

March 9, 2004

Dr. Paul L. Piciulo, Director
New York State Energy Research and Development Authority
West Valley Site Management Program
10383 Rock Springs Road
West Valley, NY 14171-9799

Dear Dr. Piciulo:

I am responding to the New York State Energy Research and Development Authority (NYSERDA) November 18, 2003, letter that provides comments on the "U.S. Nuclear Regulatory Commission (NRC) Implementation Plan for the Final Policy Statement on Decommissioning Criteria for the West Valley Demonstration Project at the West Valley Site." In this letter, NYSEDA requests: (1) that the Implementation Plan and the overall West Valley site decommissioning process be revised to reflect the fact that NYSEDA's NRC 10 CFR Part 50 license is not in abeyance and thus NRC is not precluded from performing a licensing action as set forth in the Implementation Plan; and (2) that the Implementation Plan be revised to reflect a process whereby decommissioning decisions and actions as well as licensing decisions and actions are implemented concurrently for both the West Valley Demonstration Project (WVDP) and non-WVDP portion of the Western New York Nuclear Service Center (Center).

Status of NYSEDA's 10 CFR Part 50 License

In regard to the status of NYSEDA's 10 CFR Part 50 license, the letter states that "[a] review of historical records shows that the technical specifications of License No. CSF-1 were put in abeyance via Change No. 31, which added Condition No. 7 to the license." The letter adds that the language in Condition 7 clearly indicates that the license, as a whole, was not put in abeyance; only portions of the license were suspended or put in abeyance. You also note that Change No. 32 provides further evidence that NYSEDA's license is still in effect.

NRC agrees with NYSEDA that license CSF-1 is still in effect in that it has terms and it continues certain licensee responsibilities (see Condition 7D). However, it is also clear that under the terms of license Condition 7, until the project area is returned to NYSEDA the licensee has no authority or responsibility for licensed activities within the project area and limited authority and responsibility for licensed activities outside the project area other than the State Licensed Disposal Area (SDA). NYSEDA points out that the September 30, 1981, license amendment (Change 31) put the technical specifications and certain other provisions of the license in abeyance as evidenced by Conditions 7B(1)(b), 7B(2), and 7D. In NRC's view, these conditions, together with Condition 7B(1)(a), effectively suspended, or put in abeyance,

all licensed activities specifically related to the facilities and portion of the site which were the subject of DOE work under the West Valley Demonstration Project Act (WVDPA) during the time the U.S. Department of Energy (DOE) is in possession of the facility. This point is supported by the NRC Safety Evaluation Report (SER) for this amendment, which states, "During that time, the licensees are not authorized to take any action under the license. All activities will be conducted by DOE." The SER also refers to the time in which DOE is in possession of the facility as "the period of license suspension." Therefore, although we agree that the license is still in effect, we maintain that the license conditions for operation and maintenance of the facility which is the subject of DOE action pursuant to the WVDPA are effectively suspended or in abeyance while DOE is in possession of the facility.

Since the license is in existence and continues to impose limited responsibilities in other than the project area, it can be amended as demonstrated by Amendment 32. Consequently, the language in the Implementation Plan that states that NYSERDA's license is not currently in effect and that the NRC cannot perform a licensing action is overbroad. We intend, at the next revision of the Implementation Plan, to clarify that the license is still in effect, but that NYSERDA's obligations under it with respect to the facility are essentially suspended and its obligations for the rest of the site are limited while DOE is in possession of the facility. It is for this reason that we have not been charging licensing fees to NYSERDA.

Concurrent Decommissioning Process for the WVDP and Non-WVDP Portion of the Western New York Nuclear Service Center

NYSERDA requests that the Implementation Plan be changed to reflect a process whereby decommissioning decisions and actions, as well as licensing decisions and actions, are implemented concurrently for both the WVDP and non-WVDP portion of the Center. As we understand NYSERDA's request, NYSERDA suggests that NRC exercise its Atomic Energy Act (AEA) authority and review a license amendment to approve NYSERDA's decommissioning plan for completing decommissioning of the West Valley site, to resolve NYSERDA's obligations for license termination, concurrent with NRC's review of DOE's decommissioning plan and activities under the WVDPA.

However, the Commission's Policy Statement contemplates that after DOE completes its decontamination and decommissioning responsibilities under Section 2(a)(5) of the WVDPA, NYSERDA could initiate license termination for all or portions of the site. In our view, this sequential approach is consistent with the thrust of the WVDPA, which provides, *inter alia*, that the State and DOE will enter into an agreement wherein the State will make available the facilities of the Center necessary for the completion of the project "for such period as may be required for completion of the project." Section 2(b)(4)(A) of the WVDPA. This sequential approach is also consistent with the cooperative agreement between DOE and NYSERDA, the Memorandum of Understanding between NRC and DOE, and Condition 7 of the license. Under Condition 7, NYSERDA may not undertake decommissioning at the site until DOE indicates it is ready for NYSERDA to reacquire and possess the entire site.

