UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE DIRECTOR, OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

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| In the Matter of | ) | |
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| NUCLEAR FUEL SERVICES, INC. | ) | |
| AND NEW YORK STATE ENERGY | ) | |
| RESEARCH AND DEVELOPMENT | ) | Docket No. 50-201 SCPR |
| AUTHORITY | ) | |
| | ) | |
| (Western New York Nuclear | ) | |
| Service Center) | ) | |

Response to Sierra Club
Request for Reconsideration of Change No. 32

Under Provisional Operating License No. CSF-1, Nuclear Fuel Services, Inc. (NFS) was licensed as the operator of a nuclear fuel processing plant at the Western New York Nuclear Service Center at West Valley, New York. Under the same instrument, the New York State Atomic and Space Development Authority (ASDA) was licensed as owner of the West Valley site, with authority to permit NFS to perform fuel processing activities there. ASDA's rights were subsequently vested in a successor agency, the New York State Energy Research and Development Authority (NYSERDA).

The license provided that either licensee could apply for an appropriate amendment reflecting their respective responsibilities in the event of any change in their contractual relationship. On February 1, 1982, NFS filed such an application with the Commission. NFS proposed that its rights and responsibilities under the license be terminated upon the occurrence of certain conditions, including the transfer of the West Valley facility to the

Department of Energy pursuant to the West Valley Demonstration Project Act (Pub. L. 96-368) and the "Settlement Date" of a Settlement Agreement[1/] in certain pending litigation between the parties. NYSERDA supported the issuance of the license amendment, substantially as proposed by NFS. Such an amendment (Change No. 32) was issued by the Office of Nuclear Materials Safety and Safeguards (NMSS) on February 11, 1982.[2/]

On March 26, 1982, the Sierra Club filed with NMSS what it characterized as a "show cause petition, pursuant to 10 CFR 2.202." The relief sought was for NMSS "to issue a show cause order, pursuant to 10 CFR 2.202, on why license change #32 to NRC license no. CSF-1 should not be rescinded pending a public hearing in the matter." The petition challenged the staff's findings regarding the technical and financial qualifications of NYSERDA and identified several alleged defects in the procedures observed in connection with the license amendment.

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1/ Settlement Agreement, Stipulation and Order in Civil Actions Nos. 81-18E and 81-683E in the U.S. District Court for the Western District of New York, approved by the Court on February 19, 1982.

2/ Although Change No. 32 was issued in response to the application filed on February 1, 1982, the issue of termination of NFS's rights and responsibilities had been under consideration since October 6, 1981, when NFS filed an application for license amendment. See Part II.G, infra.

On April 26, 1982, I informed the Sierra Club that I had determined that its petition constituted a request for reconsideration of the issuance of Change No. 32 and that the Sierra Club would be advised of the NRC decision with respect thereto. In response to letters from NMSS dated April 27, 1982, both NFS and NYSERDA, on May 24, 1982 and May 27, 1982 respectively, urged that the issuance of Change No. 32 not be rescinded. NMSS invited the Sierra Club, on June 4, 1982, to provide additional information and it submitted a reply on June 18, 1982.[3/]

For the reasons stated herein, I find that the issuance of Change No. 32 was proper and, accordingly, that the relief requested by the Sierra Club should be denied.

## I. Preliminary Matters

The Sierra Club appears to rely on 10 CFR §2.206 as the procedural foundation for its petition. Section 2.206 provides a means by which any member of the public may petition certain NRC staff officers for initiation of enforcement action against licensees on the basis of violations of NRC requirements or hazards posed by the licensee's activities that require NRC action to protect public health and safety, the common defense and security,

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3/ In addition, the Sierra Club, by letter dated July 14, 1982, advised NMSS that it would like to append to the petition certain information concerning rusted drums, possibly originating with NFS, that have allegedly been found in unauthorized locations. The Sierra Club has failed, however, to identify any connection between this information and the issues related to Change No. 32. The July 14, 1982 letter is being reviewed separately by NMSS, but will not be addressed further in this memorandum.

or the environment. What §2.206 is designed to do is to call to the attention of NRC information concerning some action by a licensee that gives rise to a hazardous condition and with respect to which some NRC enforcement action may be appropriate. The Sierra Club's concern is quite different; it is addressed to the allegedly inappropriate actions of NRC officials in issuing a license amendment rather than to the conduct of the licensees.

Here the petitioner is asking, in substance, for the initial licensing decision of NMSS to be reconsidered. Reconsideration by NMSS in the first instance is a sufficient means by which the issues raised by the Sierra Club can be reviewed and determined. The ability of NMSS to reconsider is inherent in the ability to decide in the first instance. See Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 2), CLI-80-41, 12 NRC 650, 652 (1980). While this power may be limited to a period of 60 days from an otherwise final decision, ibid., the Sierra Club's petition was filed well within this period.[4/]

I need not accord presumptive validity to every assertion of fact presented by the petitioner; but if I find that a substantial health or safety issue has been raised, reconsideration is appropriate. Cf. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7,

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4/ In formal adjudications, a party may file a petition for reconsideration of a final decision within ten days after the date of the decision. Neither the filing nor the granting of the petition stays the decision unless the Commission orders otherwise. 10 CFR § 2.771.

7 NRC 429, 433 (applying 10 CFR §2.206). The Sierra Club alleges that the issuance of Change No. 32, in the absence of proper institutional and financial arrangements, creates risks to health and safety, including particularly a risk of radiation released from the NRC-licensed burial ground into the water supply of residents of western New York, some of whom are members of the Sierra Club, Petition at 2. The Sierra Club's concerns are remote in time and highly speculative, and they were addressed in a safety evaluation report; even so, I conclude that the novel situation at West Valley, where licensees are to be required to be qualified at some uncertain date many years away, calls for me to review the Sierra Club's representations.

