

September 18, 2002

Mr. Raymond C. Vaughan
Coalition on West Valley Nuclear Wastes
Sharp Street, East Concord, NY 14055

Dear Mr. Vaughan:

I am responding to your August 2, 2002, letter requesting a response to the Coalition on West Valley Nuclear Wastes (Coalition) comments on the "U.S. Nuclear Regulatory Commission Final Policy Statement on Decommissioning Criteria for the West Valley Demonstration Project." We appreciate the Coalition's involvement at the West Valley site and your letter raised a number of interesting questions. However, as Chairman Meserve noted in his July 23, 2002 letter to you, the Commission has completed action on the Final Policy Statement. The attachment provides responses to specific comments addressed in the Coalition's April 14, 2002, letter.

In light of the Final Policy Statement, we will continue to consider the views of the Coalition and look forward to working with the Coalition as decommissioning at West Valley progresses. If you have any further questions on this matter, please contact Larry Camper, of my staff, at (301) 415-7234.

Sincerely,

/RA/

Martin J. Virgilio, Director
Office of Nuclear Material Safety
and Safeguards

Attachment: "Response to the Coalition on West Valley Nuclear Wastes April 14, 2002, Ltr on 'NRC's Final Policy Statement on Decommissioning Criteria for the WVDP'"

cc: Alice Williams, DOE
Paul Piciulo, NYSERDA
Thomas Attridge, CTF
Senator Charles E. Schumer
Senator Hillary Rodham Clinton
Congressman Amo Houghton
Congressman Thomas M. Reynolds
Congressman Jack Quinn
Congressman John J. LaFalce
Paul Giardina, EPA
Paul Merges, NYSDEC
Adela Salame-Alfie, NYSDOH
Cyrus Schindler, Seneca Nation of Indians

**RESPONSE TO THE COALITION ON WEST VALLEY NUCLEAR WASTES APRIL 14, 2002,
LETTER ON “NRC’S FINAL POLICY STATEMENT ON DECOMMISSIONING CRITERIA FOR
THE WEST VALLEY DEMONSTRATION PROJECT**

A. Excessive Flexibility and Lack of Definiteness

Comment 1:

The Coalition on West Valley Nuclear Wastes (Coalition) is concerned that the “flexible approach” of the U.S. Nuclear Regulatory Commission (NRC) Final Policy Statement is too vague to set limits on the U.S. Department of Energy’s (DOE’s) decommissioning alternatives. The Coalition is concerned that NRC’s emphasis on flexibility, including potential exemptions, and NRC’s willingness to consider alternatives that do not fully comply with the License Termination Rule (LTR) criteria, is likely to confuse any determination of whether a given alternative is “in accordance” or “not in accordance” with the Commission’s criteria.

Response 1:

We believe The Final Policy Statement provides a clear and consistent basis for site decommissioning and for making determinations of whether a given decommissioning alternative is acceptable. The NRC’s Final Policy Statement states that a flexible approach to decommissioning is needed both to ensure that public health and safety and the environment are protected, and to define a practical resolution to the challenges that are presented by the site. In that regard, the Commission has decided to prescribe the LTR criteria for the decommissioning of the West Valley Demonstration Project (WVDP) at the West Valley site, reflecting the fact that the applicable decommissioning goal for the entire NRC-licensed site is compliance with the requirements of the LTR. However, the Commission recognizes that health and safety and cost-benefit considerations may justify the evaluation of alternatives that do not fully comply with the LTR criteria. If parts of the NRC-licensed site cannot meet the LTR, the Commission will consider alternatives to the criteria in the LTR if it can be demonstrated that public health and safety will be protected. Specific examples of these alternatives are a long-term or even perpetual license for some parts of the site, or exemptions from the LTR. The Final Policy Statement states that Subpart N of Part 20 contains provisions for potential exemptions. [“Final Policy Statement, ‘Background’ ”, 67 FR 5004 (February 1, 2002)] The Final Policy Statement also notes that exemptions to NRC regulations can be issued if the Commission determines that the exemption is authorized by law and would not result in undue hazard to life or property. Any exemption, should one be requested, would need to meet the Commission’s expectation that all parts of the site be decommissioned to the extent technically and economically feasible. An exemption would not be approved by the Commission without prior public participation, involvement of EPA, and a Commission determination that there is reasonable assurance that there would not be undue hazard to life and property. In NRC’s April 17, 2002, public meeting on the Final Policy Statement, DOE staff stated that its goal is to decommission the WVDP in compliance with the LTR.

