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April 29, 2005

Ms. Susan Jablonski
Technical Advisor
Agreement State Director
Texas Commission on Environmental Quality
MC 122
P.O. Box 13087
Austin, Texas 78711-3087

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STP

RE: Proposed Disposal of NRC-Exempted Material at WCS'
Permitted Hazardous Waste Landfill in Andrews County, Texas

Dear Ms. Jablonski:

This letter is submitted on behalf of Waste Control Specialists, LLC ("WCS") in support of the U.S. Nuclear Regulatory Commission's ("NRC's") proposed exemption from radioactive licensing requirements of certain slightly-contaminated debris generated as a result of decommissioning activities at the Yankee Nuclear Power Station ("YNPS") in Rowe, Massachusetts. As you know, the proposed exemption is intended by NRC to allow for the disposal of this material at WCS' permitted hazardous waste landfill in Andrews County, Texas. As we discuss below, the NRC, as the sole licensing agency with respect to nuclear power facilities, is authorized by federal law to exempt low-activity material such as this from federal and state licensing requirements and WCS is by state law and the terms of its Resource Recovery and Conservation Act ("RCRA") permit authorized to accept NRC-exempted material at its hazardous waste landfill.

A. NRC's Exclusive Jurisdiction over the Regulation of YNPS Waste Material.

Under the Atomic Energy Act ("AEA"), the NRC has exclusive authority to license and regulate the ownership, possession, use and transfer of AEA materials—source, byproduct, and special nuclear material—and to set such standards as are necessary to protect the public health and safety. Thus,

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where materials covered by the AEA are involved, federal law generally preempts the states from regulating such material for the purposes of radiological safety.

In 1959, Congress amended the AEA by adding Section 274, specifically addressing the issue of cooperation between the federal and state governments and delineating the limited instances in which state regulation of nuclear materials was allowed.¹ Section 274 authorizes the NRC to enter into agreements with states that provide for the discontinuance or "relinquishment" of the NRC's authority over certain radioactive materials and activities specified in the agreement. However, Section 274(c) of the AEA and the NRC's implementing regulations carve out areas of exclusive NRC jurisdiction that cannot be relinquished by the NRC. One such area is the "construction and operation of any production or utilization facility."² Parts 50 and 150 of Title 10 in the Code of Federal Regulations detail NRC's exclusive jurisdiction over the construction and operation of utilization facilities, *i.e.*, nuclear power facilities.³

Nuclear power facilities, such as the YNPS facility, operate pursuant to an NRC "Part 50 operating license."⁴ Under Part 50, NRC's exclusive jurisdiction over a nuclear power facility that has permanently ceased operations continues in effect beyond the expiration date of the license to authorize ownership and possession of the nuclear power facility, and until the NRC notifies the nuclear power facility in writing that the license is terminated.⁵ During such period of continued effectiveness the nuclear power facility shall, among other things, take actions necessary to decommission and decontaminate the facility.⁶ Decommissioning of a nuclear power facility encompasses management of waste materials generated at the facility so that the associated property may be released for unrestricted or restricted use and the license may be terminated. Thus, the NRC has exclusive jurisdiction over a Part 50 licensee's handling of demolition debris during the decommissioning process.

¹ Section 274 of the Atomic Energy Act is codified as 42 U.S.C.S. §2021 (Cooperation with States).

² 42 U.S.C.S. 2021(c)(1); *See* Article II of the Agreement between the NRC and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility within the State Pursuant to Section 274 of the AEA, which indicates that the NRC and the State of Texas recognize and agree that the NRC retains exclusive authority over the construction and operation of any production or utilization facility as provided in 42 U.S.C.S. 2021(c)(1).

³ 10 C.F.R. Part 50 (Domestic Licensing of Production and Utilization Facilities); 10 C.F.R. Part 150 (Exemptions and Continued Regulatory Authority in Agreement States and in Offshore Waters Under Section 274).

⁴ 10 C.F.R. 50.1 states that the "regulations in this part are promulgated by the Nuclear Regulatory Commission pursuant to the Atomic Energy Act of 1954, as amended (68 Stat. 919), and title II of the Energy Reorganization Act of 1974 (88 Stat. 1242), to provide for the licensing of production and utilization facilities."

⁵ 10 C.F.R. 50.51(b) (Continuation of License).

⁶ 10 C.F.R. 50.51(b)(1).

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The State of Texas lacks authority under the AEA to determine, independently of the NRC, whether the YNPS demolition debris identified for disposal at WCS should be exempt from “further NRC and AEA licensing requirements.” The NRC’s approval of YNPS’ proposed disposition of the demolition debris pursuant to 10 C.F.R. 20.2002 and an “attendant exemption” is consistent with the NRC’s authority to “regulate matters under its [AEA] jurisdiction through case-specific measures, such as orders or license conditions.”⁷ The State of Texas’ AEA-related authority, on the other hand, is purely derivative, *i.e.*, it arises from a specific grant or “relinquishment” of authority by the NRC to the State pursuant to an AEA Section 274b agreement. That authority does not—and cannot—extend to decommissioning activities conducted by NRC Part 50 licensees at nuclear power facilities. Rather, the regulation of such activities, including any related Section 20.2002 approvals and exemptions, is exclusively within the purview of the NRC. In any event, once the NRC makes a final determination that the decommissioning debris at issue is specifically exempt from “AEA and NRC licensing requirements,” the State of Texas will be foreclosed, as a matter of federal preemption, from seeking to render any comparable determination pursuant to its Agreement State authorities.⁸ A contrary interpretation is unworkable and would appear to result in a “dual regulation” of the material and seemingly defeat the purpose of the Agreement State framework, the hallmark of which is compatibility – not conflict – between NRC and the State regulatory programs.