If the issues were presented by the Sierra Club in the form of a petition for intervention in pending proceedings, 10 CFR §2.714, such a petition might well be denied as untimely.[5/] NRC had published in the

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5/ The Sierra Club's allegations would also be insufficient to meet the requirements for standing to intervene, as a matter of right, in adjudicatory proceedings. 10 CFR §2.714. The Club states that "several of our members live within five miles of the West Valley site and almost all depend on Lake Erie, downstream of the the outflow of Cattaraugus Creek for our water supply." Even if this claim were to be accepted as a sufficient assertion of "injury in fact," the petition would be inadequate. For an organization such as petitioner to intervene as the representative of its members, it must establish that at least one of its members has standing in his own right. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-322, 3 NRC 328 (1978). The specific members must be identified, how their interests may be affected must be shown, and the members' authorization to the organization to intervene must be established. Houston Lighting and Power Company (Allens Creek Nuclear Generating Station), ALAB-535, 9 NRC 377 (1979).

Federal Register, on November 13, 1981, a notice that the Commission had received from NFS an application for amendment "to relieve NFS of all operational responsibility under the license." 46 FR 56086. The Sierra Club gave no indication to NRC of any interest in this proposed action. It did so only after issuance of Change No. 32, which (though granted in response to a separate application) dealt with precisely the same subject matter that had been identified in the Federal Register notice. Where delay disadvantages other parties, a tardy petition for intervention is not likely to be entertained. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 887-888 (1981). In this case, NFS may have been disadvantaged by the Sierra Club's failure to make a timely response to the November 13 notice. Upon the issuance of Change No. 32, NFS (1) withdrew its request with NRC for a hearing on Change No. 31, (2) filed with the Court of Appeals a motion for voluntary dismissal of its petition for review of Change No. 31, and (3) transferred the West Valley facility to DOE; I have no doubt that none of these steps would have been taken had not NRC first issued Change No. 32.[6/]

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6/ Change No. 31, issued September 30, 1981, authorized the licensees to transfer the West Valley facility to DOE in accordance with the West Valley Project Demonstration Act. It provided, among other things, that the licensees were not authorized to possess, use, or operate the facility while DOE was in possession. It further provided that:

> The licensees, as their respective interests under this license appear, shall:
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> (1) reacquire and possess the facility upon completion of the Project, in accordance with such technical specifications and subject to such other provisions as the Commission finds necessary and proper under the Atomic Energy Act and Commission regulations; and

FOOTNOTE CONTINUED ON NEXT PAGE

The tardiness of the Sierra Club may bear upon the form of remedy, if any, which would be appropriate upon reconsideration the decision to issue Change No. 32. I nevertheless have the discretion to consider the merits of the action that was taken, and I proceed to that task now.

## II. Discussion

### A. Timing of Termination of NFS's Status as Licensee

The Sierra Club first objects to the timing of Change No. 32. It argues that the "transfer" of the license -- by which it means the termination of NFS's rights and responsibilities under the license and the assumption

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6/ FOOTNOTE CONTINUED FROM PREVIOUS PAGE

(2) make timely submissions to the Commission, in anticipation of completion of the Project, as may be required by the Commission to determine such technical specifications and other provisions.

NFS expressed objections to Change No. 31 which, it indicated, would be removed only if the license were also amended to terminate its rights and responsibilities under the license in the event DOE assumed possession. Letter from O. S. Hiestand to the Commissioners (October 13, 1981). The Commission denied a NFS motion for stay of the license amendment, but directed that a Licensing Board conduct an adjudicatory hearing pursuant to the request of NFS. Nuclear Fuel Services, Inc. and New York State Energy Research and Development Authority (Western New York Nuclear Service Center), CLI-81-29, 14 NRC 940 (1981). NFS thereupon filed a petition for review with the Court of Appeals for the District of Columbia Circuit.

I accept the assertion made on behalf of NFS that NFS would have insisted on maintaining the status quo, had the Commission questioned the application for Change No. 32, or had anyone raised a question about termination of NFS as licensee before project completion, until those questions were resolved. Letter from O.S. Hiestand to Richard E. Cunningham, Director, Division of Fuel Cycle and Material Safety (May 24, 1982).

thereof by NYSERDA -- should be deferred until DOE departs the site.[7/] To the extent that this argument concerns the technical and financial qualifications of NYSERDA, it is treated in Part II.B., below.

Petitioner notes, correctly, that there is nothing in the West Valley Demonstration Project Act that requires termination of NFS's responsibilities at this time. But there is nothing in the statute that precludes this action, either.

When the Commission issued License No. CSF-1, it specifically contemplated that the respective rights and responsibilities of the licensees could be modified in the event of a change in the relationship between them.[8/] The Settlement Agreement unquestionably embodies such a change in the

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7/ See Part II.D., infra, concerning substantive requirements for Commission consent to transfer of control of a license.

8/ Paragraph 4A. of License No. CSF-1 provides:

> Notwithstanding any expiration, modification, cancellation or termination of the contractual arrangements between NFS and ASDA, NFS shall, so long as this license shall be in force with respect to NFS, be responsible for assuring that the provisions of this license and Commission regulations for protection of health and safety from radiation hazards are observed with respect to the facility and materials covered by this license. In the event of any expiration, modification, cancellation or termination of the contractual arrangement between NFS and ASDA or any other change in the relationship between them, including any proposed transfer from NFS to ASDA of responsibility for the operation and care of those portions of the facility in which the storage and burial of radioactive wastes will take place, NFS or ASDA may apply to the Commission for an appropriate amendment of this license reflecting the future responsibilities of NFS and ASDA with respect to satisfying Commission regulatory requirements. Until such amendment is issued, ASDA shall in no way prevent NFS from observing the requirements set forth in this condition.

the relationship.[9/] In the absence of a material consideration affecting health and safety, the NRC would have no basis to deny a license modification requested by both licensees.

In passing upon an application for an amendment to an operating license (or construction permit), "the Commission will be guided by the considerations which govern the issuance of initial licenses or construction permits to the extent applicable and appropriate." 10 CFR §50.91. Such a license "will be issued, to an applicant who qualifies," to transfer or acquire a production facility licensed pursuant to subsection 104b. of the Atomic Energy Act prior to December 19, 1970. 10 CFR §50.21(b)(1) (emphasis added)[10/] Moreover, "upon determination that an application for a license meets the standards and requirements of the act and regulations, and that notifications, if any, to other agencies or bodies have been duly made, the Commission will issue a license, or if appropriate a construction permit, in such form and containing such conditions and limitations, including technical specifications, as it deems appropriate and necessary." 10 CFR §50.50 (emphasis added).

