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ENCLOSURE 2

STAFF ANALYSIS OF PUBLIC COMMENTS

Information in this record was deleted in accordance with the Freedom of Information Act.
Exemptions Ex. 5
FOIA/PA 2010-0039

STAFF ANALYSIS OF PUBLIC COMMENTS

ON THE PROPOSED NEW JERSEY AGREEMENT

Commenter	Affiliation	ADAMs Accession Number
Julia Schmitt, Chair	Organization of Agreement States	ML091680374
Anonymous	No known affiliation	ML091680375
Hoy E. Frakes, Jr	President, Shieldalloy Metallurgical Corporation	ML091700382 and ML091680491
Loretta Williams	No known affiliation	ML091680387
James Lieberman	Regulatory and Nuclear Consultant	ML091810997
Gregory R. Reinhard, MBA, DVM	Merck & Co., Inc.	ML091900370

INTRODUCTION:

U.S. Nuclear Regulatory Commission (NRC) staff received six comment letters in response to a public notice that the Governor of New Jersey has requested to enter into an Agreement with the Commission under Section 274b of the Atomic Energy Act of 1954, as amended. NRC received comments from the Organization of Agreement States (OAS), two members of the public, a regulatory and nuclear consultant, and two NRC licensees from the State of New Jersey (NJ). Two commenters supported the Agreement, two commenters opposed the Agreement and one commenter did not state their opinion. The remaining commenter supported the rationale whereby States can assume regulatory authority; however, was not supportive of the difference in fees between NJ and NRC. A summary of the comments received and NRC's response is provided below.

The agency published the notice in the *Federal Register (FR)* on May 27, 2009; June 3, 2009; June 10, 2009; and June 17, 2009. The notice contained a copy of the proposed Agreement and a summary of NRC staff's draft assessment of the proposed New Jersey Agreement State program. The *FR* requested comments in four categories: (1) the proposed Agreement, (2) the NRC Staff Assessment of the NJ Agreement State program, (3) the adequacy of the NJ Agreement State program, and (4) the adequacy of the NJ Agreement State program staff.

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SUMMARY OF COMMENTS ON THE PROPOSED AGREEMENT

Comments Supporting the Agreement

Summary of Comments

1. The Organization of Agreement States (OAS) "strongly supports" the Agreement between NRC and the State of New Jersey. The OAS letter stated that "The OAS is committed to the improvement of radiation regulation nationwide, and to fostering a cooperative and productive partnership among Agreement States, with the U.S. Nuclear Regulatory Commission, and with other Federal, State and Local agencies involved in the regulation of radioactive materials."

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2. A member of the public, Loretta Williams, expressed her support for the Agreement between NRC and the State of New Jersey. Ms. Williams indicated that she has been involved as a member of the public related to the decommissioning of an NRC-licensed facility in her community. She believes that the State's regulatory program will protect the health and welfare of the residents of the community by enforcing a complete cleanup of the radioactive waste, off-site, at a licensed waste facility.

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NRC Staff Response

The comments support NRC staff's plan to complete the NRC Staff Assessment documenting that the Commission's criteria for entering into an Agreement are satisfied, and then to request the Commission's approval of the proposed Agreement with State of NJ.

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No changes were made to the NRC Staff Assessment based on these comments.

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Comments Opposing the Agreement

Summary of Comments

1. A member of the public did not approve of the Federal government giving regulatory authority of this Agency to the State of New Jersey for this radioactive material. This individual preferred that the Federal government keep regulatory authority, commenting that while the Federal government is corrupt, New Jersey government is more corrupt.

   NRC Staff Response

   This individual did not provide any specific reasons regarding his/her belief that New Jersey government is corrupt. The individual did not provide any information that caused the staff to reassess the original assessment that the proposed NJ Agreement State Program is adequate to protect public health and safety and compatible with NRC's regulatory program.

   No changes were made to the NRC Staff Assessment based on this comment.

