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AUTHOR: Peter Smith  
AFFILIATION: NY  
ADDRESSEE: Robert Card

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DEDR  
RIV

February 13, 2004

Mr. Robert G. Card  
Under Secretary of Energy  
United States Department of Energy  
1000 Independence Ave., SW  
Washington, DC 20585

Dear Mr. Card:

The purpose of this letter is to communicate the views of the New York State Energy Research and Development Authority (NYSERDA) on the appropriate allocation of cleanup responsibilities between the United States Department of Energy (Department) and NYSERDA at the Western New York Nuclear Service Center (Center) under the West Valley Demonstration Project Act.<sup>1</sup> This issue has important implications for the ongoing Environmental Impact Statement process, for the decommissioning plan that the Nuclear Regulatory Commission has requested, and for the scope of work of the completion of the West Valley Demonstration Project.

The Department's Decontamination and Decommissioning Obligations Include all Project Premises, Project Facilities, and Any Other Non-federally Owned Facilities Used in Carrying Out the Project

The Department's decontamination and decommissioning obligations under the West Valley Demonstration Project Act are defined in Section 2(a)(5) which requires the Department of Energy "to decontaminate and decommission ... the tanks and other facilities of the Center in which the high-level radioactive waste solidified under the project was stored, ..the facilities used in the solidification of the waste, and .. any material and hardware used in connection with the project...." In Section 2(a) (5) of the Act Congress unambiguously has directed the Department to decontaminate and decommission all tanks and *facilities* where the high level radioactive waste was stored prior to solidification. Thus the obligation to decontaminate and decommission extends not only to the high level radioactive waste tanks but to the related piping and containment structures and any other building, container, containment structure and related

<sup>1</sup> It is NYSERDA's view that the federal government has responsibilities for the West Valley cleanup under other environmental laws that go beyond the West Valley Demonstration Project Act. This letter focuses only on the Department's responsibilities under the Act.

Main Office  
Albany  
17 Columbia Circle  
Albany, NY 12203-6399  
Toll Free: 1 (866) NYSERDA  
Phone: (518) 862-1090  
Fax: (518) 862-1091

West Valley Site  
Management Program  
10282 Rock Springs Road  
West Valley, NY 14171-9799  
Phone: (716) 942-4387  
Fax: (716) 942-2148

New York City  
485 Seventh Ave., Suite 1006  
New York, NY 10018  
Phone: (212) 971-5342  
Fax: (212) 971-5349

Buffalo  
617 Main Street, Suite 105  
Buffalo, NY 14203  
Phone: (716) 842-1522  
Fax: (716) 842-0156

Y  
piping where high level radioactive waste was stored at the Center prior to solidification under the Act. Congress has clearly imposed an equally broad obligation on the Department with respect to "facilities" used during the demonstration project. All facilities "used in the solidification of the waste" are to be decontaminated and decommissioned. Similarly, all equipment and material "used in connection with the project" must be decontaminated and decommissioned.

It was always anticipated that the Department would clean up those portions of the site that it used during the solidification project. This is demonstrated by the legislative history.

Support for the proposition that Congress intended that the Department conduct extensive decontamination and decommissioning can be found, for example, in the statement of Congressman Kemp, who said in colloquy:

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The bill now before us establishes a Federal demonstration project to solidify the high-level wastes at the West Valley Center and move the wastes to a Federal repository for long-term burial. *The site is then to be decommissioned and decontaminated, and a plan for the safe removal of the wastes must be prepared.*

Congressional Record, September 15, 1980, H. 8767 (emphasis added).

But perhaps the most persuasive interpretation of the Department's decontamination and decommissioning obligations under the Act is the Department's own contemporaneous interpretation as reflected in the Cooperative Agreement negotiated between the Department and NYSERDA. Among many references in the Agreement to the Department's obligation to decontaminate and decommission is Section 4.03, which states:

Condition on Surrender. On the Project Completion Date, the Department shall surrender to the Authority

(a) the Process Plant and

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(b) such other Project Premises, Project Facilities and any other non-federally owned facilities, material, and hardware which it uses in carrying out the Project

decontaminated and decommissioned in accordance with the Act and such requirements as the Commission may prescribe... In no event shall the Department be required under this Agreement to decontaminate and decommission materials buried in the Burial Facility prior to the assumption by the Department of possession of, and responsibility for, the Project Premises and Project Facilities.

