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**POLICY ISSUE**  
(Information)

For: The Commissioners  
From: Leonard Bickwit, Jr.  
General Counsel  
Subject: WEST VALLEY DEMONSTRATION PROJECT ACT  
PUB. L. NO. 96-368

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Discussion: Enclosed for your information is a preliminary legal analysis of this Act and a brief description of the NRC's new regulatory responsibilities under the Act. Comments from the Office of the Executive Legal Director are included.

*Leonard Bickwit, Jr.*  
Leonard Bickwit, Jr.  
General Counsel

Enclosure as stated

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## WEST VALLEY DEMONSTRATION PROJECT ACT

### Introduction

As you know, the "West Valley Demonstration Project Act" [hereinafter "WVDPA"] has become law. Pub. L. No 96-368 (October 6, 1980). It establishes a program for the solidification of the high-level reprocessing waste at the Western New York Service Center in West Valley, New York [hereinafter "West Valley"] and the decontamination and decommissioning of all facilities related to the solidification and storage of that waste. Although the Secretary of Energy [hereinafter "Secretary"] will be responsible for carrying out the project, the NRC has new substantial regulatory responsibilities which must be evaluated and integrated into the Commission's existing program. These responsibilities are summarized in an Appendix. There is also some question as to the extent that DOE will be treated as an NRC licensee for the purposes of this project. That issue is discussed in detail in an attached memorandum which in turn attaches a proposed response to Congressmen Dingell and Ottinger.\*

### Overview

The WVDPA directs the Secretary to carry out a high-level radioactive waste demonstration project at West Valley for the purpose of demonstrating solidification techniques which can be used to prepare high-level radioactive waste for disposal. Section 2(a). Before undertaking the project, the Secretary will be required to hold public information hearings in the area; consider the various available solidification and handling technologies suitable for the high-level waste at West Valley; prepare a plan for the safe removal of the high-level waste from the storage tanks; conduct safety analyses of the project; prepare environment impact analyses; and enter into a cooperative agreement with New York under which the state will make available to the Secretary the high-level waste and facilities at West Valley necessary for the completion of the project. New York will be required to pay 10 percent of the project costs as determined by the Secretary. Section 2(b). By October 1, 1981 the Secretary and the Commission shall enter into an agreement which will establish arrangements for NRC's review and consultation with respect to the project. Review and consultation shall be conducted informally by the NRC, and shall not include or require formal procedures or actions by the Commission pursuant to the Atomic Energy Act of 1954 (AEA) or the Energy Reorganization Act of 1974 (ERA). Section 2(c). However, nothing in the Act is to be construed as affecting any applicable licensing requirement of the AEA or ERA. Section 5(a).

\*SECY NOTE: The proposed response to Congress is being circulated by the SECY Correspondence & Records Branch as CR-81-004.

## Discussion

### I. Project Activities by the Secretary

The Secretary's activities under the demonstration program include solidification of the liquid high-level radioactive waste; development of containers for disposal of the solidified waste; transportation of the solidified waste to a federal repository as soon as is feasible; disposal of low-level and transuranic radioactive waste generated by the solidification program; and decontamination and decommissioning of all facilities and equipment associated with the storage and solidification of the high-level liquid waste.

The high-level liquid radioactive waste is to be solidified by vitrification or other technology which the Secretary determines to be most effective and which produces a waste form suitable for transportation and disposal. Section 2(a)(1). Because the waste form must be suitable for transportation to and disposal in a licensed federal repository, the Secretary's choice of solidification technology should be directed toward the production of a waste form capable of complying with applicable regulatory requirements for transportation and disposal. H.R. Rep. No. 96-1100 Part II, 96th Cong., 2d Sess. 17 (1980) [hereinafter "Report"]. In exercising his discretion with respect to the choice of solidification technology, the Secretary is required to consult with the NRC on the solidified form of the high-level waste. Section 2(c)(2).

The Secretary is to develop containers suitable for ultimate disposal of the solidified waste. Section 2(a)(2). Because these containers will eventually be placed in a licensed repository, they must be developed in a manner which complies with all applicable requirements of the NRC. Report at 17. To ensure this compliance, the Secretary is directed to consult with the NRC. Section 2(c)(2). This consultation shall occur at each stage in the design and construction of these containers. Report at 17.

As soon as is feasible, the Secretary shall transport the solidified waste to a licensed federal repository. Section 2(a)(3); Report at 17. In undertaking this responsibility, the Secretary is to be viewed as an agent of the licensee and owner of the waste. Accordingly, this transportation will be subject to all laws and regulations in the same manner and to the same extent as the transportation of any other licensed commercial waste. Report at 18.

