

Letter For Electronic Distribution

Original signed letter on file at the following address

Nevada Division of Environmental Protection
333 West Nye Lane
Carson City, Nevada 89706-0851

January 25, 2001

Docket no:
0500201; P00M-032

Carl Gertz
Environmental Management
U.S. Department of Energy
P.O. Box 98518
Las Vegas, Nevada 89193-8518

Re: DOE Nevada Operations Office (DOE/NV) Audit of the West Valley Demonstration Project (WVDP), Low-Level Radioactive Waste Certification Program - Audit No. RWAP-A-01-04

Dear Mr. Gertz:

The U.S. Department of Energy -- Nevada Operations Office (DOE/NV) has received a request from the West Valley Demonstration Project (WVDP) in New York State to be approved as an offsite waste generator eligible to dispose of Low Level Radioactive waste (LLW) at the Nevada Test Site (NTS). The Nevada Division of Environmental Protection (NDEP) received notification that an on-site audit has been scheduled by DOE/NV to evaluate a specific low level waste stream at the WVDP for compliance with the Nevada Test Site's Waste Acceptance Criteria (NTSWAC).

Upon receiving this notification, NDEP raised verbal concerns about the appropriateness of a decision by DOE/NV to accept the WVDP wastes for disposal as LLW at the NTS. Based on a further review of the WV site history regarding both the origin and ownership of the WVDP waste streams, NDEP's position is that the waste would be classified as commercial waste and need to be disposed of as such.

The State of Nevada concluded its obligation under the commercial LLW compact system for disposal of commercial LLW with closure of the Beatty commercial LLW site in 1992. Now it appears that DOE is moving toward accepting commercial LLW for disposal at the NTS. While NDEP does acknowledge DOE's self regulating authority, under the Atomic Energy Act for the management and disposal of "defense" LLW, the same cannot be said for commercial LLW. These wastes are regulated by the Nuclear Regulatory Commission (NRC) and its delegates, and DOE can not, through its own initiative, change the regulatory status of a waste.

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NDEP is requesting that DOE provide the basis for the determination that the WVDP LLW streams are acceptable to be considered for disposal at the NTS. It is noted that the "West Valley Demonstration Project Act" gives DOE specific authority for demonstrating solidification techniques for high level waste and allows DOE to dispose of LLW in accordance with the applicable licensing requirements. What licensing requirements does DOE assert are applicable to the referenced waste streams?

With respect to origin, are these LLW streams generated from activities associated with nuclear weapons production or DOE energy research activities associated with the treatment of commercial high level waste? In terms of ownership, the Act does not authorize the transfer of title of the WVDP waste to the DOE. Given this consideration, under what authority will DOE accept the LLW streams being considered for disposal at the NTS?

NDEP is aware that DOE and the New York State Energy Research and Development Authority have developed an EIS that evaluates alternatives for cleanup and disposition of radioactive wastes at the West Valley site. Has a "Record of Decision" been issued for this EIS and has DOE adhered to National Environmental Policy Act (NEPA) Tiering requirements (40 CFR 1508.28) regarding the NEPA decision making process for the referenced LLW streams?

Questions regarding any matter addressed in this letter may be addressed to John Walker at (775) 687-4670 ext. 3027, or me at ext. 3039.

Sincerely,

Paul J. Liebendorfer, P.E.
Chief
Bureau of Federal Facilities

PJL/KKB/JW/nap

cc: Allen Biaggi, NDEP Administrator
Robert R. Loux, NWPO
K. Beckley, NDEP, Carson City, NV
M.D. McKinnon, NDEP, Las Vegas, NV
Stan Marshal, Health Division

memorandum

Ohio Field Office
West Valley Demonstration Project

DATE: March 2, 2001

SUBJECT: U.S. Department of Energy (DOE) West Valley Demonstration Project (WVDP) Regulatory Basis for Shipment of Low-Level Waste (LLW) to the Nevada Test Site

TO: E. Frank DiSanza, Director
Waste Management Division
DOE-NV, C-125

In response to a request from Mr. Gary Pyles of your office, attached is the regulatory basis for disposing of LLW generated by the West Valley Demonstration Project (WVDP) at the Nevada Test Site.

If you have any questions regarding this matter, please call me at (716) 942-4312.



Alice C. Williams, Director
West Valley Demonstration Project

Attachment: Regulatory Basis

cc: Gary Pyles, DOE NV, w/att.

