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**New York State Department of Environmental Conservation**  
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MAR 30 2000

Mr. Jack Parrott  
West Valley Project Manager  
United States Nuclear Regulatory Commission  
Mail Stop T8F37  
Washington, DC 20555

Dear Mr. Parrott:

Enclosed are the comments of the New York State Department of Environmental Conservation (DEC) on the Nuclear Regulatory Commission's (NRC) "Draft Policy Statement on Decommissioning Criteria for West Valley," presented for public comment at a January 5, 2000 public meeting. We would like to thank the NRC for this opportunity to review and comment on this document and for the extension of the comment period.

The choice of a decommissioning criteria, and its application, are crucial to ensuring that appropriate choices are made during the cleanup process at the Western New York Nuclear Services Center (West Valley). This critical step in the cleanup process will have a dramatic impact on the ultimate fate of the site and the potential for significant impacts to public health and the environment of this State. Therefore, every reasonable effort should be made at this stage of the process to reach concurrence on the appropriate decommissioning criteria for this site. The DEC is encouraged by the willingness of the NRC to maintain an open process and to give serious consideration to comments from a wide range of interested parties. We believe that an acceptable outcome can be reached through the continued application of this open, cooperative process.

If you have any questions regarding the enclosed comments, you may contact Dr. Paul Merges at (518) 457-9253.

Sincerely,

Stephen Hammond, P.E.  
Director  
Division of Solid and Hazardous Materials

Enclosure

cc: P. Piciulo, NYSERDA  
B. Mazerowski, DOE



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DEC Comments on the NRC Draft Policy Statement  
on Decommissioning Criteria for West Valley

1. The New York State Department of Environmental Conservation (DEC) is in general concurrence with the application of the License Termination Rule (LTR) as the Decommissioning Criteria for West Valley. We appreciate the fact that the United States Nuclear Regulatory Commission (NRC) has established the LTR as the single decommissioning criteria for both the West Valley Demonstration Project (WVDP) premises and for the New York State Energy, Research & Development Authority (ERDA) License CSF-1.
2. The NRC has accepted the responsibility of establishing the decommissioning criteria for the West Valley Demonstration Project Act (Act). The NRC Commissioners have stated that the decommissioning criteria to be set for the WVDP is also intended by the NRC to satisfy the decommissioning requirements under the site's CSF-1 license. Based upon Attachment 2 to SECY-99-057, it appears that the NRC's position is that it has no general legislative authority, nor obligation under the WVDPA, for making the determination that the United States Department of Energy (DOE) has remediated the site to standards the NRC is now establishing. Even with the use of an Independent Verification Contractor (IVC), the DOE could make a unilateral determination that they have met their obligations for decommissioning under the Act, and then leave the site. The NRC has stated that the NRC will determine the appropriate actions for reactivation or termination of the CSF-1 license after the point where DOE has fulfilled their obligations under the Act. This has the potential to place the licensee in a position where, in order to meet its cleanup obligations for termination of the site's NRC license, it would have to perform further cleanup of material that is rightly the responsibility of the DOE.

However, the September 1981 West Valley Demonstration Project Memorandum Of Understanding (MOU) between the DOE and NRC, Section III. B. 4. d., obligates the DOE to create a Site Status Report for the WVDP. This report is to include an analysis of the extent to which the NRC prescribed decommissioning requirements have been satisfied by the DOE. Section II. B. 2. of the MOU states, "The NRC has the responsibility to carefully review, critique, and analyze, in a timely manner, the information provided to identify to the Department any potential radiological danger to the public health and safety which may be presented by the project."

New York State believes the Federal Government is obligated to ensure that wastes that are the responsibility of the Federal Government are not left to the State to remediate. This position is essentially the same as that taken by the House Committee on Interstate and Foreign Commerce during drafting of the original WVDPA, as detailed in footnote 6

of attachment 2 to SECY-99-057. Since the NRC agreed to the requirement in Section II. B. 2. of the above MOU to review and comment on documents provided to them by the DOE, specifically the Site Status Report, the DEC holds that the NRC is obligated to comment on whether the decommissioning process has resulted in DOE meeting the criteria set by the NRC. While this is not the same as a formal approval process, it is unlikely that the DOE would determine that they have successfully met the decommissioning criteria if the NRC does not concur with that position. The use of an IVC by DOE could expedite the NRC review and concurrence process. We encourage NRC to negotiate with DOE to assure the use of an IVC.