The Secretary will be responsible for disposing of the low-level and transuranic radioactive wastes generated by the solidification program in accordance with applicable licensing requirements. Section 2(a)(4). While no provision is made in the bill for the disposal of these wastes, it is anticipated that such wastes will be

disposed of at the West Valley site if the owner and the appropriate regulatory bodies determine that it is suitable for that purpose. 125 Cong. Rec. H 8768 (September 15, 1980). If the present burial ground is found to be unsuitable, the Secretary is to take appropriate actions to establish other suitable on-site burial grounds. In either case, the Secretary's on-site burial of these wastes will have to comply with applicable licensing requirements because the burial sites will be under the exclusive jurisdiction and control of the licensee. The Secretary's jurisdiction will encompass only those portions of the site and those facilities directly related to the solidification activities. Report at 18.

The Secretary will be required to decontaminate and decommission: (1) the tanks and other facilities in which the high-level waste was stored; (2) the facilities used in the solidification of the waste; and (3) any material and hardware used in connection with the project. Section 2(a)(5). Such decontamination shall be accordance with requirements prescribed by the NRC. Id. This obligation is entirely separate from and in addition to the Secretary's duty to consult with the Commission and consider the Commission's comments respecting DOE plans for decontamination. See discussion below of Section 2(c)(1). Moreover, the Commission will in effect determine when the project is concluded by deciding that the Secretary has, to the extent practicable utilized the most appropriate technology available to perform the decommissioning and decontamination activities in a manner which complies with all applicable requirements. Report at 19.

The Commission will need to determine the appropriate procedural approach for promulgating the requirements under Section 2(a)(5). This could take the form of rulemaking or adjudication. The statute provides no clear direction on this point. The end product, however, would fit the concept of a "rule" as defined by the Administrative Procedure Act, inasmuch as it would be a "statement of ...particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. 551(4). In a related context, the Commission has stated the establishment of specific decommissioning criteria would require preparation of an environmental impact statement. 43 Fed. Reg. 10370, (March 13, 1978). Thus, the question arises to the extent which NEPA requires NRC to perform environmental analyses. However, DOE is clearly the lead agency on the project and it should be possible for NRC to reach some agreement with DOE whereby duplicative reviews will be avoided.

## II. Cooperative Agreement

Before undertaking the project, the Secretary will be required to enter into a cooperative agreement with New York in accordance with Federal Grant and Cooperative Agreement Act of 1977. Section 2(b)(4). Nothing in the agreement shall affect the Secretary's authority to make all final decisions regarding conduct of the program. Report at 20. The agreement is to provide that the state will make available to the Secretary the high-level waste at West Valley and the facilities necessary for completion of the project for as long as needed by the Secretary. Section 2(b)(4)(A). The Secretary shall not take title to the waste. The purpose of this provision is to allow the Secretary to use the site until the wastes are solidified and the facilities related to high-level waste are decontaminated and decommissioned. Once that project is completed, New York is to regain exclusive control of the site and be solely responsible for its maintenance. Report at 20.

The Secretary will be required to agree to provide technical assistance to New York in its securing of required license amendments. Section 2(b)(4)(B). Initially, this provision was based on the Congressional intent to place on New York the primary responsibility for obtaining license amendments and to place the Secretary in a supporting position. Report at 21. However, this intent was apparently modified by the subsequent addition of Section 2(b)(4)(D). That section requires the Secretary to join with New York in applying to the NRC for a license amendment. The intent of this provision is not clearly defined by its legislative history. In particular, it is uncertain whether by this provision Congress intended DOE to be an NRC licensee. This issue is discussed in detail in an attached proposed response to Congressmen Dingell and Ottinger.

## III. Informal Commission Review and Consultation

By October 1, 1981, the Secretary and the Commission are to enter into an agreement for the NRC's review and consultation regarding the project. Section 2(c). NRC review and consultation is to be informal and shall not include or require formal procedures or actions by the Commission pursuant to the AEA or ERA. The agreement must include the following specific elements: (1) Commission review of and comment on the Secretary's program plan; (2) consultation with the Commission regarding the solidified waste form chosen by the Secretary and the containers to be used in the permanent disposal of the solidified waste; (3) submission of safety analysis reports and other information the Commission may require to identify any danger to the public health and safety which may be presented by the project; and (4) Commission access to West Valley to allow the NRC to monitor the Secretary's activities under the project for the purpose of assuring public health and safety.

