

February 15, 2008

West Valley Citizen Task Force
c/o The Logue Group
PO Box 270270
West Hartford, CT 06127-0270

SUBJECT: RESPONSE TO WEST VALLEY CITIZEN TASK FORCE

Dear Members of the West Valley Citizen Task Force (CTF):

This letter provides a response to your letter dated November 28, 2007. In your November 28, 2007, letter you expressed the general view that the U.S. Nuclear Regulatory Commission's (NRC) legal authority under the West Valley Demonstration Project (WVDP) is broader than indicated in our letter to the CTF dated July 19, 2007. Our July 19, 2007, letter was prepared in response to CTF's March 28, 2007, request for responses to several questions, some of which dealt with the regulatory authority of the NRC under the West Valley Demonstration Project Act (WVDP Act). Specifically, your November 28, 2007, letter addressed several sections of the WVDP Act in four numbered paragraphs. The specific concerns raised in each of these numbered paragraphs are addressed below.

1. Section 2(a)(5) of the WVDP Act.

In the first numbered paragraph of your November 28, 2007, letter you note Congress' use of the word "requirements" in section 2(a)(5) of the WVDP Act. Section 2(a)(5) of the WVDP Act directs the Secretary of Energy to decontaminate and decommission specific tanks, facilities, materials, and hardware associated with the WVDP, in accordance with such requirements as the NRC may prescribe. You state that the use of the word "requirements" in section 2(a)(5) implies that Congress intended that the NRC would identify specific and mandatory criteria for the Department of Energy's (DOE) decontamination and decommissioning activities, and express the view that the NRC has not yet provided such criteria. Specifically, you assert that the criteria set forth in the NRC's "Decommissioning Criteria for the West Valley Demonstration Project (M-32) at the West Valley Site; Final Policy Statement" (67 Fed. Reg. 5003; Feb. 1, 2002) (Policy Statement) are not definitive because "they lack both finality (with respect to exemptions) and specificity, so they apparently cannot yet be used to determine whether a given Preferred Alternative is acceptable or not." You also disagree with the NRC's plan to wait until after completion of the Environmental Impact Statement (EIS) being prepared by DOE and the New York State Energy Research and Development Authority (NYSERDA) to determine whether the DOE's Preferred Alternative satisfies the NRC's decommissioning criteria.

The NRC disagrees with CTF's assertion that decommissioning requirements identified in the Policy Statement are somehow inadequate under section 2(a)(5) of the WVDP Act. In the Policy Statement the Commission, under the authority of the WVDP Act, prescribed the NRC's existing License Termination Rule (LTR) (10 CFR Part 20, Subpart E) as the decommissioning requirements for the WVDP. (67 Fed. Reg. 5010.) The criteria contained in the LTR currently apply to the decommissioning of all NRC-licensed sites – except as provided in 10 CFR

20.1401 – including the NRC-licensed portions of the West Valley site. As the Commission stated in the Policy Statement, prescription of the LTR criteria for the WVDP was appropriate given “the fact that the applicable decommissioning goal for the entire NRC-licensed site is compliance with the requirements of the LTR.” (67 Fed. Reg. 5004.)

Further, the NRC disagrees with CTF’s assertion that the flexibility provided in the Policy Statement’s discussion of exemptions to the LTR calls the finality of the WVDP decommissioning criteria into question. First, the flexibility discussed in the Policy Statement is consistent with the flexibility provided in the LTR itself. As the Commission stated in the Policy Statement, “[i]t should be noted that the Subpart E of 10 CFR Part 20 (LTR) does contain provisions for alternate criteria and Subpart N of 10 CFR Part 20 contains provisions for potential exemptions, with both alternatives based on site-specific analysis which demonstrates that public health and safety will be adequately protected with reasonable assurance.” (67 Fed. Reg. 5004.) 10 CFR Part 20 is not unique in this sense, as most of the Commission’s regulations specifically allow for the granting of exemptions on a case-by-case basis. The acknowledgement that exemptions to NRC’s generally applicable requirements will be considered on a case-by-case or site-specific basis does not render those generally applicable requirements inadequate. In its response to comments on the proposed Policy Statement, the Commission made it clear that neither the alternate criteria in the LTR nor exemptions to the LTR would be approved without full prior public participation, involvement of the Environmental Protection Agency (EPA), and a Commission determination that there would not be undue hazard to life and property. (67 Fed. Reg. 5006.)

With regard to the NRC’s two-step process for application of the LTR to the WVDP, CTF expressed the view that determining whether the preferred alternative meets the prescribed criteria after completion of the EIS “would largely defeat the purpose of the EIS, especially if NRC’s definitive requirements for decontamination and decommissioning were withheld until afterward.” The NRC respectfully disagrees with CTF’s view. In responding to comments on the Draft Policy Statement, the Commission addressed the concern that CTF appears to be raising, stating:

[I]n response to various comments, the Commission’s intent is to prescribe the generally applicable requirements of the LTR now, before the completion of the site-specific EIS. After completion of the site-specific DOE/NYSERDA EIS, NRC will evaluate the compliance status of the preferred alternative with respect to the LTR . . . This is a two-step process. The first step is prescribing the LTR, a set of criteria that allows for unrestricted releases, restricted releases, and alternative releases, that applies to all NRC licensees. Prescribing decommissioning criteria now for the WVDP allows DOE to develop alternative approaches for meeting those criteria and consider their impacts in its site-specific EIS.

