, as long as they embody the essential objective of the NRC's program elements. Neither New Jersey's restricted release criteria[82] nor its requirement of a calculation of up to peak dose[83] is inconsistent with the essential objective of the rule, and the Staff appropriately found them to be compatible. In both of Shieldalloy's examples, the NJDEP's regulations embody the essential objective of the rule because they are aimed at limiting the dose during and after decommissioning activities to members of the public,[84] thus

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[80] Shieldalloy Motion for Stay at 12.

[81] *Id.*

[82] *See* N.J. Admin. Code §§ 7:28-12.8(a) (including "limited restricted use" and "restricted use" as decommissioning options), 7:28-12.12 (delineating requirements pertaining to engineering or institutional controls). The NJDEP regulations appear to permit "limited restricted use" and "restricted use" decommissioning options. We construe Shieldalloy's assertion to the contrary as a preference for the NJDEP restricted release criteria to be identical to 10 C.F.R. § 20.1403.

[83] *See* N.J. Admin. Code §§ 7:28-12.10(d), 7:28-12.11(f)(2)(iii).

ensuring that decommissioning will be carried out without undue impact on public health and safety and the environment.

In addition to explaining that the NJDEP regulations embody the essential objective of the NRC's program, the NRC Staff, in responding to Shieldalloy's comments on the proposed agreement, explained that they also "provide a level of protection of public health and safety that is at least equivalent to that afforded by NRC's requirements."[85] We continue to concur with the NRC Staff's assessment in this regard. Shieldalloy takes issue with the Staff's response, insisting that this "'equivalency' does not in fact exist."[86] In support of this proposition, Shieldalloy asserts that without the option of restricted release, it will be required to remove the radioactive materials from the Newfield site, which will "result[] in higher doses to workers and the public and a lower level of protection of public health and safety than that provided by the NRC regulations."[87] Shieldalloy does not offer any support for its assertion that there is no "equivalency" in the NJDEP's peak dose calculation requirement.

Shieldalloy's restricted release argument fails for reasons similar to those addressed above. The NJDEP will review Shieldalloy's decommissioning plan when it is submitted to

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(… continued)

[84] *See, e.g.*, 40 N.J. Reg. 5196(b), at 7 (Sept. 15, 2008)(reasoning, in rejecting Shieldalloy's suggestion that 1,000 years should be the limit, that "long-lived radionuclides, such as uranium and thorium, have half-lives in the millions and billions of years and peak doses may well occur after 1,000 years. The [NJDEP] and Commission [on Radiation Protection] believe it is vital to consider the peak dose, whenever it occurs, *to ensure that adequate measures are taken to protect public health and safety*" (emphasis added)).

[85] SECY-09-0114, Enclosure 2, at 5.

[86] Shieldalloy Motion for Stay at 12.

[87] *Id.* at 13.

ensure the protection of workers and the public.[88] At this point in time, "it is premature to argue that additional exposures will be caused by offsite disposal before Shieldalloy proposes offsite disposal in a decommissioning plan."[89] Shieldalloy otherwise fails to offer support for the proposition that New Jersey's program results in a lower level of protection of public health and safety than that provided by the NRC regulatory scheme.[90] In our view, Shieldalloy is not likely to succeed on the merits of this challenge to the New Jersey program.

c. "The NJDEP Regulations do not allow appropriate exemptions to their provisions"

With respect to this challenge, Shieldalloy argues that certain NJDEP regulations are inconsistent with 1981 Policy Statement Criterion 12.[91] Criterion 12 states that "[c]onsistent with the overall criteria here enumerated and to accommodate special cases or circumstances, the State regulatory authority shall be authorized in individual cases to impose additional requirements to protect health and safety, or to grant necessary exemptions which will not jeopardize health and safety."[92] Here, Shieldalloy questions the NJDEP's ability to grant exemptions, not its ability to impose additional requirements. Specifically, Shieldalloy states that the NJDEP's decommissioning regulations, unlike NRC regulations: (1) do not permit

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[88] New Jersey Response at 4 ("Shieldalloy would be required to propose measures to ensure protection of workers and the environment against radiation hazards during decommissioning. . . . New Jersey would review the plan to ensure that it meets all regulatory standards.").

[89] *Id.*

[90] Indeed, Shieldalloy essentially concedes that New Jersey's program is at least equivalent to the NRC's in observing that additional exposures to workers and the public resulting from removal of the material would be expected to remain within NRC regulatory limits. Shieldalloy Motion for Stay at 7.

[91] *Id.* at 13.