The Commission's review and consultation on the Secretary's program plan is designed to inform the public of the results of the NRC's analysis and of DOE's response to that analysis. The process is initiated when the Secretary submits to the NRC a plan for: (1) solidification of the high-level waste at West Valley; (2) removal of the waste for purposes of solidification; (3) preparation of the waste for disposal; and (4) decontamination of the facilities used to solidify the waste. Upon submission of the plan, the Secretary shall publish in the Federal Register a notice of submittal and availability of the plan for public inspection. After the NRC reviews the plan, it shall provide the Secretary with comments which shall specify with precision any NRC objections to any provisions of the plan. The Secretary will then publish in the Federal Register a notice of his receipt of the NRC's comments and of their availability for public inspection. Finally, if the NRC has objected to specific provisions of the plan, and the Secretary does not revise the plan to meet those objections, then the Secretary must publish in the Federal Register a detailed statement explaining why he has not so revised the plan.

The Act does not specify time limits for these procedures, nor does it explicitly tie initiation of the Secretary's program to completion of the Secretary's final detailed statement, should one be necessary. On the other hand, the Act appears to support a requirement that consultation on a specific step must be completed before it is performed by DOE, although the explicit informality of the review and consultation procedure appear to argue against including in the agreement a condition that the entire consultation procedure must be concluded before the Secretary may initiate the project.

#### IV. Relation to the Atomic Energy Act

Subsection 5(a) states that other than the costs and responsibilities established by this Act for the project, nothing in this Act shall be construed as affecting any rights, obligations, or liabilities of the commercial operator of the Center, the State, or any person, as is appropriate, arising under the Atomic Energy Act of 1954 or under any other law, contract, or agreement for the operation, maintenance, or decontamination of any facility or property at the Center or for any wastes at the Center. Nothing in this Act shall be construed as affecting any applicable licensing requirement of the Atomic Energy Act of 1954 or the Energy Reorganization Act of 1974. This Act shall not apply or be extended to any facility or property at the Center which is not used in conducting the project.

## V. Definitions of Waste

This Act provides a legislative definition of high-level waste, low-level waste, and transuranic waste. These definitions are limited to the purposes of the Act. High-level radioactive waste is defined as: (1) high-level liquid radioactive waste produced directly by the reprocessing of spent fuel at West Valley; (2) dry solid material derived from such waste; and (3) any other material the Commission designates as high-level radioactive waste for the purpose of protecting the public health and safety. Section 6(4). Transuranic waste is defined as material contaminated with transuranic elements in concentrations greater than 10 nanocuries per gram, or in any other concentrations the Commission may prescribe to protect the public health and safety. Section 6(5). Low-level radioactive waste is defined by elimination to be radioactive waste not classified as high level radioactive waste, transuranic waste, or by-product material as defined in Section 11e.(2) of the Atomic Energy Act of 1954 (mill tailings). These definitions provide the NRC with substantial regulatory flexibility.

## APPENDIX

### COMMISSION ACTIVITIES PURSUANT TO THE WVDPA

Section 2(a)(3) -- The Secretary shall comply with applicable provisions of law regarding the transportation of solidified waste to a federal repository for permanent disposal. The Secretary is to Act as the licensee's agent in transporting the waste. Report at 18. This means that the Commission shall regulate such transportation in the same manner and to the same extent as it regulates the transportation of any other licensed commercial waste.

Section 2(a)(4) -- The Secretary shall comply with the licensing requirements applicable to the disposal of low-level and transuranic radioactive wastes produced by the solidification of high-level waste at West Valley.

This provision is based on the expectation that the Secretary will dispose of such wastes on those portions of the site which remain under the licensee's exclusive jurisdiction and control. Because New York is an Agreement State, it would have jurisdiction over the on-site disposal of low-level waste. However, the disposal of transuranic waste could be regulated by either New York or the NRC. See, 42 U.S.C. 274c.(4). On the other hand, if the Secretary disposes of these wastes at DOE facilities, then the NRC would have no authority to license that disposal. See, 42 U.S.C. 5842(3).

To the extent that the NRC is considered an appropriate regulatory body with regard to the disposal of these wastes at the West Valley site, it is expected to participate in a prompt review of the existing on-site burial grounds at West Valley to determine if they are suitable for continued use for the disposal of low-level and transuranic wastes generated by this program.

Section 2(a)(5) -- The Commission may prescribe requirements for the Secretary's decontamination and decommissioning of the following:

- A. All tanks and facilities at West Valley used to store high-level liquid waste solidified under the project;
- B. Facilities used to solidify the high-level waste; and
- C. Any material and hardware used in connection with the project.

The Commission will determine whether the Secretary, to the extent practicable, has utilized the most appropriate technology available to perform the decommissioning and decontamination activities in a manner which complies with all applicable requirements. Report at 19.

