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May 24, 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

Re: Sierra Club's Petition for a Show Cause Order to Rescind Change No. 32 to License No. CSF-1.

Dear Mr. Cunningham:

Nuclear Fuel Services, Inc. (NFS) hereby responds to your letter of April 27, 1982 requesting NFS's comments on the March 26, 1982 petition of the Sierra Club for a show cause proceeding to rescind Change No. 32 to License No. CSF-1. From your letter, NFS understands that the Commission is treating the petition as a request for reconsideration rather than as a request for a show cause notice.

Summary

Change No. 32 was issued in accordance with NRC regulatory procedures after the Commission determined that it would involve no significant hazards. The Sierra Club has alleged no violations of any regulatory requirements for which an order to show cause could be issued against NFS pursuant to 10 C.F.R. § 2.202. The Club's contention that important issues remain to be resolved are unsubstantiated and patently incorrect. NFS, therefore, submits that since the Sierra Club has presented no legitimate reason why Change No. 32 should be rescinded, its request, whether considered a request for a show cause proceeding or for reconsideration of the Commission's issuance of Change No. 32, must be denied.

FEE EXEMPT

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Background

Nuclear Fuel Services, Inc. and the New York State Energy Research and Development Authority (NYSERDA) are joint licensees under NRC Provisional Operating License CSF-1. The license, issued April 19, 1966, authorizes NYSERDA to own the West Valley, New York facilities used for the reprocessing of spent nuclear fuel, and the storage and disposal of radioactive wastes, and authorizes NFS to operate those facilities.

On October 1, 1980, the West Valley Demonstration Project Act, Pub. L. 96-368 ("Act"), was enacted. The purpose of the Act was to authorize the Department of Energy ("DOE") to carry out a high level liquid nuclear waste management demonstration project at West Valley. The Act, Section 2(b)(4)(A), provides that "(t)he State (of New York) will make available to the Secretary (of DOE) the facilities of the Center and the high level radioactive waste at the Center, which are necessary for completion of the project" (hereinafter "the West Valley facilities"). Section 2(a)(5) of the Act provides that DOE shall decontaminate and decommission the facilities in accordance with such requirements as the Commission may prescribe, and Section 2(c) directs that DOE shall consult with the Commission and submit plans and safety reports to the Commission for review and comment.

NYSERDA and DOE entered into a Cooperative Agreement, effective October 1, 1980, to implement the demonstration project. Pursuant to the Cooperative Agreement, NYSERDA agreed to grant exclusive use and possession of the West Valley facilities to DOE for the duration of the Project, which is expected to last for more than fifteen years. The Agreement further provides that upon project completion, NYSERDA will accept surrender of the decontaminated and decommissioned facilities from DOE.

A necessary precondition to the lawful transfer of the NRC licensed facilities and radioactive materials to DOE was a valid amendment to License CSF-1 permitting such a transfer. Pursuant to an application by NYSERDA, joined by DOE, on September 30, 1981, the Commission issued a license amendment, Change No. 31, to License CSF-1. Change No. 31 authorized NFS and NYSERDA, as their interests appeared, to transfer exclusive possession of the West Valley facilities

to DOE, subject to certain conditions, in order to implement the West Valley Demonstration Project Act.

NFS opposed the issuance of that license amendment without NFS as licensee having the opportunity for a prior hearing, as authorized by NRC regulations. Although Change No. 31 was, on its face, permissive, NFS was concerned that the Change could become mandatory if a court order forced NFS to vacate the West Valley facilities. 1/ In that event, NFS would have been faced with undefined legal and economic consequences. NFS, therefore, filed with the NRC Commissioners a Motion to Postpone the Effectiveness of the License Amendment and a Request for Hearing. 2/ By Order dated November 6, 1981, the NRC Commissioners denied NFS's Motion, and directed the Chairman of the Atomic Safety and Licensing Board (ASLB) to establish a Licensing Board to conduct a hearing pursuant to NFS's request.

On October 16, 1981, NYSERDA obtained a partial summary judgment from the U.S. District Court for the Western District of New York requiring NFS to vacate the West Valley facilities. This Order was subsequently stayed and later reversed by the U.S. Court of Appeals for the Second Circuit. In remanding the case, the Court directed the District Court to act promptly to resolve the litigation.

1/ At that time NYSERDA and NFS were involved in active litigation in the U.S. District Court for the Western District of New York concerning their contractual rights and responsibilities with regard to the West Valley facilities.