[92] 46 Fed. Reg. at 7541.

alternative remediation standards that would exceed the dose criterion of 15 mrem per year, "even if justified through an ALARA analysis"; (2) do not permit alternative remediation standards if they would result in doses exceeding 100 mrem per year for an "all controls fail" scenario; (3) require the use of tables of parameters based on specific exposure scenarios for dose calculation; and (4) do not allow licensees to take credit for engineering controls such as a fence or cover when modeling the "all controls fail" scenario to determine if the 100 mrem per year limit is exceeded.[93]

When we approved the New Jersey Agreement, as now, we agreed with the Staff's assessment that NJDEP regulation N.J.A.C. § 7:28-2.8 fulfills Criterion 12. This regulation expressly allows the NJDEP to provide exemptions to its rules:

> [The NJDEP may,] upon application and a showing of hardship or compelling need, with the approval of the Commission [on Radiation Protection], . . . grant an exemption from *any requirement of the rules* should it determine that such exemption will not result in any exposure to radiation in excess of the limits permitted by N.J.A.C. 7:28-6, "Standards for protection against radiation."[94]

Section 7:28-2.8 thus provides a mechanism for seeking an appropriate exemption, and reflects the NJDEP's determination that an exemption will not jeopardize health and safety if it will not result in exposure to radiation in excess of NJDEP's dose limits.

Unsatisfied with this response, Shieldalloy asserts that it "ignore[s] New Jersey's position that it is precluded by statute from providing . . . exceptions" that would allow consideration of

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[93] Shieldalloy Motion for Stay at 13.

[94] SECY-09-0114, Enclosure 2, at 6 (emphasis added). *See also* N.J. Admin. Code § 7:28-12.11(a) (permitting the filing of a petition for alternative soil remediation standards as long as the resulting dose would not exceed 15 mrem per year).

the ALARA principle in meeting the decommissioning dose criteria.[95] Shieldalloy's grievance, then, is not that the NJDEP cannot provide exemptions as a general matter, but rather that it cannot or will not provide the specific exemptions that Shieldalloy would request with respect to the license termination regulations. At bottom, Shieldalloy rehashes its complaint that the NJDEP regulations do not incorporate its – incorrect – interpretation of ALARA. Shieldalloy appears to assume that incorporation of the ALARA principle would permit it to exceed the 15 mrem per year dose limit, but remain under 25 mrem. As discussed above, the ALARA principle, if it were incorporated expressly in the NJDEP's regulations, would require an annual dose limit "as low as is reasonably achievable" under 15 mrem, not 25 mrem.

Moreover, Shieldalloy's ALARA reference and the four examples that it provides are based on NJDEP regulations that correspond with the NRC's license termination rule. As such, they are compatibility category "C" regulations, and are therefore permissibly more stringent

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[95] Shieldalloy Motion for Stay at 14. In its response to Shieldalloy's comments in this regard on the proposed NJDEP rules, the NJDEP stated that "[t]he fact that these dose criteria do not have an explicit associated ALARA requirement is . . . not new. ALARA determinations allow the use of cost as a factor for determining what level of remediation is cost effective below the standards. The [NJDEP] and the Commission [on Radiation Protection] did not include a provision for ALARA in meeting these dose criteria because the Brownfield and Contaminated Site Remediation Act [(BCSRA)], N.J.S.A. 58:10B-1 et seq., does not allow such a provision." 40 N.J. Reg. 5196(b), at 9. In its response, the NJDEP did not explain further what specifically in the BCSRA does not permit the use of ALARA.

Section 58:10B-1.2 articulates the New Jersey Legislature's findings in enacting the BCSRA. The legislature recognized that "often there are legal, financial, technical, and institutional impediments to the efficient and cost-effective cleanup of brownfield sites as well as all other contaminated sites wherever they may be." It determined that "strict standards coupled with a risk based and flexible regulatory system will result in more cleanups and thus the elimination of the public's exposure to these hazardous substances and the environmental degradation that contamination causes." N.J. Stat. Ann. § 58:10B-1.2. The NJDEP regulations accordingly provide strict standards – the maximum permissible annual dose cannot exceed 15 mrem; however, "there is flexibility in complying with the remediation standards, including the availability of a petition for alternative remediation standards, N.J.A.C. 7:28-12.11." 40 N.J. Reg. 5196(b), at 9.

than the NRC's corresponding regulations. As stated above, by lowering the annual dose limit and requiring the use of conservative dose calculation methodologies, the NJDEP's decommissioning regulations embody the essential objective of the license termination rule.[96] With nothing offered to controvert the finding that the NJDEP's regulations are at least equivalent to the level of protection of public health and safety afforded by NRC requirements, Shieldalloy's argument fails. Accordingly, Shieldalloy is not likely to succeed on the merits with respect to this challenge to the New Jersey program.[97]

d. "The New Jersey Program disrupts ongoing licensed activities"

Finally, in its motion Shieldalloy asserts that the New Jersey program, "as applied to Newfield," fails to satisfy 1981 Policy Statement Criterion 25,[98] which concerns the "arrangements [that] will be made by NRC and the State to ensure that there will be no interference with or interruption of licensed activities or the processing of license applications by

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[96] *See, e.g.*, 40 N.J. Reg. 5196(b), at 8-9 (responding to Shieldalloy's comment regarding the NRC's allowing credit for certain engineering controls when modeling the all controls fail scenario, NJDEP states that "the rules require the [NJDEP] to consider the public health consequences in the event that the engineered barriers completely fail at some point in the future. This is a reasonable approach to ensure an adequate degree of protection to the public health and safety. The NRC approach of assuming that engineered structures degrade over time does not take into account intentional human intervention. In the [NJDEP's] experience, human intervention greatly increases radiation exposure at radiologically contaminated sites").