The principal purposes of a decommissioning plan are to: (1) describe site characterization; (2) identify the residual radioactive material to be left on the site at the time of license termination; and (3) provide a performance assessment to determine if the site meets the dose criteria of the License Termination Rule (LTR). This requires a site-wide assessment, and in the case of West Valley, consideration of all sources of radiation at the site other than that from the SDA, which is a State-licensed facility. Until DOE completes its decontamination and decommissioning responsibilities under the Act, no determination can be reached regarding what further remediation is required by NYSERDA, if any, to meet the LTR for the NRC-licensed portion of the site. During our January 16 telephone call to discuss your letter, you informed the staff that NYSERDA was not prepared to state what source terms would be included in its decommissioning plan but stated clearly that NYSERDA does not intend to include any sources that it believes are DOE's responsibility. NRC is concerned this could produce gaps in the dose assessment.

The end state of DOE actions will not be known until DOE has completed its decontamination activity under the WVDPA, since it is not unusual for changes to occur during decommissioning that may impact dose assessments. It would be an inefficient use of limited NRC resources and inconsistent with the requirements of the LTR to review NYSERDA's approach to license termination before our review and acceptance of DOE's decommissioning plans, as well as the implementation of those plans. In sum, a decision on the NYSERDA decommissioning plan could not be given finality until DOE's decontamination and decommissioning actions are completed and the project area is returned to NYSERDA. Thus, NRC believes it would be at the very least impracticable to make licensing decisions before DOE completes its decontamination and decommissioning responsibilities under the WVDPA.

It is recognized that the Implementation Plan provides that NYSERDA could develop a "proposed Decommissioning Plan," which would not be docketed or approved until DOE's actions were complete. The concept of a proposed decommissioning plan was to provide a comprehensive view of the residual contamination for the entire site. However, DOE has committed to do this in its decommissioning plan. In light of DOE's commitment, we no longer see a need for NYSERDA to develop a separate proposed decommissioning plan at this time. We encourage NYSERDA to work with DOE to identify any residual contamination outside the WVDP so that DOE can consider those sources. In that regard, there will be opportunities for NRC to obtain NYSERDA's comments, as well as others', on the DOE decommissioning plan, at meetings between NRC and DOE and during the commenting process, consistent with the provisions of 10 CFR 20.1405. However, we expect that DOE and NYSERDA will engage each other on these issues before the 10 CFR 20.1405 process commences. Apart from the decommissioning plan process, NYSERDA's views will also be considered in the Environmental Impact Statement process.

For the aforementioned reasons, we do not intend to modify the Implementation Plan to provide for the concurrent review and approval of decommissioning for both the WVDP portions and the non-WVDP portions of the Center property. We intend to modify the Implementation Plan to remove the discussion of NYSERDA's proposed decommissioning plan for the reasons discussed above.

Sincerely,

/RA/

John T. Greeves, Director
Division of Waste Management
Office of Nuclear Material Safety
and Safeguards

cc: T.J. Jackson, USDOE
P. Giardina, USEPA
S. Hammond, NYSDEC
A. Crocker, NYSDEC
C. Gerwitz, NYSERDA
H. Brodie, NYSERDA
P. Bembia, NYSERDA
S.D. Jones, Akin Gump Strauss Hauer & Feld LLP
A. Salame-Alfie, NYSDOH
R. Armstrong, Seneca Nation of Indians

For the aforementioned reasons, we do not intend to modify the Implementation Plan to provide for the concurrent review and approval of decommissioning for both the WVDP portions and the non-WVDP portions of the Center property. We intend to modify the Implementation Plan to remove the discussion of NYSERDA's proposed decommissioning plan for the reasons discussed above.

Sincerely,

/RA/

John T. Greeves, Director
Division of Waste Management
Office of Nuclear Material Safety
and Safeguards

- cc: T.J. Jackson, USDOE
- P. Giardina, USEPA
- S. Hammond, NYSDEC
- A. Crocker, NYSDEC
- C. Gerwitz, NYSERDA
- H. Brodie, NYSERDA
- P. Bembia, NYSERDA
- S.D. Jones, Akin Gump Strauss Hauer & Feld LLP
- A. Salame-Alfie, NYSDOH
- R. Armstrong, Seneca Nation of Indians

Distribution: G20030719

DCB r/f	DWM r/f	NMSS DO r/f	B. Fleming	P. Shea	W. Travers
M. Virgilio	C. Paperiello		EDO r/f	SECY-LTR-03-0755	

S:\DWM\DCB\CJG1\NRC.NYS1.wpd

ML040690953

*See previous concurrence

OFFICE	DCB	DCB	DCB	PMDA	OGC	DWM
NAME	CGlenn*	CCraig*	DGillen*	EKraus*	JLieberman*	JGreeves*
DATE	02/19/04	02/20/04	02/20/04	02/19/04	03/09/04	02/19/04

OFFICIAL RECORD COPY