2. Shieldalloy Metallurgical Corporation (SMC) submitted comments opposing the proposed Agreement with the State of NJ. SMC generally commented that NRC should deny NJ's application to become an Agreement State because NJ's regulatory program fails to meet NRC's compatibility criteria or implementation standards in NRC's Policy Statement, *Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement,* 46 Fed. Reg. 7,540, 7,543 (1981), as amended by 46 Fed. Reg. 36,969 (1981) and 48 Fed. Reg. 33,376 (1983) [Criteria Statement of Policy]. SMC further commented that if NJ became an Agreement State, NRC should retain authority over SMC's facility in Newfield, New Jersey. NRC addresses SMC's specific comments below.

   A. The New Jersey Program Fails to Meet the NRC's Compatibility Criteria

   General Comment:

   SMC stated it sent NRC their public comments submitted to NJ on July 18, 2008, during the public comment period on the State's proposed regulations. SMC criticized NRC for not referencing or addressing SMC's comments. In these comments, SMC said they pointed out the inconsistency between NJ's regulatory framework and those of NRC. SMC states that draft NRC Staff Assessment of the New Jersey program application is incomplete and in part erroneous and must be substantially revised to recognize the incompatibility of the NJ Program with NRC's program.

   NRC Staff Response:

   In reviewing a State's proposed regulations, NRC does not evaluate public comments that a State receives during its public comment period on its proposed regulations. NRC reviews the State's final regulations when it assesses the Agreement State application.

   During the application process, NRC reviews a State's radiological program to ensure that it is compatible with NRC's regulatory program and adequate to protect public health and safety from radiation hazards. NRC staff reviews the State's application in accordance with (1) the Office of Federal and State Materials and Environmental Management Programs (FSME) Procedure SA-700, "Processing an Agreement," and (2) the Statement of Policy,

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"Discontinuance of NRC Authority and Assumption Thereof by States through Agreement," (46 FR 7540, January 21, 1981; 48 FR 33376, July 21, 1983) [Criteria Statement of Policy].. This Criteria Statement of Policy describes the criteria that a State must meet in order to enter into an Agreement with NRC. (SMC specific comments also refer to the criteria described in this document).

NRC reviewed NJ's final regulations using the above criteria and found that the State's regulatory program adequate to protect public health and safety and compatible with NRC's regulatory program. These findings are documented in the NRC Staff Assessment. NRC disagrees with SMC's comment that "The NRC Staff Assessment is incomplete, in part erroneous, and must be substantially revised."

No changes were made to the NRC Staff Assessment based on this comment.

Specific Comments

1. The Regulations issued by NJDEP are Invalid

SMC stated that NJ regulations are invalid because they were not adopted in accordance with the procedural requirements of NJ's Administrative Procedures Act (APA). N.J.S.A. 52:14B-1 *et seq.* (APA). SMC's bases for asserting the regulations are invalid were: (1) NJ failed to conduct a proper Federal Standards Analysis as required by State law; (2) NJ failed to analyze and minimize the adverse economic impacts of its proposal to become an Agreement State as required by NJ's Regulatory Flexibility Act; and (3) NJ's modification of the final rule to apply to "all persons" was a substantial change requiring notice and comment under the State APA.

NRC Staff Response

SMC's comments express their concern that NJ failed to comply with State laws when enacting its regulations. NRC reviews the State's statutory authority and administrative procedures to assure the fair and impartial administration of regulatory law, which include public participation and procedures for formulation of rules of general applicability. (Criterion 23 – Criteria Statement of Policy page 7543) NRC reviewed NJ's statutory provisions and determined that the State had adequate authority to establish a radiation regulatory program and enter into an Agreement. In particular, State Statute N.J.S.A. 26:2D-7 provides the New Jersey Department of Environmental Protection (NJDEP) authority for the promulgation of codes, rules or regulations, stating that "the commission shall have the power to formulate, adopt, promulgate, amend and repeal codes, rules and regulations as may be necessary to prohibit and prevent unnecessary radiation in accordance with the provisions of the "Administrative Procedure Act (APA)." NRC further reviewed the State's APA and found that NJ has extensive requirements in N.J.S.A. 52:14B-2, B-3, B-4, and B-22, including a public comment process and opportunity for hearing.