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9/ Under Section 3 of the Settlement Agreement, when effective, the lease between NFS and NYSERDA would be deemed to have expired according to its terms on December 31, 1980, the leased premises would have been surrendered by NFS and accepted by NYSERDA, and responsibility for waste storage would have been surrendered by NFS and assumed by NYSERDA. NMSS was cognizant of the dispute between NFS and NYSERDA and these elements of the contemplated settlement.

10/ License No. CSF-1 was issued pursuant to subsection 104b. of the Atomic Energy Act, 42 U.S.C. 2134 (1964). License, ¶2A.

If the Commission is persuaded of its qualifications, an applicant is entitled to have a license, or amendment, issued. Westinghouse Electric Corp. v. U.S. Nuclear Regulatory Commission, 598 F.2d 759, 772 (3d Cir. 1979). The relevant standards for determining that a license, or amendment, will be issued are set out at 10 CFR §50.40. If I was not persuaded that NYSERDA is financially and technically qualified to engage in the proposed activities or that the health and the safety of the public will not be endangered, I would not sustain the issuance of the amendment; conversely, however, since I am persuaded on these points, for the reasons outlined in the next part of this decision, the amendment must be issued now.

B. Technical and Financial Qualifications of NYSERDA

Petitioner next challenges the licensing action on the grounds that (1) the technical qualifications of NYSERDA "have never been ascertained" and (2) "it is questionable whether the State has the financial resources as well." Petition at 4-5.

The qualifications of NYSERDA were discussed in a safety evaluation report prepared when Change No. 32 was issued. The report concluded that the proposed action involved no significant hazards consideration.[11/] It

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11/ Safety Evaluation Report Related to Amendment No. 32 to Facility Operating License CSF-1, Division of Fuel Cycle and Material Safety, February 1982, at 4-5, reproduced in relevant part as an Appendix to this decision.

examined the risks to the public health and safety that would be presented at the time NYSERDA acquired the facility. The report found that NYSERDA's subsequent operation of the facility will not involve a significant increase in the probability or consequences of an accident previously evaluated, or the possibility of creating a type of accident different from those that had been evaluated, or any reduction in margins of safety. The Sierra Club takes exception to these findings only insofar as they rest upon the evaluation of qualifications of NYSERDA as reflected in the report's statement that the Commission "...considers NYSERDA, as an agency of the State of New York, to possess sufficient institutional stability and resources, to enable it to acquire the technical qualifications to prevent accidents, or mitigate their consequences, if a licensed operator is needed when NYSERDA, or its successor, reacquires the facility."

Petitioner argues that the Staff's conclusions regarding NYSERDA's qualifications "...are in the realm of pure conjecture." It asserts that, "whether NYSERDA has the financial and technical qualifications requires a hearing before the license is transferred, when NFS is still present" (emphasis in petition).

The safety evaluation report properly examined the bases upon which it is reasonable to anticipate that NYSERDA would have, or would be able to obtain, the necessary technical and financial qualifications, should a licensed operator be needed upon completion of the project. This examination included a review of the condition of the facility after completion of

decontamination and decommissioning in accordance with requirements prescribed by the Commission and the observation that NYSERDA will be required (see note 6, supra) to comply with technical specifications and such other conditions as the Commission finds to be necessary and proper.

The flaw in the position of the Sierra Club is its assumption that the health and safety of the public would be jeopardized if, upon completion of the Project, NYSERDA were then found not to be technically qualified and the licensed operator, NFS, had been relieved of responsibility. The proposition that NFS could be relied upon (or, in light of the West Valley Demonstration Project Act, should be expected) to maintain its technical qualifications over the many years that the facility will be in DOE's possession is doubtful. Even if that is assumed, Change No. 32 does not place the health and safety of the public at risk, since there can be no transfer of the facility to NYSERDA, if a license (with appropriate technical specifications) is still required, until the license has been further amended. Unless NYSERDA is found technically qualified to perform the acts necessary at the time, such an amendment will not issue and, as a practical matter, DOE will be obliged to retain possession and hence to perform those acts on a continuing basis that might be necessary to protect the health and safety of the public.[12/]

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12/ If there were any substantial reason to doubt the technical and financial qualifications of NYSERDA, some reservation might have been expressed by DOE with respect to issuance of Change No. 32. On the contrary, DOE indicated to the Commission its agreement with that license amendment before it was issued. Letter from R. Tenney Johnson, General Counsel, DOE to Richard E. Cunningham, Director, Division of Fuel Cycle and Material Safety (February 10, 1982).

More importantly, the technical qualifications of NYSERDA to maintain the site and wastes stored at the site, in accordance with applicable regulations, were reviewed at the time the license was originally issued. At the insistence of the Commission, the State of New York formally accepted this responsibility.[13/] It was the judgment of the Commission that the State (through ASDA) possessed the necessary qualifications, although the details of the required management would be defined at a later date.[14/] The issuance of Changes No. 31 and 32 is fully consistent with this approach, because it will be the obligation of NYSERDA (assuming termination of NFS's rights and responsibilities) to reacquire the facility "in accordance with such technical specifications and subject to such other provisions as the Commission finds necessary and proper under the Atomic Energy Act and Commission regulations."

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13/ The State of New York accepted responsibility "...for the proper maintenance of the Western New York Nuclear Service Center ('Site'), and for the wastes to be stored at the Site, in perpetuity in accordance with all applicable federal, state or local laws, regulations or licenses." Amendment No. 1 to the Application for Licenses of the New York State Atomic Research and Development Authority, April 8, 1963, reprinted in Remedial Action at West Valley, New York: Oversight Hearing Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 96th Cong., 1st Sess. 133 (1979).

14/ Paragraph 4B. of License No. CSF-1 provides for the definition of such details of management as follows:

> To the extent that the operation of the facility under this license results in the production of radioactive wastes to be stored in portions of the facility or in improvements hereafter constructed at the site, or otherwise to be managed at the site, beyond the term of this license or any superseding license, NFS or ASDA may apply to the Commission for an appropriate amendment of this license or any superseding license with respect to such continued storage or management in accordance with Commission regulations.