[97] Shieldalloy requested an exemption from the requirements of N.J. Admin. Code §§ 7:28-12 and 7:28-58, which the NJDEP denied on December 11, 2009. *See* December 11 NJDEP Letter at 1. The NJDEP reasoned that Shieldalloy "ha[d] not demonstrated hardship or a compelling need for the exemption," as required under N.J. Admin. Code § 7:28-2.8. *Id.* According to the NJDEP, "if [Shieldalloy] considers itself to be aggrieved by the [NJDEP's] denial of the exemption request," it may request a hearing before the New Jersey Office of Administrative Law within twenty days of receipt of the denial letter. *Id.* at 2.

[98] Shieldalloy Motion for Stay at 15.

reason of the transfer" of NRC authority.[99] Shieldalloy cites the NJDEP's rejection of its decommissioning plan with the proposed LTC approach as "disrupting" its licensed activities. This argument is without merit. New Jersey law provides for recognition of NRC licenses, and NJDEP procedures provide that upon the effective date of the agreement, all active NRC licenses issued to facilities in New Jersey will be recognized as NJDEP licenses.[100] Consistent with Criterion 25, the NJDEP recognized Shieldalloy's source material license at the Newfield site.[101] Furthermore, in rejecting its proposed decommissioning plan, the NJDEP acknowledged that Shieldalloy met the timeliness requirements of 10 C.F.R. § 40.42 when it submitted the plan to the NRC. It used this as a basis for granting Shieldalloy an extension of time to file a revised decommissioning plan.[102] These actions appear to be consistent with an orderly transfer of authority between the NRC and New Jersey.

Shieldalloy's arguments to the contrary are, in essence, yet another challenge to the NRC's designation of the license termination rule as compatibility category "C."[103] The NJDEP's rejection of Shieldalloy's proposed decommissioning plan was taken pursuant to the regulatory scheme that we found to be adequate and compatible in accordance with AEA section 274. Taking Shieldalloy's argument to its logical conclusion, the NJDEP would have had to apply NRC regulations rather than its own in order to meet Criterion 25 to Shieldalloy's satisfaction.

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[99] 46 Fed. Reg. at 7543.

[100] *See* SECY-09-0114, Enclosure 2, at 8 (citing N.J. Stat. Ann. § 26:2D-9(k); NJDEP BER Procedure 3.08, "License Transition from NRC to New Jersey").

[101] *See* October 8 NJDEP Letter at 1.

[102] *Id.*

[103] *See supra* notes 58 and 67 and accompanying text.

This would be characteristic of compatibility category "A" or "B" regulations, not, as here, compatibility category "C" regulations. For these reasons, Shieldalloy is not likely to succeed on the merits of this challenge to the New Jersey program.[104]

[104] The Frakes Affidavit attached to Shieldalloy's motion contains an additional challenge to the New Jersey program that is not addressed in the body of the motion. In Paragraph 9 of the affidavit, Mr. Frakes asserts that the New Jersey program is incompatible with the NRC's program because it "is aimed specifically and uniquely at the [Shieldalloy] Newfield Facility." Frakes Affidavit ¶ 9. According to Mr. Frakes, this "runs directly contrary to NRC [1981 Policy Statement] Criterion 23, which requires that the State implement 'practices for assuring the fair and impartial administration of regulatory law.'" *Id.* This argument is without merit. The NRC requires states to have a regulatory program in place that will cover all types of uses of the radioactive material or activities over which a state assumes regulatory authority, even if there is only one licensee in the state currently licensed for a specific radioactive material or activity. The NJDEP's license termination regulations would apply to any licensee that submits a request for license termination. *See, e.g.*, 40 N.J. Reg. 5196(b), at 8 ("The fact that there may be only one facility in the State now affected by the rule does not mean that other facilities will not be affected in the future. . . . Creating an open class is not the equivalent of special legislation, which is prohibited, nor is it arbitrary or discriminatory."). We have received no evidence that would indicate that New Jersey's program cannot be implemented fairly and impartially. *See* SECY-09-0114, Enclosure 2, at 7.

3. Balancing of the Stay Factors

Shieldalloy's failure to satisfy the first two stay factors renders it unnecessary to make determinations on the two remaining factors: harm to other parties and where the public interest lies.[105] Absent a demonstration of irreparable harm or likelihood of success on the merits – the two factors that are given the most weight – we find no basis upon which to grant a stay.

III. CONCLUSION

For the reasons set forth above, we *deny* Shieldalloy's stay request.

IT IS SO ORDERED.

For the Commission

(NRC SEAL) **/RA/**

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of January, 2010.

[105] *See Oyster Creek*, CLI-08-13, 67 NRC at 400. *See also Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1635 (1984).