Section 2(c) -- By October 1, 1981, the Commission and DOE are to enter into an agreement establishing procedures for NRC review and consultation on the project. This review and consultation is to be conducted informally and shall not include or require formal procedures or actions by the Commission pursuant to the Atomic Energy Act of 1954 as amended. The agreement shall provide for the following:

- (1) The Commission's review and comment on the Secretary's plan to solidify the high-level waste at West Valley, remove the waste for the purpose of solidification, prepare the waste for disposal, and decontaminate the solidification facilities; and the Commission's precise specification of any objections to the plan.
- (2) The Commission shall consult with the Secretary regarding the choice of solidified form for the high-level waste and the containers to be used for the permanent disposal of such waste.
- (3) The Commission may require the Secretary to submit safety reports and other information needed for the identification of any danger to the public health and safety presented by the project.
- (4) The Commission shall have access to West Valley and be permitted to monitor activities under the project for the purpose of assuring public health and safety.

Section 6(4) -- The Commission may designate as high-level radioactive waste any material at West Valley produced from reprocessing of spent fuel in addition to liquid wastes produced directly by reprocessing and any solid material derived from such liquid waste.

Section 6(5) -- The Commission may prescribe concentrations of transuranic elements as contaminants in materials at West Valley to be treated as transuranic waste.

For: The Commissioners

From: Leonard Bickwit, Jr.  
General Counsel

Subject: NRC AUTHORITY TO REGULATE DOE ACTIVITIES  
AT WEST VALLEY

Discussion: On October 1, 1980 the West Valley Demonstration Project Act (Act) became law. Pub. L. No. 96-368. The Act directs the Secretary of Energy to carry out a high-level radioactive waste management demonstration project at the Western New York State Service Center in West Valley, New York. The Act also provides for substantial new NRC regulatory authority regarding the Department of Energy's activities at that site. By letter of September 30, 1980, Congressmen Dingell and Ottinger expressed the view that under the Act DOE is an NRC licensee with regard to all aspects of the project. The Congressmen imply that their interpretation should be deemed authoritative because they were the principal authors of the version of the bill on which the Act is based.

The Congressmen presented the following analysis to support their conclusion.

Section 5 of the Act preserves all applicable licensing requirements of the Atomic Energy Act of 1954 and Energy Reorganization Act of 1974. Because the facility is currently licensed, and the proposed actions by the Secretary are not permitted under that license, license amendments will be required. Moreover, because the Act does not diminish the Commission's licensing authority, the Commission may include in the license amendment terms and conditions the Commission believes consistent with its statutory

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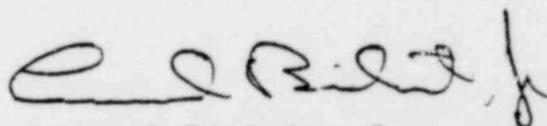
authority. The Congressmen believe that this authority, in conjunction with the requirement that DOE join New York in applying to NRC for a license amendment, implies that DOE must be an NRC licensee for the purposes of this Act. In addition, they point to a colloquy between themselves on the floor of the House in which they concluded that because a license amendment would be necessary the Commission would be authorized to terminate any action by the Secretary in regard to this program.

In our view, neither the Act nor its legislative history supports the Congressmen's interpretation of NRC's authority to regulate DOE's activities at West Valley. The reasons for our position are explained in the enclosed draft response to Congressmen Dingell and Ottinger.

Comments by the Office of the Executive Legal Director have been incorporated.

Recommendation:

Send the proposed response.



Leonard Bickwit, Jr.  
General Counsel

Attachments:

Letter Ahearne to Dingell

POOR ORIGINAL



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D. C. 20555

The Honorable John Dingell  
United States House of Representatives  
Washington, D.C. 20515

Dear Congressman Dingell:

This is in response to your letter of September 30, 1980 regarding the authority of the Nuclear Regulatory Commission to regulate the Department of Energy's activities under the West Valley Demonstration Project Act (WVDPA). Pub. L. No. 96-368. The WVDPA establishes a program for the solidification of high-level liquid waste at the Western New York Service Center in West Valley, New York and the decontamination and decommissioning of all facilities related to the solidification and storage of that waste. We understand that you are of the view that DOE is to be treated as an NRC licensee for all purposes of the project. We have carefully considered your arguments and the language and legislative history of the Act. WVDPA does provide the Commission with substantial new authority to regulate that program. However, the Commission cannot conclude from its review that it can or must treat the Secretary as a licensee for the purpose of any and all aspects of the project. The reasons for this position are explained below. The interpretation of the WVDPA which would treat DOE as an NRC licensee for all aspects of this project is based on Section 2(b)(4)(D), which requires that New York State and the Secretary jointly apply for a NRC license amendment. There is no question that New York, as an existing NRC licensee, may appropriately apply for such a license amendment. However, we do not believe that the legislative history of this provision supports the conclusion that DOE also must be treated as an NRC licensee. An analysis of that legislative history is attached.