NRC's review found the State's radioactive material program and regulations adequate to protect public health and safety and compatible with NRC's regulatory program. NRC has not received any evidence, such as a State court ruling, to indicate that the existing regulatory program can not be implemented. Questions regarding whether a State complied with State law when promulgating their regulations should be addressed through the State's administrative process.

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No changes were made to the NRC Staff Assessment based on this comment.

2. The NJ Program Fails to Satisfy Compatibility Criterion 9 in that it sets Release Criteria that Differ from Those in 10 CFR Part 20

SMC commented that the NJ regulations differ from the radiological criteria for license termination in 10 CFR Part 20 in many significant respects, in violation of Criterion 9. SMC gave several examples where NJ regulations differ from NRC regulations, such as (1) the maximum allowable total dose to a member of the public of 15 mrem/year versus 25 mrem/year in NRC's regulations, (2) failure to include implementation of the "as low as reasonably achievable" (ALARA) principle, (3) failure to include provisions for restricted release, (4) allowing calculation of peak dose over 1,000 years, (5) failure to allow for more than 100 mrem total effective dose equivalent under any circumstances, and (6) requiring that the radioactivity releases to ground and surface waters be limited to the levels set by the NJ Ground Water And Surface Water Standards.

NRC Staff Response

NRC reviews State regulatory requirements to ensure they are compatible with the NRC regulatory program and adequate to protect public health and safety. NRC establishes the compatibility level for each NRC regulation and program element according to FSME Procedure SA-200, "Compatibility Categories and Health and Safety Identification for NRC Regulations and Other Program Elements," and reviews Agreement State program according to the Handbook for NRC Management Directive 5.9, *Adequacy and Compatibility of Agreement State Programs.* A regulation's compatibility designation determines how much flexibility a State has in adopting a specific regulation while maintaining compatibility with NRC's program.

"Statement of Principles and Policy for the Agreement State Program: Policy Statement on Adequacy and Compatibility of Agreement State Programs, Final Policy Statement" (62 FR 46517, 46524-46525, September 3, 1997) (Adequacy and Compatibility Policy Statement) explains that Agreement States have "flexibility in program implementation to accommodate individual State preferences, State legislative direction, and local needs and conditions. ...[T]hat is, a State would have the flexibility to design its own program, including incorporating more stringent, or similar, requirements provided that the requirements for adequacy are still met and compatibility is maintained, and the more stringent requirements do not preclude or effectively preclude a practice in the national interest without an adequate public health and safety or environmental basis related to radiation protection." Adequacy and Compatibility Policy Statement, at 46520, column 2.

An Agreement State radiation control program is compatible with the NRC's regulatory program when it's "program does not create conflicts, duplications, gaps, or other conditions that would jeopardize an orderly pattern in the regulation of agreement material on a nationwide basis." Adequacy and Compatibility Policy Statement at 46524. NRC developed Compatibility Categories to designate how much flexibility a State would have when adopting a specific regulatory provision. NRC assigns a Compatibility Category to each NRC regulation. The Compatibility Categories vary from requiring the State standards to be essentially identical to NRC standards to program elements not required, or even prohibited, for State adoption. In particular, Compatibility Category "C" regulations do not require that the State be essentially identical to NRC standards. Compatibility Category "C" regulations

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allow more flexibility but require the Agreement State program elements to embody the essential objectives of the corresponding NRC program elements.

SMC commented that the NJ program fails to satisfy Criterion 9. While Criterion 9 applies to disposal of low level waste, SMC examples are regulations in the "License Termination Rule (LTR)," in Subpart E of 10 CFR Part 20. The final LTR was noticed in the FR on July 21, 1997 (62 FR 39058). The compatibility designation of this rule is addressed in the Statements of Consideration (SOC) for the final rule, in Section F.1, "State and NRC Compatibility," in the comment resolution. NRC originally designated the LTR as a Division 2 Rule. Subsequently, NRC developed the Policy Statement and reclassified the LTR as Compatibility Category "C." As previously discussed, the Adequacy and Compatibility Policy Statement explained that Compatibility Category "C" designates program elements "that are 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 nation wide basis. Such Agreement State program elements should embody the essential objective of the corresponding Commission program elements." Adequacy and Compatibility Policy Statement at 62 FR 46524, column 3.