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TJV/slb

**DISPOSAL OF
WEST VALLEY DEMONSTRATION PROJECT
LOW-LEVEL WASTE
AT A DEPARTMENT OF ENERGY DISPOSAL SITE**

PURPOSE

The purpose of this paper is to provide the regulatory basis for disposing of low-level radioactive waste (LLW) generated by the U.S. Department of Energy (DOE) West Valley Demonstration Project (WVDP) at a DOE disposal site, rather than exclusively at a commercial disposal site. The WVDP waste disposal scope includes waste currently in inventory and waste that may be generated by the DOE during Project completion activities. The regulatory justification is based on a review and interpretation of applicable Federal laws and regulations pertaining to the assignment of radioactive waste management and disposal responsibilities, as well as, on current DOE programmatic planning and decision making for waste management.

HISTORICAL BACKGROUND OF WVDP

The WVDP is located on the site of the only commercially-operated Spent Nuclear Fuel (SNF) reprocessing facility in the nation. The commercial facility operated from 1966 to 1972 under a leasing arrangement with New York State (NYS) and a U.S. Nuclear Regulatory Commission (NRC) license. Approximately 640 metric tons of SNF were processed; approximately 60 percent of which came from the Federal Atomic Energy Commission Facility at Hanford (N Reactor). In 1976, the commercial operator notified NYS of its intent to exercise its rights under the waste storage agreement and to surrender the responsibility for all wastes to NYS. In 1980, Congress passed the WVDP Act directing the U.S. Department of Energy to carry out a high-level liquid nuclear waste management project at the Western New York Nuclear Service Center in West Valley, New York.

REGULATORY ANALYSIS

In comparison to most DOE sites, the WVDP is unique in that Congress has mandated that the DOE has taken over certain responsibilities for wastes and facilities that had formerly been managed by a private (commercial) entity operating under a NRC license. Congress mandated this via passage of the WVDP Act of 1980 (Public Law 96-368). The DOE is required to perform certain waste management and disposal activities, as defined in the language of the WVDP Act. These activities are discussed in the following section.

West Valley Demonstration Project Act of 1980

The WVDP Act directs the DOE to carry out a high-level liquid nuclear waste management project at the Western New York Nuclear Service Center in West Valley, New York. A number of specific responsibilities are listed, including activities that involve LLW management and disposition. The WVDP Act does not distinguish between the commercial/non-defense vs. defense aspects of West Valley's waste. Section 2.(a)(4), of the WVDP Act states, "The Secretary shall, in accordance with applicable licensing requirements, dispose of low-level

radioactive waste and transuranic waste produced by the solidification of the high level radioactive waste under the project."

In the WVDP Act, Section 2 (a)(5) states that, "The Secretary shall decontaminate and decommission (A) the tanks and other facilities of the Center, in which the high level radioactive waste solidified under the project was stored, (B) the facilities used in the solidification of the waste, and (C) any material and hardware used in connection with the project." In conducting the WVDP, the DOE has generated and will continue to generate LLW that requires disposition by the Department, whether this waste was generated during preparation of the site for vitrification, during actual vitrification operations, or during decommissioning activities yet to take place. The language of the WVDP Act does not mandate any particular waste disposal locations, but only mandates that DOE is responsible for disposing of waste in compliance with any applicable licensing requirements.

Low Level Radioactive Waste Policy Amendments Act

Prior to the passage of the WVDP Act, and the Public Law authorizing Waste Isolation Pilot Plant (WIPP), little regulatory attention has been given to waste disposal issues and responsibilities, particularly in terms of the private sector (NRC commercial licensees) vs. public sector (nuclear weapons production). However, in 1985, the Federal government passed the Low-Level Radioactive Waste Policy Amendments (LLRWPA) Act defining the role of the Federal and State's governments in managing and disposing of LLW. It assigns the States with the responsibility to form compacts and establish low level radioactive waste disposal sites for wastes generated, at a minimum, within the compact.

The basis of this law is not one of identifying the origin of the waste as either defense or commercial. Instead, the LLRWPA has as its basis identification of the owner and/or generator of that waste. The LLRWPA gives the federal government the responsibility to dispose of the wastes it generates. States are not responsible for disposing of LLW that is owned or generated by the DOE; owned or generated by U.S. Navy vessel decommissioning; Formerly Utilized Sites Remedial Action Program (FUSRAP) sites; or owned or generated as a result of any research and development, testing, or production of any atomic weapon. States are also not required to accept waste for disposal that exceeds the limits for Class C radioactive waste as defined by 10 CFR 61.55. Specifically, 42 U.S.C. and 2021c of the LLRWPA, "Responsibilities for Disposal of Low-Level Radioactive Waste," assigns States the responsibility to dispose of LLW generated within the state that consists of, or contains, Class A, B, or C waste as defined by 10 CFR 61.55, except for the Federal sources described above.