The statute, as finally enacted, contains provisions defining the role of NRC with regard to DOE's actions at West Valley. Section 2(c) provides that by October 1, 1981, the Secretary and the Commission are to enter into an agreement establishing procedures for NRC review and consultation on this project. Under the Act, this review and consultation is to be conducted informally and is not to include or require formal procedures or actions by the Commission pursuant to the Atomic Energy Act of 1954. The agreement shall provide for: (1) Commission review of and comments on the Secretary's program plan; (2) consultation with the Commission regarding the solidified waste form chosen by the Secretary and the containers to be used for the permanent disposal of the solidified waste; (3) submission of safety analysis reports and other information the Commission may require to identify any danger to the public health and safety which may be presented by the project; and (4) Commission access to West Valley to allow the NRC to monitor the Secretary's activities under the project for the purpose of assuring public health and safety. This special, detailed review regime mandated by Section 2(c) would have been unnecessary if Congress had intended DOE to be treated as an NRC licensee for all purposes of this project.

In addition, several of the provisions in the statute are inconsistent with the typical licensor/licensee relationship established under the Atomic Energy Act of 1954. For example, Section 2(a)(3) directs the Secretary to transport the solidified waste to a federal repository as soon as feasible. In undertaking this responsibility, the Secretary is to be viewed as an agent of the licensee who is the owner of the waste. This was done in order to assure that this transportation will be subject to all law and regulations to the same extent as the transportation of any other licensed commercial waste. H.R. Rep. No. 96-1100 Part II, 96th Cong., 2d Sess. 18 (1980). If the Secretary were an NRC licensee for all aspects of this project, his delivery of the waste to a carrier would be subject to NRC regulation, including review of the suitability of the waste form for transportation. Thus, there would be no need to treat the Secretary as an agent of New York State in order to subject his transportation of the solidified waste to NRC regulatory authority. Also, Section 2(a)(5) provides that the Secretary's decontamination and decommissioning of certain facilities at West Valley shall be in accordance with requirements prescribed by the NRC. If the Secretary were an NRC licensee, there would be no need to explicitly provide the NRC with this authority.

As noted at the outset, the Commission will exercise substantial regulatory oversight over DOE's activities at West Valley even though DOE will not be a licensee. The Commission expects to evaluate and monitor DOE activities effectively at all stages of the project, and to bring to public attention any DOE activity which the NRC believes to be contrary to the public health and safety. We believe this to be consistent with the role which the WVDPA established for the NRC and hope that this evaluation and monitoring will help allay any concern you may have regarding independent review of and public participation in the project.

Sincerely,

John F. Ahearne

## ATTACHMENT

The requirement that the Secretary join New York in applying to NRC for a license amendment first appeared when the Senate considered S. 2443. 126 Cong. Rec. S 6731 (June 12, 1980). The accompanying report stated that such joint application would be made only if a license amendment would be necessary for the conduct of the project. S. Rep. No. 96-787, 96th Cong., 2d Sess. 7 (1980). Thus, at that time the Senate had not concluded that a license amendment was essential. The bill also explicitly provided for application of the Atomic Energy Act (AEA) and Energy Reorganization Act (ERA) to all aspects of the project. However, it is not clear whether the Senate intended this provision to impose new licensing requirements or merely require that existing law be applied.

When the House considered H.R. 6865, the Senate bill had been substantially redrafted by the Committee on Interstate and Foreign Commerce. The Bill no longer explicitly provided for application of the AEA and ERA to all aspects of the project, or for a joint license application. It did require the Secretary to provide technical assistance to New York in obtaining a license amendment. However, most importantly, the bill contained new explicit consultation procedures consistent with earlier NRC recommendations. Those recommendations explicitly excluded NRC licensing of DOE from the NRC proposed definition of consultation. On the floor, Mr. McCormack, in commenting on H.R. 6865, stated that this consultation procedure, and consultation regarding decontamination and decommissioning, were the only areas of NRC regulation of DOE. 126 Cong. Rec. H 8765. Mr. Lundine agreed that H.R. 6865 was not intended to provide for NRC licensing of the project. *Id.* at H 7866. Mr. Dingell, in commenting on Mr. McCormack's statement, noted that because West Valley is currently licensed, a license amendment would be necessary. *Id.* However, this statement is not inconsistent with Mr. McCormack's because New York's license would require amending independent of any licensee responsibilities on the part of DOE.