The Commission’s criteria for the decommissioning of the WVDP site are protective of public health and safety and the environment. The Commission believes that DOE or any licensee should be allowed the full range of technical freedom in complying with those criteria. The LTR is a performance-based rule that provides a range of doses and controls, adopted after consideration of extensive public comments. Based on NRC’s experience, a prescriptive approach can effectively exclude the development of innovative and efficient methods for reducing radiation levels.

B. Incidental Waste

Comment 2:

The Coalition states that NRC "...has decided to issue incidental waste criteria to clarify the status of and classify any residual wastes present after cleaning of the high-level radioactive waste (HLW) tanks at West Valley." The Coalition is concerned that "...this plan is illegal." The Coalition points out that "NRC mentions both Section 6(4) of the West Valley Demonstration Project and a series of NRC rulemakings in relation to its decision on incidental waste." "In fact, neither the Act nor the NRC rulemakings provide legal authority for reclassifying any of the West Valley waste as "incidental." Any reclassification of West Valley waste as "incidental" is contrary to the West Valley Demonstration Project Act. Such reclassification would be illegal, regardless of whether NRC intends to make the reclassification itself or merely encourages DOE to do so. Neither NRC nor DOE has the authority to override the West Valley Demonstration Project Act." The Coalition's letter also states "There is no rational interpretation of Section 6(4) of the WVDP that would allow NRC to remove any HLW material from the Congressional definition of HLW. Any West Valley HLW must therefore remain HLW unless the West Valley Demonstration Project Act is changed."

Response 2:

Since 1969, the Commission has recognized the concept of waste incidental to reprocessing. The Commission has concluded that certain material, that otherwise would be classified as HLW and sent to a geologic repository, need not be disposed of as HLW because the residual radioactive contamination after decommissioning is sufficiently low as not to represent a hazard to the public health and safety. As to the question of authority, the Commission has concluded that it has the authority to provide criteria that should be applied for the classification of residual reprocessing wastes that will likely remain in the tanks after the HLW is vitrified. The Commission believes that the concept of incidental waste is implicit within the WVDP Act, as well as other statutes, that address HLW.

Waste incidental to reprocessing was also an issue that commenters on the draft Policy Statement requested the Commission to address. The Commission provided criteria to address this issue in the Final Policy Statement. The Commission believed that practical considerations mandated early resolution of the criteria that will guide the classification of incidental waste. These considerations included concerns that: 1) vitrification of HLW is nearing completion and DOE intends to shut down the melter; 2) delay in providing the Commission's views for incidental waste could prove extraordinarily expensive after the melter is shut down, if vitrification is needed for any additional waste that must be shipped elsewhere for disposal; and 3) since control of the site will ultimately revert to NYSERDA, under an NRC license, both NYSERDA and NRC have an interest in ensuring that the incidental waste determination need not be revisited.

The Commission has decided that the most recent advice provided to DOE for the classification of incidental waste at the Savannah River site (SECY-99-0284-"Classification of Savannah River Residual Tank Waste as Incidental," May 30, 2000), with some modifications, constitutes the appropriate criteria that should be applicable to West Valley. These criteria are risk-informed and performance-based, in that these criteria allow DOE to develop innovative approaches to meeting the performance objectives in 10 CFR Part 61. This approach emphasizes risk, while maintaining doses as low as is reasonably achievable. In effect, DOE should undertake cleanup to the maximum extent that is technically and economically practical and should achieve performance objectives consistent with those we demand for the disposal of low-level waste. The LTR must also be met for the remaining residual material. If satisfied,

these criteria should serve to provide protection of the public health and safety and the environment, and the resulting calculated dose would be integrated with the resulting calculated doses for all other remaining material at the NRC-licensed site. The impacts of identifying waste as incidental to reprocessing and not HLW should be considered in DOE's environmental reviews. ["Final Policy Statement", Response F.2, 67 FR 5009 (February 1, 2002)]

C. National Environmental Policy Act Problems

Comment 3:

"NRC mistakenly claims that 'An EIS is not needed at this step of the process of prescribing the LTR because the Commission is not establishing a new requirement for the site.' ... In choosing one set of requirements from the universe of possibilities, NRC made a decision that invokes NEPA. The decision is both new and novel; it requires an EIS."

"NRC seems to think it can satisfy NEPA by being generally involved in, and by doing a detailed review of the DOE-NYSERDA EIS process. Such a review is useful but not sufficient; it does not satisfy NRC's obligation to do a NEPA review (an EIS process) to support NRC's own decision-making." "NEPA has specific substantive requirements. These include requirements for scoping (i.e., the identification of relevant issues for an EIS process), identification of impacts, review of alternatives, etc. NRC has not met these requirements with respect to its West Valley decision-making (i.e., adoption of West Valley decommissioning requirements)."