2/ NFS also filed a petition with the U.S. Court of Appeals for the District of Columbia Circuit questioning the validity of Change No. 31 because of the manner in which it was issued. This petition was withdrawn on February 11, 1982, after the parties had reached agreement on the terms of their Settlement Agreement.

Under an order from the District Court to confer with a Magistrate regarding resolution of their differences, NYSERDA and NFS negotiated a Settlement Agreement, Stipulation, and Order (Settlement Order) to be submitted to the Court. As a part of their negotiated agreement, on February 1, 1982, NFS, joined by NYSERDA, submitted to the Commission an application to amend License No. CSF-1 3/ to provide for termination of NFS' responsibilities as a licensee effective on the occurrence of three conditions: 1) acceptance of surrender of the West Valley facilities by NYSERDA, 2) assumption of exclusive possession by DOE, and 3) occurrence of the "Settlement Date" specified in a settlement agreement and order. 4/ On February 11, 1982, the Commission issued Change No. 32, which provided that NFS's responsibilities and authority under the License would be terminated when the three conditions had been met.

In accordance with the procedures agreed to by NFS and NYSERDA pursuant to the terms of the proposed Settlement Order, on February 11, 1982, NFS notified the Licensing Board that NFS was withdrawing its Request for Hearing on Change No. 31. 5/ That Settlement Order was approved by the District Court on February 19, 1982. By the terms of

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3/ NFS had previously submitted a proposed amendment to License No. CSF-1 on October 6, 1981. That amendment would have automatically terminated NFS as a licensee upon DOE assuming exclusive possession and control of the West Valley facilities. The Commission, in a letter dated January 11, 1982, denied, without prejudice, that application because NYSERDA and NFS had not agreed on its terms.

4/ The proposed Settlement Order provided that certain provisions would become effective and binding on the parties if, within one year from the date the Court approved the Agreement, or such additional period as the parties actually agreed to, certain events had occurred.

5/ The Licensing Board granted NFS's withdrawal of request for hearing in an order dated April 30, 1982.

that Order, NFS was obligated, inter alia, to request the Commission "to dismiss the pending proceedings . . . initiated by NFS relating to Change No. 31 to License No. CSF-1, without prejudice to the initiation of further proceedings if the Settlement Date does not occur within one year . . . ."

By letter agreement dated February 18, 1982, NYSERDA and NFS agreed that NFS would transfer the West Valley facilities to DOE as soon as DOE was ready to accept possession, and, effective on such transfer, NYSERDA accepted surrender of the facilities. DOE assumed exclusive possession on February 25, 1982. Thus, two of the conditions necessary for Change No. 32 to be implemented have occurred.

Standards for Issuance of a Show Cause Order.

NFS agrees with the Staff's determination that the Sierra Club petition does not meet the standards for a show cause order.

Under 10 C.F.R. § 2.202 an order to show cause shall "[a]llege the violations with which the licensee is charged, or the potential hazardous conditions or other facts deemed to be sufficient ground for the proposed action." 10 C.F.R. § 2.206 allows any person to request the Director of Nuclear Material Safety and Safeguards to issue such an order provided that the request "shall specify the action requested and set forth the facts that constitute the basis for the request."

Thus, a request for a show cause order must meet a certain factual threshold before it need be considered by the Director of Nuclear Material Safety and Safeguards. The Director is required to make an "inquiry appropriate to the facts as asserted." Consolidated Edison Company of New York (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975). "[H]e is not required to accord presumptive validity to every assertion of fact, irrespective of its degree of substantiation . . . ." Northern Indiana Public Service Company (Bailey Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 432 (1978). "General allegations that a particular action is needed or certain objectives should be met are,

without more, insufficient to provide an adequate basis for relief under 10 C.F.R. § 2.206." Metropolitan Edison Company (Three Mile Island Nuclear Station, Units 1 and 2), DD-80-14, 11 NRC 581, 582 (1980).

The Sierra Club petition fails to meet the factual threshold standard. As will be discussed more completely below, all of its allegations are based on conjecture, without any factual predicate. The Club's request for a show cause order is completely without factual basis and therefore does not satisfy the requirements of 10 C.F.R. § 2.206.

Furthermore, even if the Sierra Club had supported its allegations with some factual basis, § 2.206 is an improper vehicle for the Club's request for a show cause order. The purpose of a show cause order is to investigate license violations and hazardous conditions at a particular facility. The Club's request can be fairly characterized not as an allegation of license violations or hazardous conditions at the West Valley facilities but rather as a challenge to the propriety of the Commission's action in issuing Change No. 32.