Mr. Ottinger observed that the bill did not contain a provision originally in the Interstate and Foreign Commerce Committee's version which would have authorized the NRC to terminate at any time any action by the Secretary. He asked whether that provision had been dropped as unnecessary because the existing license would require an amendment. Mr. Dingell agreed. 126 Cong. Rec. H 8768. This does lend support to an argument that NRC review of a license amendment would entail review of all aspects of the project, and that issuance of the amendment could be conditioned such that NRC could terminate later actions of the Secretary. However, such an argument would be contrary, to the statements of Messrs. McCormack and Lundine. More importantly, adoption of this argument could render superfluous the specific consultation procedures provided in the Act.

The bill went back to the Senate, which amended it by reinstating the provision requiring the Secretary to join New York in applying for a license amendment and clarifying the NRC's consultative role by explicitly characterizing it as informal. Senator Jackson stated that the requirement that the Secretary join New York in applying for a license amendment was intended to ensure protection of the Federal government's interest as supplier of 90 per cent of the project's

costs. 126 Cong. Rec. S 12762. Thus, the Senate did not intend to make DOE a co-licensee by requiring the Secretary to join New York in applying for a license amendment. Moreover, the Senate's amendment to explicitly characterize the NRC consultation procedure as informal shows an intention not to treat DOE as a licensee.

The bill returned to the House and was passed without further amendment. Before the vote, in response to a question from Mr. Lujan, Mr. Lundine explained that the amendment requiring the Secretary to join DOE in a license amendment application was intended to ensure DOE's agreement to the amendment. 126 Cong. Rec. H 9052. Mr. Lujan found the provision desirable as explained. Id. Mr. Dingell, on the other hand, in his extended remarks, expressed the view that the amendment put DOE in the position of a colicense. Id. at H 9053. However, as noted, this does not appear to have been the purpose of the Senate in adding the provision. Moreover, because that statement was not made on the floor of the House, there was no opportunity for other Congressmen to respond to that statement; and no other Congressman expressed similar views.

## WEST VALLEY DEMONSTRATION PROJECT ACT

### Introduction

As you know, the "West Valley Demonstration Project Act" [hereinafter "WVDPA"] has become law. Pub. L. No 96-368 (October 6, 1980). It establishes a program for the solidification of the high-level reprocessing waste at the Western New York Service Center in West Valley, New York [hereinafter "West Valley"] and the decontamination and decommissioning of all facilities related to the solidification and storage of that waste. Although the Secretary of Energy [hereinafter "Secretary"] will be responsible for carrying out the project, the NRC has new substantial regulatory responsibilities which must be evaluated and integrated into the Commission's existing program. These responsibilities are summarized in an Appendix. There is also some question as to the extent that DOE will be treated as an NRC licensee for the purposes of this project. That issue is discussed in detail in an attached memorandum which in turn attaches a proposed response to Congressmen Dingell and Ottinger.

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The high-level liquid radioactive waste is to be solidified by vitrification or other technology which the Secretary determines to be most effective and which produces a waste form suitable for transportation and disposal. Section 2(a)(1). Because the waste form must be suitable for transportation to and disposal in a licensed federal repository, the Secretary's choice of solidification technology should be directed toward the production of a waste form capable of complying with applicable regulatory requirements for transportation and disposal. H.R. Rep. No. 96-1100 Part II, 96th Cong., 2d Sess. 17 (1980) [hereinafter "Report"]. In exercising his discretion with respect to the choice of solidification technology, the Secretary is required to consult with the NRC on the solidified form of the high-level waste. Section 2(c)(2).

The Secretary is to develop containers suitable for ultimate disposal of the solidified waste. Section 2(a)(2). Because these containers will eventually be placed in a licensed repository, they must be developed in a manner which complies with all applicable requirements of the NRC. Report at 17. To ensure this compliance, the Secretary is directed to consult with the NRC. Section 2(c)(2). This consultation shall occur at each stage in the design and construction of these containers. Report at 17.

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disposed of at the West Valley site if the owner and the appropriate regulatory bodies determine that it is suitable for that purpose. 120 Cong. Rec. H 8768 (September 15, 1980). If the present burial ground is found to be unsuitable, the Secretary is to take appropriate actions to establish other suitable on-site burial grounds. In either case, the Secretary's on-site burial of these wastes will have to comply with applicable licensing requirements because the burial sites will be under the exclusive jurisdiction and control of the licensee. The Secretary's jurisdiction will encompass only those portions of the site and those facilities directly related to the solidification activities. Report at 18.