The second step is for NRC to evaluate on a site-specific basis the approach for meeting the LTR. This will be done after the DOE/NYSERDA EIS is completed and the NRC adopts it or otherwise produces its own NEPA evaluation of the site-specific criteria developed in the DOE/NYSERDA EIS. NRC will be evaluating the DOE’s and NYSEERDA’s preferred alternative for meeting the LTR and other alternatives presented in the DOE/NYSERDA EIS.

This process is in accordance with the “Statement of Considerations” for the LTR, which describes the relationship between the [Generic Environmental Impact Statement (GEIS)] for the LTR and site-specific decommissioning actions. A site-specific EIS is prepared in cases where the range of environmental impacts of the alternatives at a specific site may not be within those considered in the GEIS for the LTR. This is similar to the approach that NYSERDA, as an NRC licensee, would need to meet if the license were not being held in abeyance. The Commission is satisfied that this approach is within the intent of the WVDP Act for the prescription of decommissioning requirements by NRC. (67 Fed. Reg. 5009-5010.)

In sum, the LTR is the decommissioning criteria to be used by DOE for the WVDP and constitutes the “requirements” referenced in section 2(a)(5) of the WVDP Act. The proposed alternatives for meeting the LTR at the WVDP site will be identified in the DOE/NYSERDA EIS, which is currently being developed. These proposed alternatives, which constitute the site-specific approaches to meeting the LTR, will be evaluated by the NRC in the context of its role under the WVDP Act and, if license termination is eventually requested by NYSERDA after its license is reactivated, as a regulator under the authority provided in the Atomic Energy Act of 1954, as amended (AEA) and the Energy Reorganization Act of 1974, as amended (ERA). As stated above, in the context of the WVDP, NRC’s evaluation of the alternatives will be completed after the agency either adopts the DOE/NYSERDA EIS, or otherwise concludes its own National Environmental Policy Act (NEPA) review of the proposed alternatives.

2. Section 2(a)(4) of the WVDP Act.

In the second numbered paragraph of your November 28, 2007, letter you state that section 2(a)(4) of the WVDP Act requires the DOE to dispose of certain low-level waste and transuranic waste in accordance with applicable licensing requirements. You go on to assert that the NRC has tended to ignore section 2(a)(4); that the NRC apparently believes that sections 2(a)(4) and 2(a)(5) are redundant, and that the disposal requirements under section 2(a)(4) are superseded by the decontamination and decommissioning requirements under 2(a)(5); and conclude that such an interpretation is not legally permissible. You also state that since some of the closure alternatives proposed by DOE are encompassed by the “usual definition of disposal,” section 2(a)(4) and its “applicable licensing requirements” must be considered, and that the “authority and obligation for licensing lie with NRC and/or NRC’s Agreement State partners such as New York.”

The NRC disagrees with CTF’s assertion that the agency has tended to ignore section 2(a)(4) and with CTF’s characterization of the NRC’s interpretation of sections 2(a)(4) and 2(a)(5). Section 2(a)(4) of the WVDP Act states that “[t]he Secretary shall, in accordance with applicable licensing requirements, dispose of low level radioactive waste and transuranic waste produced by solidification of the high level radioactive waste under the project.” As a preliminary matter, CTF should note that section 2(a)(4) imposes a direct legal duty on the Secretary of Energy, not the NRC. As stated in our July 19, 2007, letter to CTF, the NRC’s regulatory authority stems primarily from the AEA and the ERA, and neither of those Acts provides NRC with regulatory authority over DOE’s activities at West Valley. While the WVDP Act does provide NRC with a consulting and monitoring role at West Valley (see section 2(c))

and with certain specific responsibilities, such as prescribing the decommissioning criteria that DOE must use at the WVDP site (see section 2(a)(5)), it does not provide NRC with licensing or general regulatory authority over the DOE.

More specifically, the NRC agrees with CTF to the extent that it asserts that the “applicable licensing requirements” in section 2(a)(4) of the WVDP Act refers to licensing requirements imposed by either the NRC or an Agreement State in cases where low-level wastes are disposed of in the NRC or State licensed on-site disposal areas at West Valley, or at off-site disposal facilities licensed by the NRC or an Agreement State. Exactly which licensing requirements are applicable to disposal activities under section 2(a)(4) would depend on where the disposal occurred (i.e., on the state-licensed portion of the West Valley site, on the NRC-licensed portion of the West Valley site, or in an off-site facility licensed by the NRC or an Agreement State). But in a 2001 letter to the NRC, DOE stated that it was no longer considering on-site disposal for WVDP low-level waste that was in storage at that time. Instead, the DOE stated that it planned to dispose of WVDP low-level waste off-site at a DOE facility that is not licensed by the NRC. (See Letter from A.C. Williams, DOE, to J.T. Greeves, NRC, dated June 8, 2001 (ML080300633)). Therefore, there are no applicable NRC licensing requirements for WVDP low-level wastes disposed of in this manner. As the DOE has statutory authority to manage its waste and its sites under the AEA, the NRC has no objection to this approach for disposal of WVDP low-level waste. (See Letter from J.T. Greeves, NRC, to A.C. Williams, DOE, dated October 5, 2001 (ML012270497)).

