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TO:

Reyes, EDO

FOR SIGNATURE OF :

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DESC:

20.2002 Process for Off-Site Disposals

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SPECIAL INSTRUCTIONS OR REMARKS:

For Appropriate Action.

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June 3, 2005

Luis A. Reyes  
Executive Director for Operations  
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Washington, DC 20555

Dear Mr. Reyes:

I want to compliment the staff for putting on the recent workshop on Decommissioning. The meeting was interactive with good participation from the attendees. The staff and other participants provided useful information. One of the issues discussed was the Commission's processes under 10 CFR 20.2002. The staff stated that they were interested in, among other things, comments on the section 20.2002 process for off-site disposals. Accordingly I am submitting these comments on the section 20.2002 process. I am submitting these comments as a member of the public and not as a representative of any entity.

Section 20.2002 of 10 CFR Part 20 provides that a licensee may seek approval from the Commission to dispose of licensed material in a manner not otherwise authorized by the Commission's regulations. The regulation describes the information to be provided but does not set forth criteria for the Commission to use in processing and granting the requested approval. It is my understanding that the NRC has interpreted this regulation to allow approvals up to the public dose limit of 100 mrem/yr based on paragraph (d) of section 20.2002 that provides that the application for section 20.2002 approvals provide "analyses and procedures to ensure that doses are maintained ALARA and within the dose limits in this part [20]." The dose limit in part 20 is 100 mrem/yr.<sup>1</sup> See, Results of the License Termination Rule Analysis, SECY-03-0069 (May 2, 2003) at Attachment 4, page 2.

I recognize that it is the current NRC practice to limit approvals under section 20.2002 to a relatively few millirem and not the full public dose limit. The regulation does not prevent the NRC from authorizing a higher level. In fact, as recently as 2000 the NRC applied a standard of 25 millirem per year. See, for example the case involving a company named "II-VI, Incorporated" where the NRC staff allowed thorium to be disposed of in a landfill after concluding the doses did not exceed 25 millirem per year.

It is clear that the NRC has substantial discretion in applying this regulation. The decision to authorize a disposal under section 20.2002 is more than a mere ministerial decision. It is not simply an administrative change. Appropriate technical and environmental reviews are needed

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<sup>1</sup> The limit of 25 mrem/yr for unrestricted release is a dose constraint and not a public dose limit. See Statement of Considerations for 10 CFR Part 20, subpart E.

to support the decision making. It is clearly a substantive decision involving both public policy and technical reviews.

While I see the value of providing NRC with flexibility to address a variety of situations, in my view it is important that NRC, as a regulatory agency, exercise this flexibility in a structured way that provides for public participation before the agency makes a decision concerning the disposal of radioactive material and for finality after the decision is made. Specifically, I recommend that the Commission's guidance for section 20.2002 off-site disposals provide for:

- 1) public notice in the vicinity of where the radioactive material is contemplated to be disposed of similar to the provisions of 10 CFR 20.1405 (a) (1) and (b);
- 2) a written acknowledgment from the owner /operator of the site where the material is to be disposed that states that a) the person(s) realizes the material to be disposed of contains radioactive material that is to be exempted from further NRC regulation, b) that the appropriate regulatory authorities have been notified, and c) that the person(s) grants NRC access to the property as necessary for the NRC to carry out any regulatory activities;
- 3) the authorization to be granted through a license amendment process with opportunity for public comment, a public meeting should be held if requested, and for those adversely affected, a hearing;
- 4) the authorization require that the licensee provide a written statement that the material will be disposed of as described in the application and after the disposal occurs, a statement that the material was disposed of as provided in the section 20.2002 authorization; and
- 5) any exemption associated with materials authorized to be disposed of by a section 20.2002 authorization be published in the Federal Register to provide advance notice of the potential for issuance of the exemption and after issuance of the exemption, notice of it.<sup>2</sup>

The bases for these recommendations are set forth below:

1. Public notice in the vicinity of where the radioactive material is contemplated to be disposed of should be provided similar to the provisions of 10 CFR 20.1405 (a) (1) and (b).