The Secretary will be required to decontaminate and decommission: (1) the tanks and other facilities in which the high-level waste was stored; (2) the facilities used in the solidification of the waste; and (3) any material and hardware used in connection with the project. Section 2(a)(5). Such decontamination shall be in accordance with requirements prescribed by the NRC. Id. This obligation is entirely separate from and in addition to the Secretary's duty to consult with the Commission and consider the Commission's comments respecting DOE plans for decontamination. See discussion below of Section 2(c)(1). Moreover, the Commission will in effect determine when the project is concluded by deciding that the Secretary has, to the extent practicable utilized the most appropriate technology available to perform the decommissioning and decontamination activities in a manner which complies with all applicable requirements. Report at 19.

The Commission will need to determine the appropriate procedural approach for promulgating the requirements under Section 2(a)(5). This could take the form of rulemaking or adjudication. The statute provides no clear direction on this point. The end product, however, would fit the concept of a "rule" as defined by the Administrative Procedure Act, inasmuch as it would be a "statement of ...particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. 551(4). In a related context, the Commission has stated the establishment of specific decommissioning criteria would require preparation of an environmental impact statement. 43 Fed. Reg. 10370, (March 13, 1978). Thus, the question arises to the extent which NEPA requires NRC to perform environmental analyses. However, DOE is clearly the lead agency on the project and it should be possible for NRC to reach some agreement with DOE whereby duplicative reviews will be avoided.

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## II. Cooperative Agreement

Before undertaking the project, the Secretary will be required to enter into a cooperative agreement with New York in accordance with Federal Grant and Cooperative Agreement Act of 1977. Section 2(b)(4). Nothing in the agreement shall affect the Secretary's authority to make all final decisions regarding conduct of the program. Report at 20. The agreement is to provide that the state will make available to the Secretary the high-level waste at West Valley and the facilities necessary for completion of the project for as long as needed by the Secretary. Section 2(b)(4)(A). The Secretary shall not take title to the waste. The purpose of this provision is to allow the Secretary to use the site until the wastes are solidified and the facilities related to high-level waste are decontaminated and decommissioned. Once that project is completed, New York is to regain exclusive control of the site and be solely responsible for its maintenance. Report at 20.

The Secretary will be required to agree to provide technical assistance to New York in its securing of required license amendments. Section 2(b)(4)(B). Initially, this provision was based on the Congressional intent to place on New York the primary responsibility for obtaining license amendments and to place the Secretary in a supporting position. Report at 21. However, this intent was apparently modified by the subsequent addition of Section 2(b)(4)(D). That section requires the Secretary to join with New York in applying to the NRC for a license amendment. The intent of this provision is not clearly defined by its legislative history. In particular, it is uncertain whether by this provision Congress intended DOE to be an NRC licensee. This issue is discussed in detail in an attached proposed response to Congressmen Dingell and Ottinger.

## III. Informal Commission Review and Consultation

By October 1, 1981, the Secretary and the Commission are to enter into an agreement for the NRC's review and consultation regarding the project. Section 2(c). NRC review and consultation is to be informal and shall not include or require formal procedures or actions by the Commission pursuant to the AEA or ERA. The agreement must include the following specific elements: (1) Commission review of and comment on the Secretary's program plan; (2) consultation with the Commission regarding the solidified waste form chosen by the Secretary and the containers to be used in the permanent disposal of the solidified waste; (3) submission of safety analysis reports and other information the Commission may require to identify any danger to the public health and safety which may be presented by the project; and (4) Commission access to West Valley to allow the NRC to monitor the Secretary's activities under the project for the purpose of assuring public health and safety.

The Commission's review and consultation on the Secretary's program plan is designed to inform the public of the results of the NRC's analysis and of DOE's response to that analysis. The process is initiated when the Secretary submits to the NRC a plan for: (1) solidification of the high-level waste at West Valley; (2) removal of the waste for purposes of solidification; (3) preparation of the waste for disposal; and (4) decontamination of the facilities used to solidify the waste. Upon submission of the plan, the Secretary shall publish in the Federal Register a notice of submittal and availability of the plan for public inspection. After the NRC reviews the plan, it shall provide the Secretary with comments which shall specify with precision any NRC objections to any provisions of the plan. The Secretary will then publish in the Federal Register a notice of his receipt of the NRC's comments and of their availability for public inspection. Finally, if the NRC has objected to specific provisions of the plan, and the Secretary does not revise the plan to meet those objections, then the Secretary must publish in the Federal Register a detailed statement explaining why he has not so revised the plan.

The Act does not specify time limits for these procedures, nor does it explicitly tie initiation of the Secretary's program to completion of the Secretary's final detailed statement, should one be necessary. On the other hand, the Act appears to support a requirement that consultation on a specific step must be completed before it is performed by DOE, although the explicit informality of the review and consultation procedure appear to argue against including in the agreement a condition that the entire consultation procedure must be concluded before the Secretary may initiate the project.