The issue of NYSERDA's financial qualifications was considered and resolved, along with technical qualification issues, at the time of issuance of License CSF-1. As already noted above, the need to have long-term care under the management of a financially qualified institution was such a significant factor in the Commission's evaluation that a formal commitment from the State was solicited and obtained in advance of construction. Thus there is nothing new in the statement in the safety evaluation report that the Commission "considers NYSERDA, as an agency of the State of New York, to possess sufficient institutional stability and financial resources" to enable it to take over the facility upon completion of the project.[15/] The Sierra Club cautions NMSS "to remind itself that NYSERDA claimed before Congress that it did not have the financial resources to solidify the high level liquid wastes at West Valley and requested assistance from the Federal government." Petition, at 5. But, as NYSERDA advises, the State's call for substantial federal participation in solidification was a matter of equity and justice unrelated to the adequacy of the State's financial resources.[16/]

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15/ Because a State enjoys taxing powers that are unavailable to most applicants, little if anything should be needed other than its commitment to assume responsibility for the activities in question. See 47 FR 13750 (1982) (to be codified as amendment to 10 CFR §50.33(f))(no financial review to be conducted if electric utility applies for a license to construct or operate a production or utilization facility for commercial or industrial purposes).

16/ Letter from Howard A. Jack, First Deputy Counsel, NYSERDA, to Richard E. Cunningham, Director, Division of Fuel Cycle and Material Safety (May 27, 1982).

The record bears this out.[17/]

I conclude that NYSERDA's technical and financial qualifications had properly been ascertained and that the the issuance of Change No. 32 did not involve significant hazards considerations.

C. Leakage from NRC-Licensed Burial Ground

Petitioner expresses concern about possible leakage of radioactive materials from the NRC-licensed burial ground. Whatever the merit of this claim may be, it has no bearing upon the issuance of Change No. 32, which is concerned with the identification of the licensee who is to be responsible for the carrying out of responsibilities under the license.[18/] The duty

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17/ See Oversight Hearing, supra note 13, at 38-44, 81-91 (statement of James Larocca, Chairman, NYSERDA) ("substantial legal and moral responsibility on the part of the Federal Government"); H.R. Rep. No. 96-1100, Part II, 96th Cong. 2d Sess. 14 (1980).

18/ The Sierra Club appears to be especially concerned about the presence of certain sand lenses at the West Valley site. On the basis of available information, NMSS believes that sand and waste alike are fully confined within a barrier of impermeable clay material. However, in order to further characterize the geologic and hydrologic characteristics at the site, NRC has initiated a research program, which will include the obtaining and analysis of appropriate sample materials from drilled holes. The extent and significance of the sand lenses is being considered in the research program. Reports on the program will be placed in the Public Document Room as they become available.

of NYSERDA to care for the wastes in perpetuity includes the duty to take such actions as may be necessary from time to time to protect health or to minimize danger to life or property.[19/] I have already concluded that NYSERDA's technical and financial qualifications to care for the wastes had properly been ascertained; it is unnecessary to repeat that discussion here.

Petitioner's claim that the burial of fuel assemblies may have violated the license is not only unsupported, but it, too, is beside the point. One of the concerns of the Commission was to provide for responsibility in the event that NFS were to fail to perform its license obligations.[20/] The assurances of the State were given, among other things, to satisfy this concern.[21/] Moreover, even if the burial of fuel assemblies were a violation of the license -- and I have no reason to believe such to be the case -- NYSERDA

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19/ The Commission may establish, by order, instructions governing the possession and use of special nuclear material and byproduct material, where necessary or desirable to protect health or to minimize danger to life or property. Atomic Energy Act of 1954, sec. 161b, 42 U.S.C. 2201(b).

20/ Letter from Robert Lowenstein, Director, Division of Licensing and Regulation, AEC, to Oliver Townsend, Chairman, ASDA, February 13, 1963, reprinted in Oversight Hearing, supra note 13 at 129-130.

21/ Letter from Townsend to Lowenstein (April 8, 1963), id. at 131-132.

would continue to have recourse against NFS[22/]. The assumption that Change No. 32 would place large financial burdens on NYSERDA therefore appears to be lacking any basis in fact.[23/]

D. License Transfer

The Sierra Club claims that issuance of Change No. 32 violated 10 CFR §50.80, which requires Commission consent to any "transfer of control of the license" for a production facility and sets out certain procedural conditions for the granting of such consent. Assuming, without deciding, that the

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22/ Settlement Agreement, supra note 1, Section 9(b)(2). NYSERDA would be barred as to violations known by it prior to February 19, 1982. Both NFS and NYSERDA imply, in their responses to the Sierra Club's petition, that there were no relevant license violations chargeable to the knowledge of NYSERDA. The facility was inspected by NRC on February 2-5, 1982. No items of noncompliance were observed at that time. Letter from R. W. Starostecki, Director, Division of Project and Resident Programs, NRC Region I, to R. W. Deuster, President, NFS (March 10, 1982) (discussing Inspection 50-201/82-01). The Sierra Club has not explained its basis for believing that NFS is not in compliance with License No. CSF-1.

23/ The Sierra Club asks, in connection with the possibility of a license violation: "How could the NRC take regulatory [action] against a non-licensee?" It is unnecessary to respond to this point since, as explained in the text, the responsibility for remedial action would be that of NYSERDA. NFS would nevertheless remain subject to the civil penalty provisions set out at section 234 of the Atomic Energy Act, 42 U.S.C. 2282, which apply to "any person" who commits specified violations. The termination of rights and responsibilities under a license does not relieve a person of potential liability for civil penalties for acts done in violation of a license during its term. H.R. Rep. No. 691, 91st Cong., 1st Sess. 11-12 (1969).

factual circumstances here involve such a transfer of control,[24/] consent should be given if NYSERDA is qualified to be the holder of the license and the transfer is consistent with applicable provisions of law. NYSERDA has been found to be technically and financially qualified, and no question has been raised with respect to consistency with other laws, regulations, and orders. Accordingly, this memorandum will constitute a formal record of the determinations specified in §50.80 and an express consent in writing to such transfer, subject to the provisions of Change No. 32 as originally issued.[25/]

E. License Termination

Petitioner points out that a license for a production facility may not be terminated until a decontamination plan has been reviewed and approved, and dismantling and disposal operations have been completed. 10 CFR §50.82. Since Change No. 32 does not terminate the license, this provision is inapplicable.

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24/ See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 22-23 (1978); Public Service Company of Indiana, Inc. (Marble Hill Nuclear Operating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 201 (1978).