At issue in a 20.2002 decision for offsite disposal is contaminating a property that may not have been previously contaminated with radioactive material. Thus, there should be clear notice to the landowner and potentially affected members of the public that a property may become a site where radioactive material is disposed of.<sup>3</sup> If NRC routinely provides notice pursuant to 10 CFR 20.1405 when a license is terminated where the licensee is leaving residual contamination on a property where licensed activities were conducted,<sup>4</sup> it seems only logical that NRC would give notice if it was authorizing a non-impacted site to become impacted. Moreover, if a member of

<sup>2</sup> I recognize that in individual cases, the staff may be implementing some of these proposals.

<sup>3</sup> It is recognized that a disposal site within the meaning of 10 CFR Part 61 is not being created as Part 61 does not apply to disposals authorized under 10 CFR Part 20 which would include section 20.2002.

<sup>4</sup> Such notice is required when a decommissioning plan is submitted.

the public is going to complain about a disposal, it is better that the dispute is raised before, rather than after, the NRC decision. The fact that the material has been exempted from future regulation based on the site specific disposal analysis does not remove the need for public notice. State and local regulators should be aware of the fact that such a disposal activity is being authorized. The Congress recognized the interests of the states in such disposals by promulgating section 276 of the Atomic Energy Act of 1954, as amended (AEA) which makes it clear that the states can regulate material exempted by the Commission if the material was exempted after 1992. Clearly, an exemption that was based on a case-by-case section 20.2002 decision similar to the recent Haddam Neck case would be material exempted after 1992. It follows that the NRC should follow the same public notice provisions it would follow for a site that is being released for unrestricted use.

It should be noted that the Commission requires both a Federal Register notice and a public meeting before allowing a partial site release of an area of a reactor site that was non-impacted by radioactive material. 10 CFR 50.83. If NRC requires such notice for a non-impacted area, the argument is stronger to require notice when NRC is allowing a non-impacted area to become impacted.

2) A written acknowledgement from the owner/operator of the site where the material is to be disposed should be obtained during the application process that states that a) the person(s) realizes the material to be disposed of contains radioactive material that is to be exempted by the NRC from further regulation, b) that the appropriate regulatory authorities have been notified, and c) that the person(s) grants NRC access to the property as necessary for the NRC to carry out any regulatory activities, it deems desirable.

It is important that the owner and operator of the property where the radioactive material is to be disposed of know that the material contains radioactive material and its regulatory status. This should not be a problem. A written statement confirms that and avoids the potential for a future controversy. Notifying appropriate regulatory authorities is consistent with 10 CFR Part 20, Subpart E and is important since a state may choose to impose additional regulation pursuant to section 276 of the AEA. Again this should be confirmed in writing. As to granting NRC access, since neither the site operator nor owner will be NRC licensees, granting access in writing in advance should minimize the potential for a person questioning NRC's authority to conduct inspections should the NRC desire to do so. NRC may desire to conduct inspections during the processing of a section 20.2002 application or after the grant of alternate authority to determine if the conditions of the authorization and exemption were met.

3) The authorization granted by a section 20.2002 decision should be done through a license amendment process with an opportunity for public comment, a public meeting should be held if requested, and for those adversely affected, a hearing.

I note that the NRC uses two different processes for making decision under section 20.2002 depending on whether a reactor is involved. It has been the long standing practice of the NRC that section 20.2002 authorizations are issued under letters if reactors are involved and by license amendments for non-reactor cases. For example, the alternate disposal for radioactive material from Haddam Neck 20.2002 was approved by letter dated April 19, 2005. I am not aware of any opportunity for public comment, nor was an opportunity for a hearing provided as a license amendment was not involved. An environmental assessment (EA) was issued. On the other hand, in the case of II-VI, Incorporated, the authorization was issued by a license

amendment with an opportunity for a hearing.<sup>5</sup> An EA was also issued. The materials approach provided for public participation and finality through section 189 of the AEA. Finality is important because once the material has been disposed of, a decision requiring excavation would be costly. Unfortunately, the reactor approach does not provide for public participation or the finality offered through the amendment approach. In fact, though the Haddam Neck documents were publicly available on ADAMS, I am not aware of any public notice being provided.

In my view, NRC should use a consistent approach in applying a regulation that is common to both reactors and materials licensees. It is not clear how the agency can interpret the same words to reach different results. If an authorization is considered a licensing action in one case, why not the other. It is the same regulation that is being implemented.