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NRC assigned the LTR as Compatibility Category "C" because the rule addresses basic principles of radiation safety and regulatory functions that allow a State to establish regulations and dose limits for license termination and decommissioning that provide a sufficient and ample margin of safety and to ensure compliance with the public dose limits of 10 CFR Part 20. The SOC for the LTR also stated that "[T]he States would be required to adopt the regulation but would have significant flexibility in language, and would be allowed to adopt more stringent requirements." Radiological Criteria for License Termination, Final Rule 62 FR 39058, 39080 (July 21, 1997).

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Some of NJ's license termination regulations are more stringent than NRC regulatory requirements. Using the above criteria, NRC's assessment of NJ regulations found the State's license termination and decommissioning regulations compatible since they meet the essential objectives of the NRC program elements and provide a level of protection of public health and safety that is at least equivalent to that afforded by NRC's requirements.

No changes were made to the NRC Staff Assessment based on this comment.

3. The NJ Program fails to Satisfy Compatibility Criterion 12

SMC commented that NJ regulations fail to meet Criterion 12 because the regulations do not provide the State the ability to grant necessary exceptions to the regulatory standards that do not jeopardize health and safety in individual cases. SMC provided four examples in which it states that NJ's regulations fail to allow necessary exemptions to comply with Criterion 12: (1) no consideration of alternate remediation standards that would increase the allowed incremental dose criterion of 15 mrem/yr, (2) no consideration of alternate remediation standards if they would result in doses exceeding 100 mrem/yr for an "all controls fail" scenario, (3) NJ regulations require that the calculations of doses from radiological decommissioning use only tables of parameters based on specific exposure scenarios, and (4) NJ regulations allow no credit for any engineering controls when determining if the 100 mrem annual dose is exceeded. SMC stated that NJ regulations provide no justification for requiring stricter remediation standards than those provided by NRC, or for not allowing licensees to apply the Federal standards when appropriate. SMC

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also commented that NJ's regulations conflict with NRC guidance. For these reasons, SMC believes that NJ regulations are incompatible with the NRC regulatory framework.

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NRC Staff Response

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The State regulation, N.J.A.C. 7:28-2.8, allows the Department, upon application and a showing of hardship or compelling need, with the approval of the NJDEP Commission, to 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." This regulation fulfills Criterion 12.

SMC's examples are based on the State's regulations that are compatible with NRC's License Termination Rule. As discussed in the previous response, these regulations are Compatibility Category "C.".which allows States flexibility in meeting the essential objectives of these NRC program elements. NRC's assessment of NJ regulations found the State's license termination and decommissioning regulations compatible by meeting the essential objectives of the NRC program elements. NJ regulations also provide a level of protection of public health and safety that is at least equivalent to that afforded by NRC requirements.

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SMC also commented that NJ's regulations are in conflict with NRC guidance. NRC guidance is not a regulatory requirement and is not legally binding. NRC develops guidance documents to assist licensees in meeting regulatory requirements. NRC does not require State regulations to be consistent with NRC guidance documents.

No changes were made to the NRC Staff Assessment based on this comment.

4. The NJ Program Fails to Satisfy Compatibility Criterion 17

SMC commented that the NJ Radiological Program fails to meet NRC's Criterion 17 which requires licensees to provide access to inspectors. SMC states that the NJ statute, in the Radiation Protection Act, N.J.S.A. 26:2D-1 *et seq.*, does not authorize inspections without either consent of the licensee or an order and concludes that the NJ regulation purporting to authorize warrantless inspections, in 7:28-4.14, lacks an adequate legal basis in NJ law.