25/ The requirement for "appropriate notice to interested persons," 10 CFR §50.80(c), was satisfied by the publication of a Federal Register notice on November 13, 1981. That notice alerted interested persons to the possibility that NYSERDA would succeed to the rights and responsibilities of NFS. See Part II.G, below.

Even if major portions of the facility are decontaminated under the West Valley Demonstration Project Act so as to qualify for release to unrestricted use, NYSERDA's continuing responsibility as licensee would extend to the storage and handling of all radioactive wastes remaining at the site. See 10 CFR §150.15(a)(1). Termination of that responsibility must be preceded by observance of the procedures set out in §50.82.

F. "Dangerous Licensing Precedents"

The Sierra Club complains that the DOE's undertaking of decommissioning by DOE allows licensees a way to escape a responsibility that is properly theirs. Whatever merit this argument may have, it is addressed not to Change No. 32, but to a prior amendment (Change No. 31) instead.[26/] Change No. 31 authorized the transfer of the facility to DOE, and that license amendment has not been challenged by petitioner.

The West Valley Demonstration Project Act reflects a legislative judgment that under the conditions prevailing at West Valley, the conduct of certain decontamination and decommissioning activities by DOE is in the public interest. This judgment reflects the history of the facility, including the federal role in its establishment, and the benefits associated with demonstration of solidification technology. DOE's assumption of decommissioning responsibilities is therefore unlikely to be a significant precedent. But in any event, this is a policy issue which was resolved by law and cannot be questioned in NRC licensing proceedings.

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26/ See note 6, supra.

G. Denial of Public Review

Change No. 32 was issued on February 11, 1982. This action was taken nine working days after NFS had submitted its application, and without prior notice of receipt of such application in the Federal Register. Petitioner asserts that the Commission's "haste" denied the interested public's right to be heard.

There was no legal requirement for any prior published notice of the action. A notice of proposed action with respect to the amendment of a license for a production facility is required only if a "significant hazards consideration" is involved. 10 CFR §2.105(a)(3).[27/] The staff's Safety Evaluation Report explained why the requested amendment did not involve a significant hazards consideration. For the reasons presented there and in the further discussion in this memorandum, I conclude that this determination was correct, and that the Sierra Club had no statutory right to prior notice or to a hearing.

The Commission had in fact provided public notice that the termination of the rights and responsibilities of NFS was under consideration. A notice

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27/ But see Sholly v. Nuclear Regulatory Commision, 651 F.2d 780 (D.C. Cir. 1980), rehearing denied, 651 F.2d 792, cert. granted, 451 U.S. 1016 (1981).

of receipt and availability of application for license amendment, published November 13, 1981, 46 FR 56086, advised interested persons that on October 6, 1981, NRC had received an application for amendment "to relieve NFS of all operational responsibility under the license." Over the next three months, neither the Sierra Club nor any other member of the public gave any indication of any interest in the subject matter of the application.

The NFS application was denied on January 11, 1982, to avoid adjudication of issues being litigated at the time in federal court. The new application, filed by NFS on February 1, 1982, proposed that the termination of NFS rights and responsibilities be conditioned upon a judically-approved settlement, thereby eliminating the concern which had been cited as grounds for denial of the prior application. The new application could properly have been characterized as having the same objective as the earlier one -- "to relieve NFS of all operational responsibility under the license." Under these circumstances, bearing in mind the absence of response to the earlier announcement in the Federal Register, it was entirely reasonable to take action without further notice. Further, it appeared to the staff that issuance of Change No. 32 could avoid further delay in transfer of the facility to DOE. The Commission's decision on Change No. 31, on November 6, 1981, emphasized that the solidification program at West Valley should not be

delayed.[28/] The action of the staff, in issuing Change No. 32 nine working days after receipt of the application, was responsive to this direction. Indeed, had this action not been taken, the commencement of the demonstration project could have been set back indefinitely.

H. Termination of Prior Proceeding

Petitioner states that it was a party in a prior construction permit proceeding in Docket No. 50-201. It asserts that, to its knowledge, that hearing has never been officially terminated. In fact, the hearing was

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28/ In its order, supra note 6, at 943, the Commission made the following observations:

> Congress also recognized that the solidification program at West Valley would provide a significant step in the nation's overall waste management program and, thus, should not be delayed. West Valley would be the first full-scale demonstration facility for solidifying high-level waste and could be expected to provide significant technical knowledge. S. Rep. No. 96-787, 96th Cong. 2d Sess. 5 (1980). Accordingly, the project was perceived as the next logical step in the national effort to demonstrate technology capability in the nuclear waste area, H.R. Rep. No. 96-1100, Part I, 96th Cong., 2d Sess. 7 (1980), and described as a necessary step in the Government's program for disposing of high-level radioactive waste. 126 Cong. Rec. H. 8765 c.3 (daily ed. September 1980); 126 Cong. Rec. S. 12762 c.3 (daily ed. September 17, 1980). Thus, delay in initiating the West Valley program could be expected to also delay the long-awaited resolution of the nation's nuclear waste problem. Such delay would be inconsistent with Congress' continuing concern, as evidenced by continuing legislative activity, that the waste problem be expeditiously resolved. This circumstance also supports the Commission's finding that it is in the public interest to make this license amendment immediately effective.

terminated by order of the Commission, Mixed Oxide Fuel, CLI-77-33, 6 NRC 862 (1977). The order specifically noted that one of the proceedings affected by the decision was Docket No. 50-201. The Commission directed that the order "shall be filed in these dockets and shall be served on all parties of record." The order was published promptly thereafter. 42 FR 65334, December 30, 1977. A memorandum of decision providing the reasons for the order was issued on May 8, 1978, Mixed Oxide Fuel, CLI-78-10, 7 NRC 711 (1978), again with the direction that it be filed in the dockets of the listed proceedings and served on all parties of record.

The Sierra Club denies receipt of copies of the order and memorandum. However, whether they were or were not served is, in the last analysis, irrelevant. The fact is that the Commission imposed a moratorium on those proceedings. Westinghouse Electric Corp. v. U.S. Nuclear Regulatory Commission, 598 F.2d 759, 773-776 (3d Cir. 1979). Any new application by a licensee would be entertained as provided in the Commission's rules. There was no longer any pending proceeding and, accordingly, no requirement to notify the Sierra Club or others similarly situated.