Apart from the requirements governing disposal of low-level waste, the residual radioactivity that will remain on a site for which an NRC licensee requests license termination is evaluated against the NRC’s LTR. As explained above, the NRC prescribed the LTR as the requirement for decommissioning of the tanks, facilities, materials, and hardware referenced in section 2(a)(5) of the WVDP Act. Therefore, proposed alternatives identified in the DOE/NYSERDA EIS that call for radioactive materials remaining on-site after closure would be evaluated against the requirements of the LTR.

Thus, sections 2(a)(4) and 2(a)(5) cover two distinct activities: (1) disposal of low-level radioactive and transuranic wastes by DOE (in the case of section 2(a)(4)), and (2) decontamination and decommissioning certain tanks, facilities, material, and hardware (in the case of section 2(a)(5)). This interpretation does not render these sections redundant or require that one section supersede the other.

3. Section 6(5) of the WVDP Act.

In the third numbered paragraph of your November 28, 2007, letter, you discuss the definition of transuranic waste provided in section 6(5) of the WVDP Act. Specifically, you reference a 1987 Stipulation of Compromise Settlement (Settlement) that resulted from a 1986 lawsuit between the DOE and the Coalition on West Valley Nuclear Wastes. You state that the Settlement allowed the NRC to decide between the 10 and 100 nanocurie/g thresholds for defining transuranic waste; that the NRC subsequently made a policy decision defining this threshold; and that the NRC “remains in charge of this site-specific policy and its associated conditions which are legally binding.”

Section 6(5) of the WVDP Act provides the NRC with authority to prescribe concentration limits

defining transuranic waste. In paragraph 11 of the Settlement, the DOE agreed to seek and abide by the NRC's determination or prescription on the definition of transuranic waste for disposal at the Western New York Nuclear Service Center (Center). Paragraph 11 goes on to state that "[f]or disposal at locations other than the Center, such disposal will be in accordance with applicable law." As discussed in the Policy Statement, the NRC provided DOE with its position on this issue, with respect to on-site disposal, in a letter from M. Knapp, NRC, to W. Bixby, DOE, dated August 18, 1987. (67 Fed. Reg. 5010.) The NRC's determination on the definition of transuranic waste remains applicable to on-site disposal of low-level wastes containing transuranics. As explained above, in 2001 the DOE made a decision to dispose of the low-level waste generated by the WVDP off-site, at a DOE site that is not licensed by the NRC. The DOE has statutory authority to manage its waste and its sites under the AEA.

4. Section 6(4)-6(6) of the WVDP Act.

In the fourth numbered paragraph of your November 28, 2007, letter, you discuss the definitions of high-level radioactive waste, transuranic waste, and low-level radioactive waste provided in sections 6(4) through 6(6) of the WVDP Act. Specifically, you describe the definitions as being interlocking and excluding newly invented categories of waste. Further, you state that the NRC has an obligation to abide by the waste classes established in the WVDP Act and to avoid participating in classification schemes that create new, and allegedly "illegal" waste classifications, such as "Waste Incidental to Reprocessing" (WIR).

The NRC disagrees with CTF's assertion that the concept of WIR constitutes an illegal waste class. As explained in the Policy Statement, the Commission has recognized the concept of WIR since 1969. As further explained in the Policy Statement, WIR classifications are based on the idea that certain material that would otherwise be classified as high-level radioactive waste need not be sent to a geologic repository because the radioactive contamination left after decommissioning is sufficiently low as not to represent a hazard to public health and safety. The Policy Statement provided criteria for use by DOE in conducting WIR determinations at West Valley, and clearly stated that the calculated doses resulting from management of WIR at the site would be integrated with all other remaining material at the NRC-licensed site. (67 Fed. Reg. 5009.) NRC does not agree that implementation of this long-standing policy is contrary to the WVDP Act.

In conclusion, the NRC continues to respect and consider the views of the CTF in the execution of its legal responsibilities under the WVDP Act. While it appears that the NRC and CTF disagree on a number of the positions taken in your November 28, 2007, letter, the NRC has been responsive to CTF's requests for dialogue on these issues and has been consistent in its interpretation of its role under the WVDP Act since its enactment in 1980.

If you have any further questions, please contact Keith McConnell, of my staff, at (301) 415-7295, or by e-mail, at kim@nrc.gov.

Sincerely,

/RA/

Larry W. Camper, Director
Division of Waste Management
and Environmental Protection
Office of Federal and State Materials
and Environmental Management Programs

cc:

U.S. Senator Hillary Clinton
U.S. Senator Charles Schumer
U.S. Representative Brian Higgins
U.S. Representative John Kuhl, Jr.
U.S. Representative Thomas Reynolds
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New York State Governor Eliot Spitzer
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Raymond Larson, U.S. NRC Region 1

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