Such an allegation of improper Commission decisionmaking is beyond the purview of § 2.206. 10 C.F.R. § 2.206 may not be used "as a vehicle for reconsideration of issues previously decided...." Indian Point, supra, 2 NRC at 177; Marble Hill, supra, 10 NRC at 615, n.3. Thus, as the Commission has done, the Sierra Club's letter should be treated as a request for reconsideration of the Commission action issuing Change No. 32 rather than a request for a show cause order. Since the Sierra Club's contentions fail to support either type of request, however, the outcome in either case should be the same.

Specific Sierra Club Allegations

Timing of Change No. 32. The Sierra Club questions whether the Commission should have issued a license amendment which allows NFS to be terminated as a titular licensee before DOE departs the West Valley site at the completion of the West Valley Demonstration Project. The Club seems to be asserting that the Commission acted improperly in issuing Change No. 32; however, the Club

presents no reasons why issuance of this change before project termination was improper. Furthermore, the Club asserts no license violation nor hazardous condition relating to Change No. 32 which would mandate issuance of a show cause order.

It is important to keep in mind the status of NFS, NYSERDA and DOE as they relate to the West Valley facilities. DOE now has exclusive possession of the facilities and is actively carrying out the West Valley Demonstration Project. When it completes that project, DOE must turn the West Valley facilities over to NYSERDA, which will be obligated both under NRC License No. CSF-1, Changes No. 31 and 32, and its agreement with DOE to accept surrender of the West Valley facilities from DOE and to take the actions necessary to obtain any additional license amendments required by the Commission.

Under the provisions of Change No. 31, NYSERDA may reacquire control from DOE only in accordance with technical specifications which the Commission deems necessary and proper. DOE will remain in control of the West Valley facilities until the Commission is satisfied that, if an NRC license is still required, NYSERDA meets the criteria necessary to possess the facilities and to carry out any residual health and safety activities required at West Valley.

NFS, on the other hand, does not have the legal capability to resume possession of the West Valley facilities. Change No. 31 excludes NFS from possession of the NRC-licensed West Valley facilities for the duration of the DOE project. Furthermore, upon acceptance of surrender of the West Valley facilities by NYSERDA on February 25, 1981, NFS' right to possession of the facilities ended.

It also should be noted that in order to implement the DOE project, DOE's contractor hired the NFS employees at West Valley and acquired (through NYSERDA) the equipment used by NFS at the site.

Since the project arrangements assure continuity of legal and technical control of the facilities by DOE and NYSERDA, there is no reason why the Commission should have waited for project completion before establishing the conditions for removing NFS as a licensee. If, after DOE project

completion, NYSERDA is required by the Commission to satisfy some technical standards before reacquiring the facilities, the fact that NFS was still a licensee would in no way affect the ability of NYSERDA, or any other organization, to meet those standards. Thus, the Commission properly found that Change No. 32 would entail no significant hazard consideration.

Technical and Financial Qualifications of NYSERDA. The Sierra Club asserts that NYSERDA's financial and technical qualifications must be considered at a hearing before Change No. 32 becomes effective. Again, the Club presents no facts to substantiate this assertion, which seems to allege Commission impropriety in issuing the license amendment rather than violations by a licensee or existence of hazardous conditions.

The Sierra Club fails to identify any statutory or regulatory requirement for a hearing prior to the issuance of the license amendment in question. This is understandable since the amendment was issued in complete compliance with applicable NRC regulations. The Director of Nuclear Material Safety and Safeguards issued the amendment pursuant to 10 C.F.R. § 50.91. Notice of issuance was published in the Federal Register in accordance with 10 C.F.R. § 2.106. No prior notice was required because the Commission found that the amendment involved no significant hazards considerations. Thus, it is unclear upon what grounds the Sierra Club bases its contention.

The Sierra Club also questions the Commission's conclusion that NYSERDA, as an agency of the State of New York, possesses sufficient institutional stability and financial resources for any post-project activities. Again, however, the Club presents absolutely no grounds for questioning the ability of NYSERDA to fulfill its contractual and license commitments. NFS notes that the Waste Storage Agreement between NFS and NYSERDA, entered into in 1963, contemplated that NFS might turn over the high-level liquid waste to NYSERDA during the period of operation of the West Valley facilities, and in any event would do so upon expiration of that Agreement on December 31, 1980. NFS submits that in issuing License No. CSF-1 the Commission (then AEC) considered and recognized that NYSERDA had a long-term

responsibility for the West Valley facilities, and had the capability to obtain the necessary financial and technical qualifications to possess the West Valley facilities after completion or termination of its arrangements with NFS. It is premature at this time to reconsider NYSERDA's capability to obtain the necessary technical and financial qualifications to assume responsibility for these facilities at some future time after completion of the DOE project.