Further, even if the construction permit proceeding were treated as not having been terminated, NMSS would have been authorized to issue Change No. 32 without notifying parties to that proceeding, since the subject matter of Change No. 32 (NFS rights and responsibilities upon completion of the West Valley Demonstration Project) is by no stretch of the imagination "related" to the dormant construction permit application. See 10 CFR § 2.717.

## III. Conclusion

I have reviewed the Sierra Club's petition because of the novel legal and factual issues arising out of the transfer of the West Valley facility and the provisions for its subsequent reacquisition under NRC license. I have concluded that NYSERDA has the necessary technical and financial qualifications to assume the responsibilities that are defined in License No. CSF-1, and that the issuance of Change No. 32 is in all respects in accordance with applicable laws and regulations.

The issuance of Change No. 32 is confirmed.

John G. Davis, Director
Office of Nuclear Materials Safety
and Safeguards

Dated at Silver Spring, Maryland this 23 day of August 1982.

APPENDIX

Excerpt from Safety Evaluation Report Related

to Facility Operating License CSF-1

The proposed license modification would terminate NFS as the facility operator without changing the authorization of NYSERDA to hold title to the facility. NYSERDA is not currently licensed to operate the facility nor would it be under the proposed modification. Whether a licensed operator possessing the requisite financial and technical qualifications will be necessary when NYSERDA, or its successor, reacquires the facility cannot be determined now. It is clear that upon completion of the West Valley Demonstration Project, radiological risk at the facility will be reduced from its present level. It is not clear whether that reduction in radiological risk will permit release of the facility to unrestricted use not requiring a Commission licensed operator. This cannot be determined now because DOE plans for operation of the facility have not been finalized and the requirements for decontamination and decommissioning the facility have not yet been established. It is important to note, however, that under the West Valley Demonstration Project Act, the Commission will prescribe these decontamination and decommissioning requirements. In doing so, the Commission will determine the level of long term radiological risk remaining at the facility and any need for a licensed operator. The Commission considers NYSERDA,

as an agency of the State of New York, to possess sufficient institutional stability and financial resources, to enable it to acquire the technical qualifications to prevent accidents or to mitigate their consequences, if a licensed operator is needed when NYSERDA, or its successor, reacquires the facility. Under paragraph 7, NYSERDA would be required to comply with technical specifications and such other conditions as the Commission finds to be necessary and proper. Operation of the facility at that time will not involve a significant increase in the probability or consequences of an accident previously evaluated.

When NYSERDA, or its successor, reacquires the facility there will be no possibility of creating a type of accident different from those presently evaluated because the project facilities will have been decontaminated and decommissioned and no new activities are authorized.

In addition, the margins of safety will be increased, rather than reduced, since the high level liquid radioactive waste will no longer be present and since the facility will have been decontaminated and decommissioned according to such requirements as the Commission may prescribe.

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| Marvin Resnikoff<br>Sierra Club | COMPL. DEADLINE | 5/21/82 | |
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| TO:<br>Cunningham, NMSS | INTERIM REPLY | | PREPARE FOR SIGNATURE OF:<br>☐ CHAIRMAN<br>☐ EXECUTIVE DIRECTOR<br>OTHER: Davis |
| | FINAL REPLY | | |
| | FILE LOCATION | | |

DESCRIPTION ☒ LETTER ☐ MEMO ☐ REPORT ☐ OTHER

2.202 Show Cause Petition on why change #32 to NRC license no. CSF-1 should not be rescinded pending a public hearing

SPECIAL INSTRUCTIONS OR REMARKS

TCHF to Davis Ltr 4/30/82 interim response
Davis signed 4/26/82
Final response signed by Davis 5/23/82

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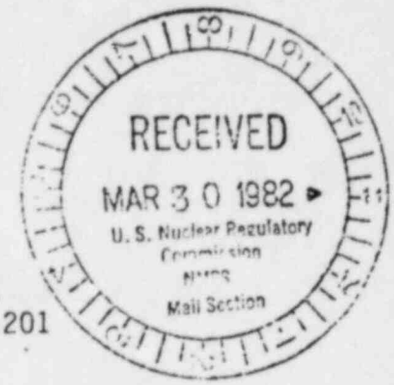
March ~~18~~ 26, 1982




Richard E. Cunningham, Director
Division of Fuel Cycle and Material Safety
Office of Nuclear Material Safety and Safeguards
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Lic. No. CSF-1
Docket No. 50-201

Dear Mr. Cunningham:

With this letter, the Sierra Club files a show cause petition, pursuant to 10 CFR 2.202, on why license change #32 to NRC license no. CSF-1 should not be rescinded pending a public hearing on the matter. License change #32 terminates the responsibilities of Nuclear Fuel Services under CSF-1 and transfers these responsibilities to New York State Energy Research and Development Authority (NYSERDA). This termination of NFS' license responsibilities is a major NRC action with important precedents, yet it was approved by Staff without prior notice of the receipt and availability of the application in the Federal Register and without a public airing.

As indicated in the attached petition, important questions regarding the technical and financial qualifications of the remaining licensee NYSERDA have been ignored in the sketchy five page Staff review. Important policy and procedural precedents are being set by the Staff action. The public interest will not be served unless these issues have a full airing. Our petition requests a rescission of license change #32 and a public hearing. Since contract negotiations regarding this license transfer are moving at a rapid pace, we are asking that you consider this request on an expedited basis.

Please inform us of your disposition of this matter, and include us on any and all distribution lists regarding docket no. 50-201.

Sincerely yours,

Mina Hamilton
Director

Marvin Resnikoff
Technical Consultant

cc: V. Parker
K. Sheldon
H. Fox
P. Weinberg
R. Lippes
S. Sage
M. Hamilton
L. Finaldi
D. D'Arrigo
J. Riley
G. Coan
R. Caplan
C. Mongerson
P. Gitlen
P. Skinner
R. Abrams
J. Clemente
R. Ottinger
S. Lundine
NRC Secretary
J. Wolfe
A.T. Clarke, Jr.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ionable whether the State has the financial resources as well. The Staff would do well to remind itself that NYSERDA claimed before Congress that it did not have the financial resources to solidify the high level liquid wastes at West Valley and requested assistance from the Federal government. If major alterations, such as exhumation of the burial ground, are required hence, will New York State again request assistance from the Federal government, and will such assistance be forthcoming? These are important questions that must be resolved before a license is terminated or transferred. They affect whether the site will be properly cared for and whether the site will be inimical to the health and safety of the public.