For the reasons above, the NRC has exclusive jurisdiction to render decisions regarding the waste material generated at the YNPS facility, including whether the low-contaminated demolition debris can be exempt from AEA and NRC licensing requirements and acceptable for disposal at a RCRA Subtitle C hazardous waste disposal facility.

B. State Law Authorizes the Disposal of NRC-Exempt Material at WCS’ RCRA Facility.

Consistent with the NRC’s exclusive jurisdiction over nuclear power facilities, Section 401.102 of the Texas Radiation Control Act provides that “Nuclear reactor facilities licensed by the [NRC] are not required to be licensed or registered under this chapter.” Therefore, as a matter of state law, the NRC retains the sole and exclusive jurisdiction to determine the extent to which nuclear power facilities, including waste generated as a result of the decommissioning of such facilities, are subject to licensing requirements.

With the rare exception of low-activity waste such as that presented here, wastes generated during such decommissioning activities will be classified by NRC and subject to licensing and disposal as

⁷ See Letter from Richard A. Meserve, Chairman, NRC, to Rep. John Dingell, dated Dec. 20, 1999.

⁸ See *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm’n*, 461 U.S. 190, 207 (1983) (stating that the Commission has “exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials”).

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low-level radioactive waste. Nevertheless, where NRC exempts such waste material from licensing, it is not subject to state licensing by the TCEQ or Department of State Health Services ("DSHS") under Section 401.102.

The Commission has authorized WCS to receive and dispose of exempt material into its permitted hazardous waste landfill. On October 15, 2001, the TCEQ issued a Class 2 Permit Modification for WCS Permit No. HW-50358. WCS' existing permit incorporates by reference WCS' Waste Analysis Plan dated August 24, 2001. Section 4.1.2 of the Waste Analysis Plan states, "If material has been exempted from licensing by any authorized licensing agency, it can be received for disposal after review and approval by WCS." (emphasis added) The approval of this permit modification by the TCEQ recognizes that WCS can receive material exempted by licensing agencies other than the DSHS.

Exemption from licensing by "any authorized licensing agency" would definitely include the NRC's exemption in this matter given the fact that federal law grants the NRC exclusive jurisdiction over the regulation of a nuclear power facility during operation, which includes management of waste materials generated during the decommissioning phase. Further, a nuclear power facility can only conduct such activities pursuant to a license issued by the NRC. As a result, the NRC is an authorized licensing agency referenced in WCS' Waste Analysis Plan which, because it was incorporated by reference into WCS' Permit No. HW-50358, has been recognized by TCEQ as compliant with the regulations and policies of that state agency.

It is also important to recognize that disposal of the demolition debris from the YNPS facility into the WCS hazardous waste landfill will not result in a significant risk to public health and safety and the environment. The NRC directly addressed this issue in its Draft Environmental Assessment ("Draft EA"). In the Draft EA, the NRC concluded that the proposed action concerning the demolition debris generated at the YNPS facility would not have a significant effect on the quality of the human environment. In fact, the NRC determined not to prepare an environmental impact statement for the proposed action.

If the NRC ultimately exempts the demolition debris generated at the YNPS facility, WCS has appropriate authorization, according to federal and state law, to receive the material for disposal at WCS' RCRA hazardous waste disposal facility. The NRC-exempted waste meets the criteria set forth in WCS' permit issued by the TCEQ and will not result in a significant risk to public health and safety and the environment.

Mr. Susan Jablonski

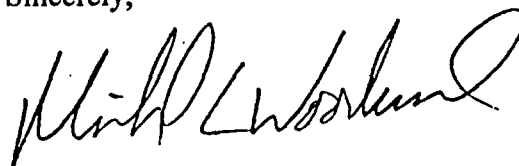
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WCS understands the agency's desire to be informed of its acceptance of waste that may bear on the licensing activities pending before the TCEQ. I trust that you view this letter as a continuation of our open dialogue with respect to matters of common interest.

Should you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael L. Woodward". The signature is fluid and cursive, with a large loop at the end.

Michael L. Woodward

cc: Ms. Celeste Baker, TCEQ General Counsel
✓ Mr. Paul Lohaus, U.S. Nuclear Regulatory Commission
Mr. John Hickman, U.S. Nuclear Regulatory Commission
Ms. Ruth E. McBurney, Texas Department of State Health Services
Mr. Jack D. Rollins, Yankee Atomic Electric Power Company
Waste Control Specialists, LLC