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NRC Staff Response

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Criterion 17 requires that a State have authority such that licensees shall be under obligation by law to provide access to inspectors. NRC reviewed NJ's regulations and legislative authority to ensure this authority was in place. NJDEP has general authority to "*enter and inspect a building or place for the purpose of investigating an actual or suspected* source of pollution of the environment and ascertaining compliance and non-compliance with any codes, rules, or regulations of the Department." N.J.S.A. 13:1D-9(d). In addition, the Radiation Protection Act has a similar provision to allow the NJDEP inspectors to: "Enter and inspect any building or place for the purpose of investigating an actual or suspected source of radiation and ascertaining compliance with this act or any rule, regulation or order promulgated or issued pursuant thereto and inspect radiation sources, their shielding and immediate surroundings, and records concerning their operation for the determination of any possible radiation hazard." N.J.S.A. 26-2D-9(j).

Based on these legislative provisions, NRC concluded that NJ has adequate legislative authority and can implement regulations to meet the essential objectives of Criterion 17 that licensees are under obligation by law to provide access to inspectors.

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No changes were made to the NRC Staff Assessment based on this comment.

5. The NJ Program Fails to Satisfy Compatibility Criterion 23

SMC commented that many of NJ's regulations are aimed specifically and uniquely at SMC's Newfield site, and provided several examples to support their comment. SMC stated that NJ acknowledged in its response to SMC comments on the State's proposed regulations that the stand-alone limits on radioactive releases to the surface waters affect only one facility in the State. SMC believes that this acknowledgment, coupled with the more stringent license termination provisions, demonstrates that NJ's regulations qualify as "special legislation" because it appears to apply only to the Newfield site. SMC claims the regulations are to prevent SMC from disposing of the licensed materials on-site for license termination and decommissioning. SMC comments that the State violated the New Jersey State Constitution, art. IV § 7, ¶ 7, which provides that "[n]o general law shall embrace any provision of a private, special or local character," See *also, Phillips v. Curiale, 128 N.J. 608, 627 (1992).* For these reasons, SMC concludes the NJ Program fails to meet Criterion 23 for fair and impartial administration of regulatory law and particularly does not formulate "rules of general applicability" but its decommissioning rules are, instead, single-purpose legislation aimed exclusively at SMC.

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NRC Staff Response

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Criterion 23 is related to State practices for assuring the fair and impartial administration of regulatory law, including the provision for public participation where appropriate. The specific requirements under Criterion 23 are that the State incorporates procedures for: 1) formulation of rules of general applicability; 2) approving or denying applications for licenses or authorization to possess and use radioactive materials; and 3) taking disciplinary actions against licensees.

SMC's comments express their concern that NJ fails to meet Criterion 23 by enacting single-purpose legislation aimed exclusively at SMC. As stated in the response to SMC Specific Comment 1, NRC does review the State's statutory authority and administrative procedures for promulgating regulations to ensure there is public participation in the rulemaking process. NRC found NJ's statutory authority and regulations provided adequate procedures for the formulation of rules of general applicability.

Agreement States must have a regulatory program in place that will cover all types of uses of the radioactive material or activities that a State assumes regulatory authority over in their Agreement. NRC requires the States to have this regulatory program in place even if there is only one licensee in the State currently licensed for a specific radioactive material or activity. There is no evidence to suggest that NJ regulations were designed to exclusively refer to the SMC Newfield site. The State regulations would apply to any material licensee that submits a request for license termination and subsequently begins decommissioning of its site. NRC's review found the State's radioactive material program and regulations adequate to protect public health and safety and compatible with NRC's regulatory program. NRC has not received any evidence, such as a State court ruling, to indicate that the New Jersey's regulatory program can not be implemented. Questions regarding whether a State

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complied with State law when promulgating their regulations should be addressed through the State's administrative process.

Based on NRC's review of NJ legislative authority and regulation, NRC concluded that NJ has adequate legislative authority for assuring the fair and impartial application of regulatory law.

No changes were made to the NRC Staff Assessment based on this comment.

6. The NJ Program Fails to Satisfy Criterion 25

SMC commented that the NJ program fails to satisfy NRC Criterion 25 in that NJ has not sought to make "appropriate arrangements" with NRC to ensure there will be no interference with the processing of license applications by reason of the transfer. SMC stated that they filed a proposed decommissioning plan which is currently under review by NRC, and claims that instead of ensuring the smooth processing of the decommissioning plan, NJ has opposed it at every opportunity. SMC examples of NJ's interference include: (1) the State's requesting a hearing, and raising numerous contentions against approval of the SMC decommissioning plan at the Newfield site; (2) NJ's challenging in court NRC's decommissioning guidance in NUREG-1757 ["Consolidated Decommissioning Guidance"]; and (3) NJ filing a petition for rulemaking with NRC to rescind the NRC guidance document.