UNEVALUATED SAFETY QUESTIONS
POSSIBLE LICENSE VIOLATIONS

3. The Staff further states that "when NYSERDA, or its successor, reacquires the facility there will be no possibility of creating a type of accident different from those presently evaluated because the project facilities will have been decontaminated and decommissioned and no new activities authorized." These remarks are also conjectural and may be contradicted by information presently being developed. The Sierra Club believes that solid wastes were buried in permeable strata in the NRC-licensed burial ground. No previous analysis with which we are aware evaluates movement of radioactivity along permeable strata. The previous studies assume that wastes are buried in impermeable silty till, as required by the license. Information from core drilling and monitoring wells will be developed this summer by the NYS Geological Survey, under funding from the NRC. These drillings may help clarify the geology of the NRC-licensed burial ground if the work is scientifically-based and done with integrity. However, if an insufficient number of drillings are conducted, if core samples are not taken at frequent enough intervals or if there is controversy regarding the interpretation of the core sampling,

LICENSE TERMINATION, 10 CFR PART 82

5. Part 50.82 applies to license termination. As the NYSERDA Dec. 17 letter makes clear, NFS has not filed a decontamination plan and environmental report, as required by 50.82. To terminate a license the Commission must determine that a site has been properly decontaminated and

the applicant must provide reasonable assurance that the action is not inimical to the health and safety of the public. But the application on file has none of this and the staff has not made a proper safety evaluation of the applicant's request. This includes an evaluation of the NRC-licensed burial ground, fuel pool and reprocessing building.

DANGEROUS LICENSING PRECEDENTS

6. The action by the NRC Staff sets extremely bad precedents for future license terminations. It essentially allows DOE the ability to "launder" an NRC operating license, relieving licensees of decommissioning responsibilities. Had DOE not taken possession of the West Valley site, then NFS' termination would have brought on a full public hearing on NYSERDA's qualifications and on whether NFS had left the site in properly decommissioned condition. However, with DOE taking possession of the site, the final decommissioning time is postponed 20 years hence and NFS will escape this responsibility, if change #32 is allowed to take effect. This same scenario could occur for a nuclear reactor. DOE could assume decommissioning responsibility while the licensee terminated its responsibility. In this fashion, no licensee need ever be concerned about decommissioning. This sets a very bad precedent for other nuclear facilities.

PUBLIC INTEREST NOT SERVED

7. The Commission appears to have purposefully denied the public the opportunity to review these matters. The receipt and availability of several prior license amendments

3164 M[illegible] Street | Buffalo, New York 14214 (716) [illegible]-9100

Director of Nuclear Material Safety and Safeguards )
)
U.S. Nuclear Regulatory Commission )

Docket No. 50-201
NRC Lic. No. CSF-1

Show Cause Petition

On Why License Change #32 Should Not Be Rescinded Pending a Public Hearing

The Sierra Club hereby petitions the Director of Nuclear Material Safety Safeguards to issue a show cause order, pursuant to 10 CFR 2.202, on why license change #32 to NRC license no. CSF-1 should not be rescinded pending a public hearing in the matter. The basis for this request is stated below.

SIERRA CLUB INTEREST

The Sierra Club is an environmental organization consisting of 300,000 members nationwide, 18,000 in New York State and 800 in Western New York. Our interest in the matters of Nuclear Fuel Services and the West Valley site has been long-standing, from Dec., 1970 to the present. In April, 1974, the Club became a full party to the NRC construction permit and licensing proceedings regarding an expansion of the NFS reprocessing operation and was an active, responsible participant. As you are aware, the licensee announced, in Sept., 1976, that it was withdrawing from the reprocessing business. It requested prior to that, in April, 1976, that NYSERDA take over responsibility for the nuclear waste materials on the West Valley site. To our knowledge, the hearing regarding Nuclear Fuel Services construction permit has never been formally terminated, at least the parties to Docket No. 50-201 were never informed that notices and license amendments would no longer be received. Before the U.S. Congress, the Club supported the West Valley Demonstration Project and efforts to solidify the high level liquid wastes in an environmentally safe manner. We have

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expressed frequent concern about the status of the high level waste tanks and the need to remove the liquid wastes.

The Club is seriously concerned about the institutional and financial arrangements for care and maintenance of the spent fuel in the spent fuel pool and the two burial grounds, the attendant risk to the public health and safety absent proper institutional and financial arrangements, and the cavalier actions of the NRC Staff. Several of our members live within five miles of the West Valley site and almost all depend on Lake Erie, downstream of the outflow of Cattaraugus Creek, for our water supply. Our Western New York members would therefore be affected by radiation released from the plant facilities, particularly the NRC-licensed burial ground. Our members nationwide would be affected by the precedents being established by the staff in granting a license termination and transferral so precipitously. Because of these affected interests concerns and the damaging precedents being set by the NRC Staff action, on March 6 the Radioactive Waste Committee (the Board of the Radioactive Waste Campaign) and on March 13 the Atlantic (New York State) Chapter of the Sierra Club approved this show cause petition and other, including any necessary subsequent, actions.

BACKGROUND

On August 19, 1981, the Commission received an application by NYSERDA, joined by DOE, to authorize transfer of the facility to DOE, in order that DOE could undertake high level waste solidification operations under the West Valley Demonstration Project Act. The availability and receipt of this application was properly noticed in the Federal Register Sept. 2, 1981 and the license amendment, change #31, was granted Sept. 30, 1981. On October 6, 1981, the Commission received an application from NFS requesting license change #32 which would terminate NFS' responsibility under CSF-1 and transfer these responsibilities to NYSERDA. The receipt and availability of this application was also properly noticed in the Federal Register Nov. 13, 1981. However, in a let-

ter to the Commission dated Dec. 17, 1981, this application was opposed by NYSERDA.