The significance of the LLRWPA for the WVDP is that of waste ownership vs. waste generation. The LLRWPA Act is key to the position of this paper that WVDP waste can be disposed by the DOE at the disposal site of its choosing-----either commercial or DOE. Section 2021c(b)(1) of the LLRWPA does not require that LLW be owned by DOE for its disposal to be a Federal responsibility; waste disposal is also a Federal responsibility in cases where the waste is generated by DOE, but not necessarily owned by DOE. Therefore, regardless of the ownership of project-generated waste, the DOE is not precluded from utilizing DOE disposal sites for disposing of such waste, should it choose to do so.

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DOE PROGRAMMATIC PLANNING AND DECISION MAKING

Programmatic Waste Management Environmental Impact Statement

In May 1997, DOE released the "Final Waste Management Programmatic Environmental Impact Statement" (WMPEIS). The WMPEIS is a nationwide study performed by DOE that examines the environmental impacts of managing radioactive and hazardous wastes from past and future DOE activities. DOE included West Valley in its WMPEIS analysis. The WMPEIS scope encompasses 54 sites "for which DOE has some waste management responsibility and that are within the scope of this PEIS," of which 40 are designated DOE sites (including West Valley), 11 are joint Navy/DOE sites, 2 are FUSRAP sites, and the last is the Waste Isolation Pilot Plant (WIPP). Of the 54, 17 of these sites are identified as 'major' sites on the basis of potentially receiving wastes from other sites, hosting a disposal facility, managing HLW, or being consistent with the Federal Facility Compliance Act process. The WVDP is designated as a major DOE site because of its HLW management role. However, DOE did not limit its West Valley analysis to only HLW. West Valley analysis in the WMPEIS included HLW, TRU, LLW, and LLMW.

Under the WMPEIS, Purpose and need (Section 2.2), DOE states that it is required by the Atomic Energy Act to manage the radioactive wastes that it generates. West Valley was evaluated consistently with all the other DOE sites being evaluated, including waste volumes and impacts from implementing the various alternatives under consideration. West Valley was clearly a part of the WMPEIS, and had clearly been identified as a waste generator that DOE included in its assessment for disposing of its waste at one or more of the DOE waste disposal sites under consideration. The West Valley site description is included in WMPEIS Section 4.4.17. West Valley's projected waste volumes are clearly identified within each WMPEIS section that discussed that particular waste type. West Valley's cumulative impacts and supporting narrative discussion is included in Section 11.19 in the Final WMPEIS, Volume I. West Valley detailed impacts per alternative and per waste type are included in Volume II of the final WMPEIS, Section 18.

During the comment period on the draft WMPEIS, two comments were received specifically involving West Valley. These can be found in Section 3.5.17 of Volume V of the WMPEIS. Neither include objections on West Valley's inclusion in the WMPEIS. One more general comment regarding DOE's authority to dispose of waste at the Nevada Test Site (NTS) (made by the State of Nevada), indicates that Nevada believes the NTS land withdrawal orders restrict the site to only atomic testing activities, and that DOE must obtain exclusive jurisdiction over the disposal sites to do what is being considered in the WMPEIS, and that must be obtained from the Nevada Legislature. DOE responded that this issue was outside the scope of the WMPEIS and was addressed in the NTS Site-wide EIS. No comment could be found that specifically objected to West Valley's inclusion in the WMPEIS or its potential eligibility for waste disposal at a DOE disposal facility.

On the basis of the WMPEIS analysis, DOE intended to decide which sites will manage its existing wastes and those wastes that DOE will generate in its ongoing operations. For management of LLW, DOE evaluated a range of alternatives, including no action, decentralized, regionalized, and centralized. The Preferred Alternative for LLW published in the WMPEIS is

for treatment of LLW at the generator site, with disposal at regional disposal sites following treatment. DOE's Record of Decision (ROD) for LLW, including the announcement of the selected DOE disposal sites, was issued on February 25, 2000.

DOE's decision was to perform minimum treatment at all sites and continue, to the extent practical, disposal of onsite LLW at the INEEL, the Los Alamos National Lab, the Oak Ridge Reservation, and the Savannah River Site. In addition, DOE decided to make the Hanford site and the NTS available to all DOE sites (including West Valley) for disposal of LLW.

At that time, the DOE amended the ROD for NTS to be consistent with DOE's complex-wide programmatic decision, to enable NTS to implement its Expanded Use Alternative, under which NTS may authorize new LLW generators for disposal at NTS, including (consistent with the WMPEIS) LLW from the WVDP.