NRC Staff Response

Criterion 25 addresses the transition between NRC and the State to ensure that there will be no interference with or interruption of licensed activities or the processing of license applications by reason of the transfer. The intent of this criterion is to ensure that licensees can continue to operate without interference with or interruption of licensed activities after the effective date of the Agreement.

NRC's review confirmed that State Statute N.J.S.A. 26:2D-9(k) contains a provision that provides for recognition of existing NRC and Agreement State licenses. NJDEP BER Procedure 3.08, "License Transition from NRC to New Jersey," addresses the transfer of NRC licenses to the State. Upon completion of the Agreement, all active NRC licenses issued to facilities in NJ will be recognized as NJDEP licenses. This will ensure a smooth transition in authority from NRC to NJ so that licensees can continue to operate without interference with or interruption of licensed activities. NJ will continue any licensing actions that are in progress at the time of the Agreement and make the final decision on all pending licensing actions.

NRC recognizes that NJ has taken several actions to challenge SMC's proposed decommissioning plan and NRC's decommissioning guidance document. NRC regulations at 10 CFR Part 2 provides for the opportunity for hearings on licensing actions and allows petitions for rulemaking. As such, NJ is entitled to take these actions. NJ's individual actions while SMC is under NRC regulatory authority have no bearing on whether NJ satisfies Criterion 25. Based on NRC review of NJ's statutory authority, regulations, and state procedures, NRC concluded that NJ has adequate authority and procedures to ensure that there will be no interference with, or interruption of, licensed activities or the processing of licensed applications because of the transfer of regulatory authority.

No changes were made to the NRC Staff Assessment based on this comment.

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To meet NRC's obligation under the Act, NRC reviews and determines that the State's regulatory program is adequate to protect public health and safety and compatible with the NRC's regulatory program. Agreement States must have a regulatory program in place that will cover all types of uses of the radioactive material or activities that a State assumes regulatory authority over in their Agreement. NRC requires the States to have this regulatory program in place even if there is only one licensee in the State currently licensed for a specific radioactive material or activity.

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B. The New Jersey Radiation Protection Program is not Satisfactory Under the NRC Implementation Standards

SMC commented that the NJ program will not be found to be "satisfactory" in subsequent periodic reviews of the State program. SMC commented that NRC would not find the NJ program "satisfactory" under the NRC Integrated Materials Performance Evaluation Program (IMPEP) evaluation criteria because: (1) the numerous existing inconsistencies between NJ's regulations and NRC's; (2) NJ's regulations being applicable to "all persons" would create duplication with NRC regulations because it would cover persons remaining licensed by NRC; (3) NJ's regulations would supersede NRC's decommissioning dose limits for NRC reactor licensees; and (4) NJ lacks statutory authority for all elements of its source material program, giving the example of a difference between "radioactive materials," as defined in NRC's regulations, and "sources of radiation" that the NJ statute authorizes the NJDEP to regulate. SMC believes NRC's definition includes additional safety aspects related to source material that are not covered under the NJ statute.

SMC also commented that while considering a State program against the IMPEP standards prior to entering an agreement is a discretionary adjunct to the evaluation process, there should be no obvious issues at the time the Agreement is implemented that would be found to lead to program unacceptability when NRC performs its first inspection. Such obvious issues are well in evidence in the NJ program.

NRC Staff Response

SMC refers to NRC's IMPEP evaluation criteria in Management Directive 5.6, "Integrated Materials Performance Evaluation Program." Under IMPEP, NRC verifies that Agreement State programs continue to be adequate to protect public health and safety and compatible with NRC's program. SMC's comment is that NJ's existing regulations are not compatible with the NRC regulatory framework. Compatibility of regulations and the specific compatibility of NJ's regulations were discussed in detail in the response to SMC's specific comment, in A.2, above. Again, NRC has determined that NJ's regulations are adequate to protect public health and safety and compatible with NRC's regulatory program.

