



NEW YORK STATE ENERGY OFFICE

**WILLIAM D. COTTER
COMMISSIONER**

January 31, 1991

Mr. James Kennedy
Office of Nuclear Materials Safety & Safeguards
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dear Mr. Kennedy:

This letter is in response to the Federal Register notice of Tuesday, December 4, 1990 (Vol. 55, No. 233, 50064) entitled Recommendations on the Title Transfer Provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 which seeks comments on SECY 90-318, as well as a host of specific questions related to the storage issue.

New York notes initially that many of the specific questions raised by the notice relate to the provisions of the Federal Low-Level Radioactive Waste Policy Act, as amended (LLRWPA), on forced possession and title transfer after January 1, 1996.

As you are aware, New York is challenging the constitutionality of the LLRWPA and the provisions on forced transfer of title and possession in particular. We believe the law is an unconstitutional intrusion on state sovereignty that represents an unprecedented attempt to impose on the states both the responsibility and liability for an issue that is clearly national in scope. Moreover, New York has a different directive regarding title. Under New York Public Authorities Law 1854-d(6), as amended by Chapter 368 of the Laws of 1990, "[t]itle to any low-level radioactive waste shall at all times remain in the generator of such waste..."

As a result of our legal challenge and the bifurcation, under New York law, of title and possession upon disposal, our views differ significantly from those reflected in the SECY paper. Thus, our remaining comments and responses are made subject to these fundamental differences in New York's legal position and should in no way be taken as conceding or endorsing any contrary assumption in the SECY paper.

The following numbered comments and responses correspond to the numbered questions in Appendix A to SECY-90-318:

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- (1) New York believes that NRC authority in this area is quite limited. The LLRWPA gave the NRC only very narrow responsibilities expressly set forth in its terms. It did not assign the NRC any general authority for enforcing the LLRWPA. The NRC, of course, retains authority over its licensees under the Atomic Energy Act. In New York, which is an Agreement State, its own regulatory agencies will review applications for regulatory approvals from their licensees on a case-by-case basis, taking into account relevant facts and circumstances. These would include any public health and safety and environmental impacts of longer-term storage at the particular site in question; available alternatives; and the needs of the generators and consequences of disapproval of requested longer-term storage. Consideration should be given to the precedent regarding storage already set by the NRC in currently allowing commercial nuclear power plants to continue to store high-level waste on site indefinitely, with provision being made to transfer that waste from spent fuel pools to dry casks on-site (as well as to other storage sites, also for indefinite storage).

This high-level waste conceivably could remain on site for well beyond the life of the reactor and perhaps longer than the terms of an extended license, certainly well beyond the year 2000, regardless of whether the designated federal agency provides for disposal of such waste by the time Congress has set by law. The NRC should take into account similar considerations in reviewing its licensees' requests for longer-term storage of low-level radioactive waste.

New York has recognized the need for careful evaluation of the feasibility of extended storage of low-level radioactive waste (LLRW), and is in the process of implementing a study to develop the necessary database. In particular, the New York State Energy Research and Development Authority (NYSERDA) has been charged with assessing the present capability of LLRW generators in the State to store waste on-site and their ability to enhance on-site storage capacity to permit storage for a minimum of 10 years. The study also will evaluate the economic viability of establishing a centralized storage facility for Class A medical and academic waste. It should be noted that a critical component of this evaluation will be the exploration of anticipated regulatory requirements and, thus, guidance from the NRC and other cognizant regulatory agencies is essential. As noted above, such NRC guidance would be expected to be consistent and compatible with the NRC's own action taken with respect to indefinite storage of high-level waste regardless of disposal deadlines set for such waste in federal statutes and implementing regulations and contracts.