Section 4.03 must be read along with section 3.02(b) (i), wherein the Department agrees to "assume exclusive possession of the Project Premises and Project Facilities for use in carrying out the Project" and along with section 4.02 of the Agreement which states:

Project Premises and Project Facilities shall be used solely for the purpose of carrying out the Project and for no other purpose whatsoever, except as expressly provided in this Agreement.

It is thus clear that the Department insisted upon and received the right to exclusive use and possession of the entire Project Premises<sup>2</sup> and the Project Facilities<sup>3</sup> for the purpose of carrying out the Project. Since obtaining use and possession of the Project Premises, the Department has in fact used the Project Facilities and the entire Project Premises in connection with the solidification project for such purposes as treatment, storage, transportation, security, and buffer.

The cited sections of the Cooperative Agreement, and the Department's past and continuing use of the entire Project Premises for carrying out the Project, support NYSERDA's long-held position that the Department is responsible, under the West Valley Demonstration Project Act, for decontaminating and decommissioning the entire Project Premises, with the single exception of the materials buried in the Burial Facility (generally referred to as the Nuclear Regulatory Commission-licensed disposal area or NDA) prior to the Department taking possession of the Project Premises.

The Term "Project Premises" Comprises the Land within the Defined Boundary, Including All Soils, Surface Water, and Ground Water

The term "Project Premises" is a defined term under the Cooperative Agreement. It means "the land specified in Exhibit B and Map 2 appended thereto." (Section 1.01). The term "land" "includes not only the naked soil with everything attached to it in the course of nature, as herbage and water, but everything under the surface..." *1 Rasch, New York Law and Practice of Real Property, section 1:5, citing, Mott v. Palmer, 1 NY 564 (1848). See also, Black's Law Dictionary, 6<sup>th</sup> Ed.* (Land "comprehends any ground, soil, or earth whatsoever; including fields, meadows, pastures, woods, moors, waters, marshes, and rock", and "Land is the material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance, and includes free or occupied space for an indefinite distance upwards as well as downwards...") Thus, DOE's obligation to decontaminate and decommission the Project Premises includes all soils, surface water and ground water located on or under the Project Premises.

The Department's Obligation to Decontaminate and Decommission Project Facilities Includes the Storage Lagoons and All Waste Buried in the NDA Subsequent to the Department Taking Possession of the Project Premises

The storage lagoons used as part of the system for treatment of liquid low-level radioactive waste are clearly identified as Project Facilities in Exhibit C of the Cooperative Agreement. The Department has used the these lagoons as part of the Project and has the uncontestable obligation to decontaminate and decommission them.

The NDA is clearly defined as a Project Facility in Exhibit C to the Cooperative Agreement. From 1982 until 1986, the Department placed approximately 200,000 cubic feet of radioactive waste generated by the Project in the NDA. While the Cooperative Agreement states that the Department is not obligated to decontaminate and decommission materials placed in the

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<sup>2</sup> "Project Premises" are defined in the Cooperative Agreement as the land described in Exhibit B and Map 2 appended to the Cooperative Agreement.

<sup>3</sup> "Project Facilities" are defined in the Cooperative Agreement as the facilities listed in Section 4.01 of the Cooperative Agreement.

NDA prior to the Department taking possession of the Project Premises, section 4.03 clearly obligates the Department to decontaminate and decommission the materials placed in the NDA by the Department after taking possession of the Project Premises.