#### IV. Relation to the Atomic Energy Act

Subsection 5(a) states that other than the costs and responsibilities established by this Act for the project, nothing in this Act shall be construed as affecting any rights, obligations, or liabilities of the commercial operator of the Center, the State, or any person, as is appropriate, arising under the Atomic Energy Act of 1954 or under any other law, contract, or agreement for the operation, maintenance, or decontamination of any facility or property at the Center or for any wastes at the Center. Nothing in this Act shall be construed as affecting any applicable licensing requirement of the Atomic Energy Act of 1954 or the Energy Reorganization Act of 1974. This Act shall not apply or be extended to any facility or property at the Center which is not used in conducting the project.

## V. Definitions of Waste

This Act provides a legislative definition of high-level waste, low-level waste, and transuranic waste. These definitions are limited to the purposes of the Act. High-level radioactive waste is defined as: (1) high-level liquid radioactive waste produced directly by the reprocessing of spent fuel at West Valley; (2) dry solid material derived from such waste; and (3) any other material the Commission designates as high-level radioactive waste for the purpose of protecting the public health and safety. Section 6(4). Transuranic waste is defined as material contaminated with transuranic elements in concentrations greater than 10 nanocuries per gram, or in any other concentrations the Commission may prescribe to protect the public health and safety. Section 6(5). Low-level radioactive waste is defined by elimination to be radioactive waste not classified as high level radioactive waste, transuranic waste, or by-product material as defined in Section 11e.(2) of the Atomic Energy Act of 1954 (mill tailings). These definitions provide the NRC with substantial regulatory flexibility.

APPENDIX

COMMISSION ACTIVITIES PURSUANT TO THE WVDPA

Section 2(a)(3) -- The Secretary shall comply with applicable provisions of law regarding the transportation of solidified waste to a federal repository for permanent disposal. The Secretary is to Act as the licensee's agent in transporting the waste. Report at 18. This means that the Commission shall regulate such transportation in the same manner and to the same extent as it regulates the transportation of any other licensed commercial waste.

Section 2(a)(4) -- The Secretary shall comply with the licensing requirements applicable to the disposal of low-level and transuranic radioactive wastes produced by the solidification of high-level waste at West Valley.

This provision is based on the expectation that the Secretary will dispose of such wastes on those portions of the site which remain under the licensee's exclusive jurisdiction and control. Because New York is an Agreement State, it would have jurisdiction over the on-site disposal of low-level waste. However, the disposal of transuranic waste could be regulated by either New York or the NRC. See, 42 U.S.C. 274c.(4). On the other hand, if the Secretary disposes of these wastes at DOE facilities, then the NRC would have no authority to license that disposal. See, 42 U.S.C. 5842(3).

To the extent that the NRC is considered an appropriate regulatory body with regard to the disposal of these wastes at the West Valley site, it is expected to participate in a prompt review of the existing on-site burial grounds at West Valley to determine if they are suitable for continued use for the disposal of low-level and transuranic wastes generated by this program.

Section 2(a)(5) -- The Commission may prescribe requirements for the Secretary's decontamination and decommissioning of the following:

- A. All tanks and facilities at West Valley used to store high-level liquid waste solidified under the project;
- B. Facilities used to solidify the high-level waste; and
- C. Any material and hardware used in connection with the project.

The Commission will determine whether the Secretary, to the extent practicable, has utilized the most appropriate technology available to perform the decommissioning and decontamination activities in a manner which complies with all applicable requirements. Report at 19.

Section 2(c) -- By October 1, 1981, the Commission and DOE are to enter into an agreement establishing procedures for NRC review and consultation on the project. This review and consultation is to be conducted informally and shall not include or require formal procedures or actions by the Commission pursuant to the Atomic Energy Act of 1954 as amended. The agreement shall provide for the following:

- (1) The Commission's review and comment on the Secretary's plan to solidify the high-level waste at West Valley, remove the waste for the purpose of solidification, prepare the waste for disposal, and decontaminate the solidification facilities; and the Commission's precise specification of any objections to the plan.
- (2) The Commission shall consult with the Secretary regarding the choice of solidified form for the high-level waste and the containers to be used for the permanent disposal of such waste.
- (3) The Commission may require the Secretary to submit safety reports and other information needed for the identification of any danger to the public health and safety presented by the project.
- (4) The Commission shall have access to West Valley and be permitted to monitor activities under the project for the purpose of assuring public health and safety.

Section 6(4) -- The Commission may designate as high-level radioactive waste any material at West Valley produced from reprocessing of spent fuel in addition to liquid wastes produced directly by reprocessing and any solid material derived from such liquid waste.

Section 6(5) -- The Commission may prescribe concentrations of transuranic elements as contaminants in materials at West Valley to be treated as transuranic waste.

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