NRC actions are required by section 81 of the AEA to be subject to the Administrative Procedure Act (APA). Section 551 (8) of the APA defines a "license" as "the whole or part of an agency permit, ... approval, ... exemption, or other form of permission;" and section (9) defines "licensing" as an "agency process respecting the ... amendments, modification, or conditioning of a license". By its terms, 10 CFR 20.2002 is a form of permission. This regulation states in relevant part: " a licensee... may apply to the Commission for approval of proposed procedures, not otherwise authorized... to dispose of licensed materials generated in the licensee's activities." (emphasis added). NRC by granting approval to dispose of material in a manner not otherwise permitted by the Commission's regulations is providing a licensee with authorization that it did not previously have. The NRC materials approach is consistent with the APA dictates.

That is not to say all approvals are de facto license amendments. The Commission in Cleveland Electric Illuminating Company, et al (Perry Nuclear Power Plant, Unit 1) CLI-96-13, 44 NRC 315 (1996) stated that not every approval requires a license amendment. It is not the point of this comment to disturb that decision. However, that decision is distinguishable from the issue at hand. The Perry case focused on the nature of the decision to determine if a license amendment was involved. That case involved whether a schedule change met the applicable standard in Appendix H of part 50. The licensee was not being given any authorization that it did not already have to meet the standard. The approval opportunity provided the staff with an ability to have a prior check to see if the schedule change remained within the approved standard. In that the NRC was not providing the licensee with authority it did not otherwise have, the Perry case is not applicable to a section 20.2002 approval. It should be noted that the Commission did not discuss the application of the APA in adjudicating the Perry case. However, the Commission might have applied the provisions of APA section 554 (a)(3) and concluded that the nature of the staff's decision in the Perry matter was in essence an inspection or testing function that is an exception to the adjudication provisions of the APA.

<sup>5</sup> 65 FR 34508 (May 30, 2000). Since 2000, there have been several section 20.2002 authorizations for material licenses done by license amendments. However, while EA's were published in the Federal Register, it does not appear that the associated amendment requests were noticed for an opportunity for hearing. Core Laboratories, Inc. (dba Protechnics) of Houston, TX, 68 FR 61472 (October 28, 2003); Dow Chemical Company, 68 FR 37178 (June 23, 2003); and Mallinckrodt Chemical, Inc., 67 FR 18041 (April 12, 2002). Not all material cases are routinely noticed for an opportunity for a hearing.

The Commission considered the Perry case when it promulgated the 2003 reactor rule on partial site release. In that rulemaking, the Commission decided to provide an opportunity for a hearing when there would be a partial site release involving an impacted area. In addressing the opportunity for a hearing, the Commission stated:

The rule amends 10 CFR part 2 to provide an opportunity for a Subpart L hearing if the release involves an amendment. The hearing, if conducted, must be completed before the property is released for use. However, for cases where it is demonstrated that the area is non-impacted and, therefore, there is no reasonable potential for residual radioactivity, a license amendment is not required by the rule. A review of a licensee's proposed partial site release in such cases is essentially a compliance review to determine if the release would otherwise meet the defined criteria of the regulation. Assuming the partial site release does not result in a change to an existing license, the approval of the partial site release under these circumstances does not require a license amendment (see Cleveland Electric Illuminating, et al. (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 328 (1996)). In these cases, the opportunity to comment on the licensee's proposal for a partial site release and the required public meeting held before the release approval is granted will serve as forums for public comment on the proposed release. 68 FR 19711,19713 (April 22,2003).

However, the decision making under section 20.2002 is more than a compliance decision based on an inspection or a test. It is a substantive decision requiring analysis. Thus, since by granting under section 20.2002 an approval for the use of alternate disposal procedures, the licensee is being provided with authority for disposal that it did not previously have, the grant of this additional authority should be by license amendment to be consistent with the APA. Moreover, unlike the areas in the partial site release rule that is not subject to an amendment process because they are non-impacted areas, the area where the material will be disposed of under section 20.2002 will clearly become impacted.

By subjecting the section 20.2002 process to an amendment process, there will be a hearing opportunity that increases the opportunity for public participation in the NRC regulatory process and provides for regulatory finality through section 189 of the AEA. I am not advocating unnecessary hearings. But if a person may be adversely affected by NRC disposal actions and standing requirements are met, the process should allow a hearing.