Even if the propriety of the Commission's action in issuing the amendment based on its conclusions as to NYSERDA's financial qualifications were an appropriate reason for requesting a show cause order under § 2.206, the Sierra Club has certainly failed to allege any facts which would call the decision into question.

Unevaluated Safety Questions; Possible License Violations. The Sierra Club has utterly failed to present any factual basis for its "belief" that solid wastes were buried improperly in the NRC-licensed burial ground. The Sierra Club's position seems to be that the geology of the burial ground is unclear and that a survey by the New York State Geological Survey "may help clarify the geology...if the work is scientifically-based and done with integrity." However, if the survey is done improperly because of "the biases of the New York State Geologic Survey," further surveys would be necessary. One must assume that either the Sierra Club believes the New York State Geologic Survey will not fulfill its lawful responsibilities or that the Sierra Club is hedging its bets in case the survey results do not agree with the Club's preconceptions.

In any event, a person requesting a show cause order must demonstrate "how the requested actions will satisfy his particular concerns." Three Mile Island, supra, 11 NRC at 582. It is not enough to allege that some problems may exist. The person requesting a show cause order under § 2.206 must demonstrate "the nexus" between the alleged problems and the action requested. Public Service Company of Indiana, Inc., (Marble Hill Nuclear Generating Station, Units 1 and 2), DD-79-17, 10 NRC 613, 615 (1979).

The Sierra Club has clearly failed to demonstrate such a nexus. Even if the Club's unsupported allegations

were true, the issuance of Change No. 32 has no impact on the health and safety issues of such a situation. After the conditions in Change No. 32 are met, NYSERDA will still be a licensee. If prior license violations are detected at some future date, the Commission will have a licensee to turn to for correction of the situation. Thus, release of NFS as licensee would not affect any remedial activities at the West Valley site necessary for public health and safety.

License Transfer/Termination. The Sierra Club contends that the Commission improperly characterized Change No. 32 as a license amendment issued pursuant to 10 C.F.R. § 50.91. The Club asserts that it should have been categorized as a license transfer under § 50.80 and, further, that the conditions for license termination under § 50.82 have not been complied with. Again, the Sierra Club does not allege a license violation or hazardous condition which would appropriately be the subject of a show cause order. Again, also, the allegations are incorrect.

License No. CSF-1 is not being transferred to a new licensee so as to fall within the provisions of 10 C.F.R. § 50.80. Rather the roles of the already approved licensees are being redefined, as provided for by the terms of the license. License No. CSF-1, paragraph 4.A, contemplates that the Commission may issue an amendment to the license at any time, because of changes in the relationships between NFS and NYSERDA, to reflect "the future responsibilities of NFS and [NYSERDA] with respect to satisfying Commission regulatory requirements." Either licensee may request the amendment.

Change No. 31 substantially altered the original roles of the co-licensees by authorizing transfer of exclusive possession of the West Valley facilities, by restricting the authority and the obligations of the co-licensees, and by directing that on completion of the DOE project they would, "as their interest may appear," make a timely application to the Commission for authority to possess and use the facility. Change No. 32 merely recognizes that, once NFS surrendered and NYSERDA accepted the West Valley facilities, and the other conditions of Change No. 32 have been met, NYSERDA has the sole obligation to apply for and be responsible for any license requirements imposed by Commission

with respect to possession and use of the West Valley facilities. Thus, the licensees, under the terms of their license, appropriately requested a license amendment and the Commission appropriately approved such an amendment pursuant to § 50.91.

10 C.F.R. § 50.82 applies to voluntary surrender of a license coupled with dismantling of the facility by the licensee. By its terms § 50.82 is inappropriate for the situation at West Valley where DOE was authorized and directed by Congress to decontaminate and decommission the West Valley facilities, NYSERDA, as owner of the facilities, contracted to give exclusive possession to DOE, and NFS has no control or authority over those activities. § 50.82, of course, does not limit the Commission's authority to terminate a license but rather sets criteria and guidelines for such actions when the Commission determines that certain disposal and dismantling procedures by the licensee are necessary to protect public health and safety. In this instance, DOE, under the West Valley Act, has the responsibility for disposal and dismantling of the West Valley facilities in accordance with Commission requirements.