Additionally, West Valley is currently engaged in a site specific National Environmental Policy Act (NEPA) process that will tier to the WMPEIS. If the decisions made on the basis of this site specific analysis (or analyses) call for off-site disposal of LLW, then the WMPEIS ROD will dictate the manner and place in which the waste is disposed.

SUMMARY/CONCLUSION

In summary, it is DOE's position that WVDP LLW may be disposed of at appropriate DOE sites for the following reasons:

- The WVDP Act clearly gives DOE the responsibility to dispose of the LLW generated by the project;
- The LLWPA clearly indicates that DOE is responsible for disposal of DOE generated waste; and
- U.S. Department of Energy's (DOE) programmatic decision documented in the Low-Level Waste (LLW)/Mixed Low-Level Waste (MLLW) WMPEIS ROD, issued June 2000, provided that WVDP could avail itself of a DOE regional site (NTS or Hanford) without making distinctions between DOE owned and non-DOE owned wastes. However, the LLW/MLLW WMPEIS ROD did not decide which site would receive the waste if the waste is ultimately sent to a DOE site. In addition, the LLW could also be sent to a commercial facility licensed by the Nuclear Regulatory Commission.

KERRY C. GUBIN
Governor

STATE OF NEVADA

ROBERT R. LOUR
Executive Director



OFFICE OF THE GOVERNOR
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April 25, 2001

Kathleen Carlson, Manager
Nevada Operations Office
U.S. Department of Energy
P.O. Box 98518
Las Vegas, Nevada 89193-8518

Re: Acceptance of Low-Level Radioactive Waste from the West Valley Demonstration Project (WVDP), for Disposal at the Nevada Test Site (NTS)

Dear Ms. Carlson:

On January 25th of this year the Nevada Division of Environmental Protection (NDEP) advised Mr. Carl Czeta of the Nevada Operations Office about the State of Nevada's objection to a proposal by the Department of Energy to ship Low-Level Radioactive Waste (LLW) from the West Valley Demonstration Project (WVDP) in New York State, to the Nevada Test Site (NTS) for disposal. The objection was based on the State's position that the waste in question is commercial in origin and thus inappropriate for disposal at a defense facility like the NTS. As you may know, with closure of the Beatty commercial LLW site in 1992, the State of Nevada concluded its obligation under the commercial LLW compact system for disposal of commercial LLW (per P.L. 99-240). And yet it now appears that the Department of Energy (DOE) is considering the disposal of commercial LLW at the NTS.

As the Governor's designee for the Nuclear Regulatory Commission's (NRC) Agreement State program, I must concur with NDEP officials that NTS is clearly not a legally appropriate site for the disposal of commercial LLW; and this position applies regardless of the ownership and/or control of such wastes, (i.e., owned or controlled by a federal, state, or local agency, and/or a non-government entity).

We do recognize that the Low Level Radioactive Waste Policy Amendments Act (LLRWPA) gave states responsibility for developing commercial LLW disposal sites

<http://www.state.nv.us/nucwaste/news2001/nr11186.htm>

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through a system of state compacts. However, and without regard to the unfulfill realization of the LLW Policy Act, with the closure of Beatty, Nevada has concluded its responsibility under the compact system. Hence, it is not only inappropriate but an affront to the residents of Nevada that DOE would ever consider the NTS for use as a commercial LLW disposal site.

It is also worth mentioning that additional commercial LLW streams could be acquired by DOE. We note the statutory authority is in place that gives DOE authorization to accept such waste per section 191(b) and (c) of the Nuclear Waste Policy Act. Likewise, there are other commercial LLW streams within DOE as well as within the Department of Defense (DoD) that are regulated by NRC and/or state licensing authorities. These commercial waste streams could well be "pawned-off" on DOE as defense LLW, (e.g., LLW from the Army Corps of Engineer's Formerly Utilized Sites Remedial Action Program; DoD LLW in the form of expended depleted uranium uranium and associated contaminated targets on military ranges, etc.).

In a related matter, Nevada officials are concerned about attempts by DOE to reclassify LLW from commercial to defense, for purposes of disposal at a defense site like the NTS. We believe such action would only reinforce the department's ill-fated practice of self regulation allowed under the Atomic Energy Act (AEA). As you may be aware states are opposed to self regulation under AEA and have consistently supported external regulatory authority over DOE LLW management and disposal operations.(s)

For your information I have attached a letter and accompanying position paper prepared by DOE. The attachment is DOE's response to the January 25th letter by NDEP. Please be aware that Nevada officials are unconvinced by this position paper. As such, we are once again requesting formal legal clarification as to origin of the WVDP LLW waste streams being considered for disposal at the NTS. It is our position that the waste streams in question are commercial in origin and thus should be disposed of at a licensed (non-defense) LLW disposal site. We are taking this position notwithstanding prior and/or pending analysis per DOE implementing procedures (10CFR 1021) under the National Environmental Policy Act (e.g. DOE's Waste Management Programmatic Environmental Impacts Record of Decision [6450-01-P] dated 02/18/2000).