The Coalition believes that NRC must abide by the terms of the "Stipulation of Compromise Settlement" signed by DOE and the Coalition in 1987. The Coalition also believes that NRC has no right to participate in the West Valley EIS in a manner that is inconsistent with applicable law or contrary to the procedural processes needed to complete the EIS. The Coalition maintains that there are two ways to avoid the NEPA problems: 1) NRC to adopt the LTR verbatim (without "loopholes") as the decommissioning criteria for West Valley; or 2) NRC to perform its own West Valley EIS (focusing on proposed "loopholes").

Response 3:

An EIS is not needed at this step of the process because the Commission is not establishing a new requirement for the site. This site is licensed to NYSERDA and, therefore, is already subject to the LTR by operation of the Commission's regulations. The environmental impacts of applying the LTR to NRC licensees were evaluated in the Generic Environmental Impact Statement, NUREG-1496, that supported the LTR. In promulgating the LTR, the Commission stated, in Section VI, of the "Statement of Considerations," that it will conduct site-specific environmental reviews to "...determine if the generic analysis encompasses the range of environmental impacts at the particular site." The Commission further stated that it "...will conduct an independent environmental review for each site-specific decommissioning decision where land use restrictions or institutional controls are relied upon by the licensee or where alternative criteria are proposed" as it recognized that the environmental impacts for these cases cannot be analyzed on a generic basis. The environmental impacts from the application of the criteria will need to be evaluated for the various alternative approaches being considered in the decommissioning process before NRC decides whether or not to accept the preferred alternative for meeting the criteria permitted by the LTR. NRC intends to rely on the DOE/NYSERDA EIS for the site-specific analyses of various alternatives, but could conduct further independent environmental analyses if warranted.

The "Final Policy Statement" states that the "...application of the LTR to the WVDP is a two-step process: (1) NRC is now prescribing the application of the LTR; and (2) after the

completion of the site-specific DOE/New York State Energy Research and Development Authority (NYSERDA) EIS and selection of the preferred alternative, NRC will verify that the approach proposed by DOE is appropriate.” [“Statement of Policy”, 67 FR 5011 (February 1, 2002)] In other words, NRC will consider the different EIS alternatives for decommissioning before deciding whether the preferred alternative that DOE intends to use to meet the LTR is acceptable. This two-step process is similar to NRC’s process for reviewing Decommissioning Plans from other licensees. In applying NRC’s LTR as the decommissioning criteria for its site, the licensee develops a Decommissioning Plan describing how it intends to meet the requirements of the LTR. NRC independently reviews the plan to determine whether the plan is adequate to satisfy the LTR. The licensee then remediates the site in accordance with the Decommissioning Plan and submits a “Final Status Survey Report.” NRC reviews this report to verify that the remediated site meets the LTR.

NRC intends to participate in the West Valley decommissioning EIS in a manner consistent with applicable law. Section 102 of NEPA states that “Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.” The Council on Environmental Quality (CEQ) regulations recommend that Federal agencies coordinate in preparing EISs, to minimize the effort and cost and to ensure that views of multiple Federal agencies are properly considered.

NRC is a cooperating agency for the development of the West Valley decommissioning EIS. As a cooperating agency, NRC will review and provide comments on the EIS as it is developed. In participating as a cooperating agency, NRC will be exchanging relevant information on the decommissioning EIS, applying technical expertise and staff support, avoiding duplication with other Federal and State procedures and establishing a mechanism for addressing intergovernmental issues. This arrangement assures that NRC views on the EIS are communicated to DOE, NYSERDA, and other cooperating agencies in a timely manner. The decision on whether the preferred alternative satisfactorily addresses the decommissioning criteria set forth in the NRC Policy Statement will be made by NRC, as an independent regulatory agency, once the EIS is completed and submitted for review. The NRC, after independent assessment, may decide to adopt the DOE/NYSERDA EIS in part or in full. If the NRC determines that a supplement is necessary, it would publish its own draft supplemental EIS for public review and comment before finalizing it. In either case, the NRC would issue its own environmental decision. To support this effort, the staff intends to prepare a Safety Evaluation Report following receipt of DOE’s decommissioning plans.

Finally, it is NRC’s understanding that the West Valley decommissioning EIS will address, as appropriate, the following issues identified in your letter: 1) dose consequence from loss of institutional controls; 2) isolation capability, durability, and robustness of engineered barriers; 3) exemptions to the LTR, should an exemption be requested; 4) selection of the critical group; 5) combined dose for the WVDP and NRC-licensed facility; and 6) combined dose for competing modes of failure. In addition, public comments will be requested and considered for both EIS scoping and review of the draft EIS.

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*see previous concurrence

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