SMC also commented the NJ regulations applying to "all persons" will be duplicative because it will include NRC licensees. Section 274 of the Atomic Energy Act of 1954 (AEA) only allows States to assume regulatory authority over radioactive materials or activities specified in their Agreement. Section 274(c)(1) of the AEA also requires NRC to retain regulatory authority over specific classes of radioactive material and activities, which include nuclear power reactors. New Jersey's Written Agreement acknowledges these restrictions by specifically listing the classes of radioactive materials and activities that the NRC does not discontinue its regulatory authority. Furthermore, N.J.A.C. 7:28-6.1(b), specifically states that "The Department does not regulate nuclear reactors... Insofar as the incorporated rules refer to those facilities and/or materials previously referenced, those references are not incorporated nor does any cross references include those facilities and/or materials." These provisions clarify that the State use of the phrase "all persons" is not duplicative because NJ lacks regulatory authority over NRC licensees. The State phrase "all persons" can only refer to persons under NJ regulatory authority.

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As to the differences in definitions that SMC references, States can regulate non-AEA radioactive material. Examples of these radiation/radioactive materials include x-ray machines and diffuse naturally-occurring radioactive material. A State's definitions for radioactive material covered under the State program may be different than NRC regulatory definitions as a result of this broader regulatory authority. NRC does not use a possible finding in a future IMPEP review to evaluate whether to approve a proposed State Agreement. NRC found NJ's legislative authority, regulations and radioactive program adequate to protect public health and safety and compatible with NRC's regulatory program.

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No changes were made to the NRC Staff Assessment based on this comment.

C. Even if New Jersey becomes an Agreement State, the NRC Can and Should Retain Jurisdiction Over the Newfield Site and its Decommissioning

SMC commented that should NRC decide to enter into the proposed Agreement with NJ, NRC has the power to exclude the Newfield site from the transfer of authority to the State. SMC stated that "This is explicitly contemplated by the policy embodied in Criterion 25, which directs that appropriate arrangements will be made by NRC and the State to ensure that there will be no interference with or interruption of licensed activities or the processing of license applications by reason of the transfer." SMC also indicated that exclusion of the Newfield site from the transfer of authority to NJ is consistent with notions of fundamental fairness and efficiency and is also consistent with an NRC Appeal Board decision regarding Kerr McGee's West Chicago site in Illinois. *Kerr-McGee Chemical Corporation* (West Chicago Rare Earths Facility), ALAB-944, 33 N.R.C. 81, 101-02 (1991), *vacated as moot*, CLI-96-2, 43 NRC 13 (1996).

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NRC Staff Response

Upon the effective date of a State Agreement authorized under Section 274 of the Atomic Energy Act of 1954, as amended, NRC relinquishes regulatory authority and the Agreement State assumes regulatory authority over the radioactive materials and activities specified in the Agreement. The legislative history for this Statutory provision states that Congress did not intend to allow concurrent regulatory authority over licensees for public health and safety. If the NJ Agreement is approved by the Commission, upon the effective date of the Agreement, all NRC licensees within the categories of materials for which the State requested authority will transfer to the State (b)(5)

(b)(5) NRC rarely retains regulatory authority over individual licensees within categories of materials.

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There is authority in Section 274m. of the Atomic Energy Act of 1954, as amended, for NRC to retain authority based on common defense and security; NRC has used this authority to implement increased controls regulatory requirements for certain categories of radioactive material licensees and retain regulatory authority over conversion facilities in Agreement States. However, the SMC site does not raise these common defense and security concerns.