Dangerous Licensing Precedents. The Sierra Club's argument that allowing DOE to take possession of and decommission the West Valley facilities relieves the licensees of decommissioning responsibilities is completely irrelevant. DOE's decommissioning activities carry out the Congressional mandate established in the West Valley Demonstration Project Act.

The Sierra Club seems to fear that Change No. 32 will somehow open a floodgate of DOE intervention in the decommissioning of nuclear facilities which will relieve licensees of their decommissioning responsibilities. It is impossible to imagine DOE assuming decommissioning responsibility for any privately owned nuclear facilities without being directed to do so by law. If the Sierra Club feels that such a law would be ill-conceived then the place to challenge it, if and when it would ever be considered, is before Congress. In any case the decommissioning of the West Valley facilities is not a "very bad precedent", but rather a unique situation which Congress decided to deal with in a particular way.

Public Interest Not Served. This contention is a conclusion based on the contentions discussed above and, for the reasons already stated, is incorrect. Simply stated, the Sierra Club can point to no valid public health or safety interest which would be served if Change No. 32 were rescinded. Furthermore, the Commission validly issued Change No. 32 in accordance with Commission regulations. If the Sierra Club believes that these regulations are invalid, this petition to the Director is an inappropriate method to challenge them.

Improper Notice. The Sierra Club's contention that it was entitled to prior notice of Change No. 32 because it was a party to an earlier construction permit proceeding is entirely without merit. That proceeding was terminated in 1977 at the direction of the Commission, see, Mixed Oxide Fuels, CLI-77-33, 6 NRC 861, 862 (1977). Sierra Club claims that it was not served with the order terminating the proceeding. Even if true, this does not change the fact that the proceeding was terminated.

In any case, the Sierra Club certainly had the opportunity to comment on the removal of NFS as licensee long before Change No. 32 was issued. NFS proposed a license amendment on October 6, 1981 which would have terminated NFS as licensee immediately upon DOE assuming possession of the West Valley facilities. Notice of the proposed amendment was published in the Federal Register on November 13, 1981 and copies of the proposal were made available for public inspection in the West Valley area. For whatever reason, the Sierra Club chose not to comment on the proposal.

Now, over 4 months after it first had the opportunity to comment on removal of NFS from License No. CSF-1, the Sierra Club has belatedly conjured up a number of alleged reasons for not allowing such removal. In the meantime, however, NFS has substantially changed its position under the assumption that it could be removed from the license before DOE project completion.

While the Sierra Club has suffered no prejudice by the issuance of Change No. 32, for the Commission to now reconsider Change No. 32 would be extremely prejudicial to

NFS since this amendment was relied upon by NFS in agreeing to the court-approved Settlement Order with NYSERDA, in withdrawing its request for a hearing on Change No. 31, and in voluntarily transferring exclusive possession to DOE. Commission acceptance of the specific conditions in Change No. 32 for termination of NFS' responsibilities as a Commission licensee was a necessary prerequisite for those NFS actions. 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, NFS would have insisted on maintaining the status quo at the West Valley facilities until those questions were resolved.

Conclusion

NFS submits that the Sierra Club has failed to advance any facts as required by 10 C.F.R. § 2.206, which would warrant a show cause order. In fact, the issues presented by the Club, questioning the propriety of the Commission's action in issuing Change No. 32, are not even properly raised under 10 C.F.R. § 2.202. Therefore, the Commission acted appropriately in not considering the Sierra Club's letter as a valid petition for a show cause order.

Furthermore, the Sierra Club has presented no valid grounds to justify Commission reconsideration of Change No. 32. The amendment was properly issued in accordance with valid Commission regulations. No public health, safety, or interest issues have been presented which would be alleviated by rescission of Change No. 32. Therefore, it would be entirely inappropriate for the Commission to reconsider the issuance of this valid license amendment.

Sincerely,

O. S. Hiestand
Attorney for Nuclear
Fuel Services, Inc.

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

In the Matter of	)	Docket No. 50-201
	)	Provisional Operating
NUCLEAR FUEL SERVICES, INC.	)	License No. CSF-1

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served as of this date by personal delivery or first class mail, postage prepaid, to the following:

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DATED: May 24, 1982

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