Requesting a hearing should not be the only way to participate in the section 20.2002 process. In the past, hearing notices often provided members of the public with the opportunity to provide written comments for the staff for its consideration without the need to ask for a hearing. This opportunity should continue as the goal is not to increase the number of hearings, but to provide an opportunity for the public to provide information to the agency as it carries out its deliberations. It is also appropriate to follow the model of the partial site release rule that requires a public meeting even to non-impacted areas. NRC should hold a public meeting if requested, in the vicinity of the disposal location before making the section 20.2002 decision as an additional method to inform the public and receive comments.

NRC should view the opportunities to inform the public of its proposed actions and receive public comments as strengthening its regulatory process. Such steps can only improve the credibility of the agency. The potential for public scrutiny may have the benefit of improving the quality of decision-making.

4) The section 20.2002 authorization should require that the licensee provide a written statement that the material will be disposed of as described in the application and after the disposal occurs, a statement that the material was disposed of as provided in the section 20.2002 authorization.

The applicant for a section 20.2002 approval is a licensee. The person controlling the site where the material is being disposed of is not a licensee. By requiring the licensee to certify that the material will be and was properly disposed of, the licensee will have the responsibility to ensure that the conditions of the authorization are met. It is up to the licensee to make appropriate arrangements with the non-licensee site owner/operator to make sure that the materials are properly disposed. Having a written statement may improve the Commission's enforcement posture should the material be improperly disposed. Alternatively, the Commission could condition the authorization on obtaining a written statement from the site owner/operator that the material was received and properly disposed of.

5) Any exemptions associated with materials authorized to be disposed of by a section 20.2002 decision should be published in the Federal Register to provide advance notice of the potential for issuance of the exemption and after issuance of the exemption, notice of it.

Apart from the above procedural issues associated with section 20.2002 decisions, guidance should be prepared concerning the issuance of exemptions associated with material dispose of under section 20.2002. The grant of a section 20.2002 authorization provides the licensee with the authority to dispose of the material. It does not provide the recipient, non-licensee, the authority to possess the licensable material. Thus, an exemption from licensing is needed. Up until the recent Haddam Neck section 20.2002 authorization, exemptions were not specifically issued. They were implicit in the section 20.2002 decision. The NRC did issue an exemption for the material authorized by the Haddam Neck disposal. However, there was no notice published in the Federal Register that either an exemption was being considered or of the issuance of the exemption. By distribution of the cover letter to Connecticut Yankee, the company to which the exempt material was being sent received a copy of the exemption. However, it is not clear that the State of Idaho received a copy. There should be notice concerning both the potential for issuing an exemption and notice that the exemption was issued. The public should have a right to comment on the fact that the NRC may be concluding something is below its regulatory concern. Moreover, the exemption applies not only to the licensee seeking the section 20.2002 authorization, but also to all future persons receiving the material. It is also important for the state to be aware of the decision. If the state is a non-Agreement State, it can then decide whether to exercise its authority in light of section 276 of the AEA. If the state is an Agreement State, the state can decide whether to adopt the exemption as NRC has relinquished its regulatory authority over radioactive material in Agreement States.<sup>6</sup>

As noted above, the NRC should use a consistent approach in applying a regulation that is common to both reactors and materials licensees. NRC should not interpret the same words to reach different results. If an authorization is considered a licensing action for materials, it should be the same for reactors. It is the same regulation that is being implemented.

I am confident based on my past experience with the NRC that it will continue to make the right technical decisions. However, there are those that question NRC actions because they might

<sup>6</sup> It is not clear that an NRC exemption applies in an Agreement State where the exemption is not codified in the Commission's regulations.

not have notice or an opportunity to participate. It is important to provide meaningful opportunities for public participation. In my view, the recommendations, if adopted, will provide both notice to the public and states and opportunities to participate in the NRC process thereby enhancing the public credibility of the NRC.

I appreciate the opportunity to provide the above comments. I would be pleased to discuss them with you at your convenience.

Respectively submitted,

  
Jim Lieberman

cc: Karen Cyr, OGC  
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Jim Dyer, NRR