- (2) It is clear that the health, safety and environmental impact of increased on-site storage of LLRW need to be evaluated. Such evaluations are usually addressed on a case-by-case basis and undoubtedly will vary from generator to generator depending on the volume, activity, isotopes and duration involved. The New York State study of extended storage will attempt, through its regulatory analysis, to address these issues. The NRC itself has sponsored research in this area. New York finds it somewhat curious that the NRC would be asking this question. It would seem that the question might be more appropriately asked of the NRC. In any event, some obvious concerns include:
- potential for increased occupational exposure;
 - continued reliance on active maintenance to isolate waste from the environment; and
 - instability of certain waste forms, such as animal carcasses.
- (3) No. The NRC should recognize that many states and compacts are likely to require extended storage to meet their interim management needs. There may, in many cases, be no viable alternative. Again, we do not see that the NRC is responsible for enforcing the provisions of the LLRWPA, anymore than it has assumed responsibility for enforcing the HLW disposal requirements of the Nuclear Waste Policy Act of 1982, as amended. It should, rather, focus its efforts on accommodating the needs of the states and compacts as they strive to meet the mandates of the LLRWPA.
- (4) As noted above, New York believes that there are serious constitutional questions regarding the "transfer of title" requirements of the LLRWPA. We are, however, unaware of any associated administrative or technical issues within the NRC's cognizance. To the contrary, we agree that the NRC's existing regulations currently provide adequately for accommodating separately both transfer of title and transfer of possession of LLRW as explained by SECY-90-318.
- (5) It appears that the NRC regulations currently provide for, and adequately address, the bifurcation of title and possession of radioactive materials, including LLRW. Other aspects of title and possession will be governed by other federal, state and local laws. As previously indicated, New York law requires title to LLRW be retained by the generator, although possession may pass to some other party (e.g., brokers, disposal facility operators).
- (6) New York Public Authorities Law Section 1854-d(6), as amended by Chapter 368 of the Laws of 1990, requires that title to LLRW shall at all times remain with the generator

of the waste.

- (7) It would appear that, under its present laws and regulations, the NRC could only require such assurances of its licensees in assessing impacts of storage on public health and safety and the environment. (As noted above, the NRC has not been delegated any authority for enforcing the provisions of the LLRWPA.) In an Agreement State like New York, the cognizant State regulatory agencies will assess the public health and safety and environmental impacts of longer term storage, taking into account information being gathered in the NYSERDA study identified above.

Further, such assurances of disposal availability would apply only to potential future generation of LLRW and would have little meaning for waste which already exists or which is inevitable (e.g., LLRW from the decommissioning of nuclear facilities). In any event, it is not clear what assurances licensees would be able to provide. The NRC addressed a similar question relative to the storage of spent nuclear fuel at nuclear power plants pending the availability of a federal high-level waste repository. In that instance, the NRC conducted a special regulatory proceeding to develop the basis for its decision to allow such storage.

- (8) There appear to be many technical and regulatory issues that need to be addressed in considering extended storage of LLRW, whether such storage occurs at the site of generation or at a centralized facility. As noted above, New York State is attempting to address these issues. Among the obvious concerns are: waste form and packaging requirements, and their relationship to ultimate disposal requirements; physical limitations faced by many generators, especially those located in urban settings; the adequacy of regulatory resources to oversee such activity, particularly involving hundreds of distinct generator locations; availability of necessary treatment capability for difficult-to-store waste forms such as animal carcasses; and continued confusion between NRC and EPA over regulatory jurisdictions and requirements affecting mixed waste. The NRC should recognize that many states will be faced with the need to consider long-term storage (beyond five years) as a necessary component of the LLRW management program. It should begin now, not wait as SECY-90-318 suggests, to develop the technical and regulatory guidance that is essential to the informed consideration of such options. Clearly, the NRC has the technical expertise and regulatory background upon which to proceed. It currently licenses long-term possession of high-level waste and radioactive materials at nuclear power plants. It can and should assist states and generators in identifying and evaluating the

health, safety and environmental concerns which they will inevitably face, and which are clearly within the NRC's purview. Furthermore, the NRC must do far more than it has to date to pull "mixed waste" out of the quagmire created by its regulatory differences with EPA. As a result of the federal agencies' failure to address harmonization of their own responsibilities for "mixed waste", no states will be in a position to deal adequately with low-level "mixed waste" within the schedules envisioned by the federal LLRWPA.

New York appreciates the opportunity to provide comments on these matters and looks forward to working with the NRC and other cognizant state and federal bodies in finding a sound solution to the LLRW management problem.

Sincerely,

Eugene J. Gleason
Eugene Gleason
State Liaison
Officer

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