The Department's Obligation to Decontaminate and Decommission Any Other Non-Federally Owned Facility Used in Conducting the Project Includes the Streams on the Retained Premises

The Department's decontamination and decommissioning obligations under section 4.03 of the Cooperative Agreement also extend to "any other non-federally owned facilities, material, and hardware which it uses in carrying out the Project." Among the "Additional Facilities" defined in Exhibit D of the Cooperative Agreement is the "water supply and discharge" which is defined as:

The water supply impoundment, streams, water, pump house, pump, pipeline and associated fixtures, equipment, controls and instruments used for supplying water to and carrying water away from the Project Premises.

The Department has clearly used the streams located on the Retained Premises as part of the "water supply and discharge." The liquid low-level radioactive waste treatment facilities regularly release contaminated liquids to the streams through permitted discharge points. The streams on the Retained Premises are clearly non-federally owned facilities used by the Department in carrying out the Project and thus the Department is obligated to decontaminate and decommission the streams so used under section 4.03 of the Cooperative Agreement. Furthermore, Section 2(a) (5) (B) of the Act imposes on the Department the obligation to decontaminate and decommission the water supply and discharge facilities at the Center. All facilities used in the solidification project must be decontaminated and decommissioned. The streams are an integral component of the of the water supply and discharge facilities at the Center.

The Department's Obligations Include the Obligation to Take Response Actions to Protect Public Health and Safety

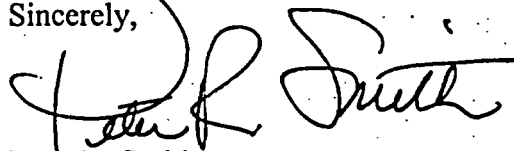
The Department's obligation to decontaminate the Project Premises includes all contaminated soil and surface waters located on the Project Premises and the North Plateau ground water plume. Under Section 3.02 of the Cooperative Agreement, the Department agreed to "assume responsibility for protection of public health and safety with respect to the Project Premises and the Project Facilities *for the duration of the Project.*" (Emphasis added) Consistent with the statutory definition of "project", the Cooperative Agreement defines the "Project" to include, *inter alia*, solidification of the high level radioactive waste in a manner suitable for transportation, transportation of the solidified waste to "an appropriate Federal repository for permanent disposal" and decontamination and decommissioning of the facilities, hardware and materials used in connection with solidification of the radioactive wastes. Thus, until the solidified wastes are removed to a permanent repository and all decontamination and decommissioning activities are complete, the Department has an obligation to undertake those measures necessary to protect public health and safety with respect to any toxic materials or substances at or migrating from the Center. This obligation is in addition to its obligation to decontaminate and decommission the facilities used in connection with the Project.

## Conclusion

In summary, the decontamination and decommissioning obligations of the Department under the West Valley Demonstration Project Act include the entire Project Premises; all Project Facilities used in carrying out the Project, including all materials buried in the NDA after the Department took possession of the Project Premises; and streams on the Retained Premises into which the Department discharged contaminated liquid waste. Furthermore, the Department is obliged to take those response actions required to eliminate the public health threat presented by the contaminants on or within the Project Premises, and contaminants that have migrated and/or are migrating from the Project Premises in surface waters and groundwater.

We look forward to discussing with the Department developing language for the Environmental Impact Statement and decommissioning plans that reflects the allocation of responsibilities mandated by the Act and the Cooperative Agreement. In addition, the Department recently posted on its web site a Draft Statement of Work for West Valley that purports to include the work necessary to complete the Department's responsibilities under the Act. The Draft Statement of Work is not consistent with NYSERDA's views of the Department's responsibilities. NYSERDA will be submitting comments on the Draft Statement of Work consistent with the views expressed in this letter.

Sincerely,



Peter R. Smith  
President

cc: Senator Charles Schumer  
Senator Hillary Rodham Clinton  
Representative Amo Houghton  
Representative Tom Reynolds  
Representative Jack Quinn  
John Cahill  
✓ Honorable Nils J. Diaz  
Honorable Mike Leavitt  
Honorable Erin Crotty  
John Greeves  
Paul Giardina  
Steven Hammond  
Robert Warther