Given these considerations, I am requesting a formal legal interpretation on the points referenced above and I am respectfully requesting that DOE implement a moratorium on any shipments of LLW from the West Valley site to the NTS, pending resolution of these matters.

Sincerely

—/s/—
Robert R. Loux
Executive Director

Attachments

<http://www.oeo.gov/nucwaste/news2001/an11186.htm>

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Department of Energy

Nevada Operations Office
P.O. Box 98518
Las Vegas, NV 89193-8518

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Alice C. Williams, West Valley Demonstration Project Director, DOE/WVDP, West Valley, NY

APPROVAL TO SHIP WEST VALLEY DEMONSTRATION PROJECT (WVDP) LOW-LEVEL RADIOACTIVE WASTE TO THE NEVADA TEST SITE

WVDP has successfully completed the program approval process described in the Nevada Test Site Waste Acceptance Criteria (NTSWAC), Revision 3.

National Nuclear Security Administration Nevada Operations Office (NNSA/NV) Radioactive Waste Acceptance Program (RWAP) personnel completed the audit of Waste Valley on January 25, 2001. The results of the audit are documented in the audit report, letter dated February 2, 2001, to Ahmad M. Al-Daouk from Gary L. Pyles.

NNSA/NV also reviewed, commented, and approved the following waste profiles:

Table with 3 columns: Waste Profile, Revision and Date, Description. Row 1: WVDP-000000001, Rev. 0, 01/18/01, VEMP Airborne Contaminated Material. Row 2: WVDP-000000002, Rev. 0, 06/01/01, Legacy Low Level Waste Treatment Facility Resin.

As a result of the above actions, NNSA/NV approves the WVDP Low-Level Waste Certification Program for the shipment and disposal of the identified waste streams. This approval is based upon satisfying the requirements of the NTSWAC, Revision 3, the current West Valley Nuclear Services Company Radioactive Waste Certification Program, and listed waste profile revisions. Enclosed are the current NNSA/NV approvals held by WVDP.

Prior to shipment of any approved waste streams, please notify Bechtel Nevada (BN) Waste Management Program Office personnel at (702) 295-6811 or (702) 295-6808 with the planned shipping date. BN will ensure sufficient funding is available and provide the necessary equipment and personnel to complete disposal activities.

Handwritten number 10 and a recycling symbol.

Alice C. Williams

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If you have any questions or require additional information, please contact Gary L. Pyles at (702) 295-2969.

For *Richard D. Ballertge*
Carl P. Gertz, Assistant Manager
for Environmental Management

WMD:GLP

Enclosure:
As stated

- cc w/encl:
- D. J. Davis, DOE/HQ (EM-34) CLVRLF
- P. J. Liebendorfer, NDEP, Carson City, NV
- M. D. McKinnon, NDEP, Las Vegas, NV
- A. M. Al-Daouk, DOE/WVDP,
West Valley, NY
- J. P. Jackson, WVDP, West Valley, NY
- J. F. Bonn, BN, Mercury, NV
- J. B. Zovi, BN, Las Vegas, NV
- M. B. Noland, BN, Las Vegas, NV
- S. K. Krenzien, HAZMED, Las Vegas, NV

- cc w/o encl:
- S. R. Livenick, BN, Las Vegas, NV

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Nevada Test Site Approval Status - June 18, 2001

West Valley Demonstration Project, West Valley, New York

Waste Stream(s):

<u>Waste Profile</u>	<u>Revision and Date</u>	<u>Approval Date</u>	<u>Title</u>
WVDP-000000001	00 01/18/01	Cover Ltr. Date	VEMP Airborne Contaminated Material
WVDP-000000002	00 06/01/01	Cover Ltr. Date	Legacy Low Level Waste Treatment Facility Resin

Waste Certification Program:

<u>WCPP</u>	<u>Revision and Date</u>	<u>Approval Date</u>	<u>Title</u>
WVDP-339	03 12/15/00	Cover Ltr. Date	West Valley Nuclear Services Radioactive Waste Certification Program Plan

Assessment Status:

Last RWAP Facility Evaluation: RWAP-A-01-04, 01/01

Next Facility Evaluation Due: 2003

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