The *Kerr-McGee* case SMC cited does involve a complex decommissioning site that was affected by the transition of a NRC license to a new Agreement State. However the case does not have precedence in this matter. The Commission terminated the Kerr-McGee proceeding as moot and vacated the previous Licensing and Appeals Boards' decisions after the parties reached a settlement to dispose of the mill tailings material off-site. In

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vacating the decisions, the Commission eliminated as precedent all three underlying decisions in the proceedings and specifically stated that:

> In these circumstances, and because these unreviewed Board decisions involve complex questions and vigorously disputed interpretations of agency provisions for disposal of byproduct material, the Commission as a policy matter chooses to vacate and thereby eliminate as precedent all three underlying decisions in this proceeding. This will permit any similar questions that may come up to be considered anew, without the binding influence of an apparently controversial Appeal Board decision that the Commission has not had the occasion to review.
>
> By vacating the decisions, the Commission does not intimate any opinion on their soundness. Without engaging in a full inquiry into the merits—which no party any longer requests, and the Commission sees no compelling reason to undertake on its own—the Commission cannot properly evaluate the analyses of the Licensing and Appeal Boards. *In the Matter of Kerr-McGee Chemical Corporation*, CLI-96-2, 43 NRC 13 (1996)

Please see the response to comment A.6, above, for a discussion of Criterion 25.

No changes were made to the NRC Staff Assessment based on this comment.

Miscellaneous Comments

Summary of Comments

1. A regulatory and nuclear consultant, Jim Lieberman, submitted a comment as to whether the State of New Jersey, upon approval of the Agreement, will honor past NRC license terminations at the 25 mrem per year standard without requiring terminated NRC licensees to conduct further remediation to meet the lower standards under New Jersey regulations. Mr. Lieberman suggested that NRC condition the Agreement giving full credit to past NRC license terminations unless there was a significant threat to public health and safety.

   NRC Staff Response

   The New Jersey regulations, N.J.A.C. 7:28-12.4(d), do not allow the imposition of new standards on already approved decommissioning/remediation plans due to a revision to established remediation standards unless the difference between the two standards differs by an order of magnitude. Given that the remediation standard in New Jersey regulations (15 mrem per year) and NRC regulations (25 mrem per year) do not differ by an order of magnitude, this regulation does not appear to give NJ a basis to revisit prior NRC license terminations under this regulation. However, New Jersey does have the authority to take appropriate regulatory action if the State determines there is a significant threat to public health and safety at a decommissioned site.

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   No changes were made to the NRC Staff Assessment or Agreement based on this comment.

2. Gregory R. Reinhard, MBA, DVM, Merck & Co., Inc. commented that the State fees that will be charged to New Jersey licensees are exorbitant at "additional use sites." Merck supports the rationale whereby states can assume regulatory authority from NRC but feels that the significant increase in fees for "additional use sites" are not justified.

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   NRC Staff Response

   In reviewing a State's request to enter into an Agreement, NRC evaluates the proposed program to ensure that the State has the funding and staffing levels to manage an Agreement State program. However, the State's radioactive material licensing fees are not a matter of adequacy and compatibility. The State establishes its own methods of funding, and decides the dollar amount of fees charged to licensees.

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   No changes were made to the NRC Staff Assessment based on this comment.

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The IMPEP procedures are detailed in Management Directive 5.6, "Integrated Materials Performance Evaluation Program." Under the IMPEP program, NRC evaluates many areas of an Agreement State program, with the compatibility of regulations being a part of that evaluation.

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SMC commented that the NJ regulations applying to "all persons" will be duplicative because it will include NRC licensees. Agreements under Section 274 of the Atomic Energy Act do not give States regulatory authority over NRC licensees. States can only assume regulatory authority over radioactive materials or activities specified in their Agreement. For example, under the Agreement, NJ will not have regulatory authority over nuclear reactors. Section 274(c)(1) of the The Atomic Energy Act of 1954, as amended, prohibits NRC from discontinuing its regulatory authority over nuclear power reactors. Furthermore, , requires that nuclear power reactors to be regulated by NRC. N.J.S.A. 26:2D-91 provides authority for Agreements with Federal government and assumption of regulatory authority by the State, to regulate sources of radiation. NJ regulations, in N.J.A.C. 7:28-6.1(b), specifically states that "The Department does not regulate nuclear reactors... Insofar as the incorporated rules refer to those facilities and/or materials previously referenced, those references are not incorporated nor does any cross references include those facilities and/or materials."