> As a preliminary procedural matter, NFS' two-page letter of October 6 falls far short of the requirements of the Commission's regulations for an application to terminate an operating license (see 10 CFR Part 50). For example, NFS' October 6 letter contains virtually none of the general information required by section 50.33, does not contain the decontamination plan required by section 50.82 or any environmental report on decontamination of the facility, and does not include the technical information required by section 50.34.

NYSERDA requested a hearing in the matter. The Commission denied the application on January 11, 1981.

On Feb. 1, 1982, NFS submitted a new proposed license amendment. Differing from the previous two license applications, no notice of the receipt and availability of the Feb.1, 1982 application appeared in the Federal Register. Supporting letters by NYSERDA and DOE were received Feb. 9 and 10, respectively, and license amendment #32 which terminates NFS' responsibilities and transfers these responsibilities to NYSERDA, was issued Feb. 11, 1982, a mere nine working days after receipt. Notice of the fait accompli appeared in the Federal Register Feb. 18, 1982.

Though the Club has engaged in discussions with NYSERDA representatives, we first became aware of these licensing actions upon reading citations in the NYSERDA/NFS agreement. We immediately called NRC Staff A.T. Clarke, Jr., to learn of these license amendments. After receiving and studying these changes, this action was brought. Had these changes been properly brought to our attention earlier, we would have entered these proceedings at an earlier date.

The Club requests that this license amendment #32 which terminates NFS' responsibility be withdrawn pending a full public hearing on the matter. The time constraints under which the Staff acted, produced a deficient five page Staff evaluation which, the Club believes, did not fully explore the policy, procedural and health and safety implications of the action. We request an opportunity to present tnese matters before the Commission.

TIMING OF NFS TERMINATION

1. According to the five page Staff evaluation, the health and safety risks of the site will be reduced by DOE's presence. After DOE departs the premises, in perhaps 20 years, NYSERDA will assume responsibility for the site. The Staff is unsure if, at that time,"a licensed operator possessing the requisite financial and technical qualifications will be necessary", since the radiological risk will be reduced. This matter cannot be determined now, according to Staff. In view of these uncertainties about the future state of the site, it is reasonable to inquire whether the license should be transferred at this time or when DOE departs the site. At that time, a full review of the status of the site can be made and the institutional and financial arrangements and qualifications of the license transferee determined. There is nothing in the West Valley Demonstration Project Act that requires that NFS' responsibilities be terminated at this time.

TECHNICAL AND FINANCIAL QUALIFICATIONS OF NYSERDA

2. The Staff further states that "the Commission considers NYSERDA, as an agency of the State of New York, to possess sufficient institutional stability and financial resources, to enable it to acquire the technical qualifications to prevent accidents or to mitigate their consequences, if a licensed operator is needed when NYSERDA, or its successor reacquires the facility." These assertions by the Staff are in the realm of pure conjecture. Whether NYSERDA has the financial and technical qualifications requires a hearing <u>before</u> the license is transferred, when NFS is still present. As the Staff knows and as NYSERDA made plainly aware in their Dec. 17 letter, the State never had operational responsibility for the site; it only was the landlord while NFS operated the facilities. The technical qualifications of NYSERDA have never been ascertained. Further, it is quest-

an independent geologic survey of the NRC-licensed burial ground by an outside firm without the biases of the New York Geologic Survey may be necessary. If drillings show that NFS violated its license, the NRC will have no recourse . How could the NRC take regulatory against a non-licensee? Other parties have also expressed concern about the state of the NRC-licensed burial ground. In the Fall, 1980, before the Argonne Senior Technical Consultants Board, the State Department of Health attributed high tritium levels in the ravine between the State and NRC-licensed burial grounds to leakage from the NRC-licensed burial grounds and called for its exhumation. Given the high curie content of this burial ground, the illegal burial of Hanford spent fuel assemblies into the ground, local governments such as the Buffalo Common Council and the Erie County Legislature in resolutions have called for exhumations of both burial grounds. If a health and safety study, with this geological information factored in, shows that it is necessary to exhume the NRC-licensed burial ground, will NYSERDA have the financial and technical qualifications to perform the work? Since this cannot be known at this time, the license transfer should wait until the integrity of the burial ground has been definitively demonstrated and a full accounting of the possible exhumation costs provided.

LICENSE TRANSFER, 10 CFR PART 80

4. This is not a simple licenseamendment under Section 50.91, but a termination of NFS license responsibilities, under 10 CFR 50.82, and transfer of its responsibilities to NYSERDA, under 10 CFR 50.80. NYSERDA has never had operational responsibility for the West Valley site. A license transfer under 50.80 (b) requires technical and financial data on the transferee and 50.80(c) requires an "appropriate notice to interested persons..." When NYSERDA assumes responsibility for the site 20 years hence, will a hearing take place on whether NYSERDA has the requisite financial and technical qualifications? It would then be too late to consider these questions.

were properly noticed in the Federal Register allowing interested parties such as NYSERDA the opportunity to respond. In this licensing termination amendment, this was not done. What could be the reason for this haste - nine working days - to approve an application and the denial of the interested public's right to be heard?

IMPROPER NOTICE

8. The Sierra Club is a full party in a proceeding on a construction permit and operating license application by NFS in Docket No. 50-201. An ASLB was appointed, contentions accepted and a distribution list set up for all full parties. To our knowledge, this hearing has never been officially terminated, though the Staff has brought it to our attention that a footnote to the Commission's GESMO order did terminate the NFS proceeding. No official notice was sent to all parties in Docket No. 50-201, however. It is expected that if an applicant is withdrawing an application, or further in this case, terminating responsibility under an existing license, a notice would be issued to all parties on the distribution list. Further, the Club does not consider this action a simple license amendment under 10 CFR 50.91, but more properly, an action under 50.80 (license transfer) and 50.82 (termination) which requires notice under the regulations.

DIRECTOR, NMSS, SHOULD RESCIND LICENSE CHANGE #32
CALL FOR PUBLIC HEARING

9. For good health and safety, procedural and policy reasons, the Club believes the Staff has seriously erred in not providing notice of the receipt and availability of the application in the Federal Register and in not providing the opportunity for a hearing. The action by the Staff was precipitous and in error. The Club therefore requests the Director of Nuclear Material Safety and Safeguards to rescind license change #32 to NRC license no. CSF-1 and to hold a public hearing in this matter.