3. The restricted release of all or part of the site would be based upon the enforceable application of institutional controls and the duration of time that their use will be required. Currently, there is no clear agreement as to the exact meaning of the term institutional control, particularly as it applies to West Valley. This concern was reinforced during the January 5, 2000 NRC Public Meeting for their Draft Policy Statement on West Valley Decommissioning Criteria, when NRC staff stated that they had no clearly defined and published definition of "institutional control." Published definitions vary both within and between regulatory agencies, for example:
  - The definitions section of the DOE's October 1999 document "From Cleanup to Stewardship" describes institutional control as "Non-engineering measures - usually, but not always, legal controls - intended to affect human activities in such a way as to prevent or reduce exposure to hazardous substances." It gives examples of what is meant by this and then goes on to say, "However, they are distinct from physical engineering measures such as treatment and containment systems."
  - 10 CFR 61.59(b) describes the elements that an institutional control program should contain as a minimum in order to "physically control access to the disposal site." This program is to include, but not be limited to, an environmental monitoring program, periodic surveillance, minor custodial care, other requirements as called for by the Commission, and the administration of funds for the program.
  - NRC DG-4006, section 4.1 "Legally Enforceable Institutional Controls" states, "At some sites institutional controls may include physical controls (e.g., fences, markers, earthen covers, radiological monitoring, and the maintenance of those controls). . . . Physical controls and their maintenance can be used to meet requirements in 10 CFR 20.1403(b) only when they are used in combination with an instrument that permits legal enforcement of the physical control." When DEC staff asked for a clarification of this section during a December 1999 phone conversation, NRC staff qualified the definition as allowing physical controls only for the purpose of restricting access to the remaining waste, not for the purpose of isolating the material from the surrounding environment.
  - In 40CFR Subpart B, Section 191.12 the EPA breaks down the topic into passive and active institutional control. Passive controls are described as the retention of

knowledge regarding site hazards using markers and records, and governmental control through regulation and ownership. Active controls are described as *physical access* control, maintenance, monitoring and remedial actions and managing releases.

- DEC regulations (6 NYCRR Part 382), which was promulgated to regulate the siting and disposal methods of any new commercial low-level radioactive waste disposal facility within New York, interprets the phrase to mean State control of site access, and State monitoring, surveillance and minor custodial care of the site. These regulations were approved by the NRC as adequate and compatible with those of the Commission.

There are some common concepts in the various definitions, but no obvious consensus. Thus, the DEC is requesting a clear and concise definition of what types of actions, documentation, administrative requirements and physical features are included in the NRC use of this phrase as it is intended to be applied to the West Valley decommissioning process. Any definition of this phrase should be clearly understood by the various regulators and site operators involved in the decommissioning process. If the NRC intends to utilize the DG-4006 definition of institutional controls, we request that they clarify whether physical controls as described in this guidance will encompass such features as erosion controls, slurry walls, membrane covers, permeable reactive barriers, and the use of reducing grout fill when applied to West Valley.

4. DEC recognizes that the United States Congress, through creation of the WVDPA, has authorized the NRC to prescribe the Decontamination & Decommissioning (D&D) criteria for West Valley. However, given the statement made at the January 5, 2000 public meeting by the EPA, there may be a problem in the future regarding the application of two different final D&D criteria to the site. Specifically, this refers to EPA's statement that once the site is released for public use by the NRC, the EPA will have regulatory jurisdiction. Since the EPA D&D standard is more restrictive than that of the NRC, we believe that it is important that the NRC and EPA resolve this issue. As the NRC is currently issuing this Policy Statement specifically for the purpose of establishing a D&D criteria for the site, DEC believes that it is imperative that NRC and EPA address the issue in a timely manner.
5. Section 4.2.1.9. of the LTR supporting document DG-4006, allows "periodic checks of the site no less frequently than every 5 years." We understand that this 5-year period is meant as an upper bound on the frequency of site checks. However, if the method of site closure chosen in the ROD will leave significant amounts of material on-site, the Department's position is that the Federal and State agencies with responsibility for the wastes should maintain a staff on-site. The size and qualifications of this staff should be commensurate with the needs of maintaining and monitoring the site to comply with the chosen closure method and to protect the public health and the environment.

6. The application of the Multi-Agency Radiation Survey and Site Investigation Manual (MARSSIM) for demonstration of compliance with decommissioning criteria detailed in the LTR is recommended in DG-4006. The DEC generally supports and encourages the use of the MARSSIM approach for compliance verification, though we disagree with how the Derived Concentration Guidance Limit, Elevated Measurement Criteria (DCGL<sub>EMC</sub>) has been applied in some instances within the State.
7. To clarify the impact of the application of a decommissioning criteria at West Valley, the extent of the area to which that criteria will ultimately be applied must be clearly defined. Therefore, we request that the NRC clearly describe the "site" to which they will apply their criteria.
8. One alternative that has been discussed in the Draft Environmental Impact Statement, and at several meetings with the Citizens Task Force, would include the exhumation and consolidation of low-level radioactive waste for above-ground on-site interim or long-term storage. If this were determined to be necessary in order to meet the NRC criteria, 6 NYCRR Parts 382 and 383 would apply to any such facility not regulated by the NRC or controlled by the DOE.
9. The Commission's Policy Statement should clarify what the NRC's licensing termination process will be and how the NRC will apply the LTR criteria to the reactivated CSF-1 license after the DOE fulfills its obligations under the Act.
10. The DEC requests that in order to reduce the potential for future misinterpretation of NRC's intent in the Policy Statement, the paraphrasing of regulations and reports in the draft be minimized or eliminated. Alternatively, a statement could be included explaining that any paraphrasing is for informational purposes only and does not take precedence over the language in the regulation or report being discussed.
11. The Policy Statement should describe what is considered sufficient financial assurance for routine expenditures and major future renovation or emergency costs. Does the NRC consider ownership of the property by the State of New York, and institutional controls by State and federal agencies, adequate for financial assurance, or will the NRC require some form of assurance fund be established?

Thank you.