M-32 PDR LPDR

March 8, 1992

TO: T. J. Rowland, DOE, West Valley Demonstration Project
G. C. Comfort, NRC, West Valley Project Manager
T. K. DeBoer, NYSERDA, Radioactive Waste Mgmt. Program
P. J. Merges, DEC, Bureau of Radiation
M. M. Cuomo, Governor of New York State
S. N. Lundine, Lt. Governor of New York State
R. Abrams, Attorney General of New York State
R. J. Marino, President Pro Tem, NYS Senate
S. Weprin, Speaker, NYS Assembly
J. L. Seward, Chair, Energy Committee, NYS Senate
M. D. Hinchey, Chair, Env. Cons. Committee, NYS Assembly
D. P. Moynihan, U.S. Senate
A. M. D'Amato, U.S. Senate
W. Paxon, U.S. House of Representatives

FROM: Raymond C. Vaughan, Coalition on West Valley Nuclear Wastes
(135 East Main St., Hamburg, N.Y. 14075)

SUBJECT: Existing obligations at West Valley and their effect on LLRW siting by New York State

As you know, the New York State legislature may pass a bill which authorizes the construction and operation of a 'low-level' radioactive waste (LLRW) facility on part of the Western New York Nuclear Service Center at West Valley, N.Y.

We believe the legislature and governor are largely unaware of various obligations that already exist, which effectively limit the legislature's and governor's power to authorize and realize such a facility.

For your review and comment, we will summarize here our understanding of the existing obligations that would require DOE, NRC, or NYSERDA decisionmaking before any new LLRW facility could be built or operated at the Western New York Nuclear Service Center (Center). In our opinion, such decisionmaking cannot be just a 'rubber stamp' or ministerial act but must involve an explicit, discretionary decision in each case.

1. According to the **West Valley Demonstration Project Act, §2(b)(4)(A)**, the State of New York will make available to the Secretary of Energy "the facilities of the Center and the high level radioactive waste at the Center which are necessary for the completion of the project. The facilities and the waste shall be made available without the transfer of title and for such period as may be required for completion of the project." Also, according to the **DOE-NYSERDA Cooperative Agreement, §4.07**, DOE may make "changes, alterations and additions to the Project Facilities and Additional Facilities as may be reasonably necessary to carry out the Project." In our interpretation, the above-quoted sections

NF04
1/0

create an obligation by NYS and NYSERDA to make available without limitation the facilities of the Center, as may be needed to carry out the Demonstration Project. We also believe that DOE has an obligation to consider seriously what may be needed for completion of the Demonstration Project, and we do not see how DOE can make a final decision before the EIS that is now in progress is completed. Thus, in our view, no new LLRW facility could be built on any portion of the Center until both NYS/NYSERDA and DOE had decided that that particular portion of the Center would not be needed for completion of the Demonstration Project. It has come to our attention recently that neither NYSERDA nor DOE seems to be treating this as a distinct, discretionary decision that must be made. Both agencies, in other words, seem to be making the unwarranted assumption that any disposal of Demonstration Project wastes at the Center must take place within the Project Premises as presently defined. NYSERDA's disagreement with us on this matter is based on an unduly narrow interpretation of §2(b)(4)(A) of the West Valley Demonstration Project Act. In our responses to NYSERDA (in letters to Jack Spath dated August 27, 1991 and January 25, 1992) we have shown that NYSERDA's interpretation cannot be supported either by the wording of the law or by the precedents that have been set in the course of the Demonstration Project. It is not clear whether we would have legal standing to challenge either NYSERDA or DOE for failure to fulfill their obligations as set forth above. However, there should be no question of our legal standing to challenge DOE on the closely related obligation listed below as no. 4.

3. According to the **DOE-NYSERDA Cooperative Agreement, §4.02**, NYSERDA "shall not use, or authorize the use of, the portion of the Center not subject to the exclusive use and possession of the Department [of Energy]...in a manner which interferes with carrying out the Project." Similarly, according to **Change No. 31, issued by NRC in 1981 to the West Valley Facility License CSF-1, §§7(B)(1)(a) and 7(D)**, NYSERDA shall neither take, nor (to the extent that NYSERDA has legal authority) permit any other person to take, "any action which in DOE's judgment may inhibit or prevent DOE from taking any action under the Atomic Energy Act or the [West Valley Demonstration] Project Act to carry out its activities pursuant to the Project Act...or to protect health or minimize danger to life or property." The words quoted here create obligations for DOE, NYSERDA, and NRC. Whenever the question arises about whether a proposed action would interfere with, inhibit, or prevent DOE's performance of its Demonstration Project duties, DOE has an obligation to decide the question of interference. NYSERDA then has an obligation to comply with DOE's decision, and NRC has an obligation as the licensing agency to ensure that NYSERDA complies. DOE and NYSERDA went through the procedure of deciding whether a proposed action would interfere by an exchange of letters in November and December of 1986, and we would expect them to follow a similar but more rigorous procedure for any proposed new LLRW facility at the Center, as we pointed out in letters to both agencies in January of 1992. It is not clear whether we would have legal standing to challenge any of the three agencies (DOE, NYSERDA, NRC) for failure to fulfill their obligations in this area alone. However, since the question of possible interference will involve some of the other obligations listed here, we believe we would have standing to raise the question of interference in at least certain areas.

3. According to **Charge No. 31, issued by NRC in 1981 to the West Valley Facility License CSF-1, §7(E)**, NYSERDA "shall (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 [NRC] regulations; and (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." These words create obligations for NYSERDA and NRC that relate to the reacquisition by NYSERDA of the Project Premises and the Facility License CSF-1. Both agencies must already consider the condition of the Center's existing burial grounds at the termination of the Demonstration Project, in conjunction with the Demonstration Project wastes themselves. The addition of new wastes to the Center as a result of a new LLRW facility would introduce further complexity from a licensing standpoint. By an exchange of letters in November and December of 1986, NRC and NYSERDA went through the procedure of deciding whether an action proposed at that time would be of concern from an NRC licensing standpoint; we would expect both agencies to follow a similar but more rigorous procedure for any proposed new LLRW facility at the Center, as we pointed out in letters to both agencies in January of 1992. It is not clear whether we would have legal standing to challenge either of the agencies for failure to fulfill their obligations in this area alone. However, since questions about licensing concerns will involve some of the other obligations listed here, we believe we would have standing to raise such questions in at least certain areas.

4. According to the **CWVNW-DOE Stipulation of Compromise Settlement of May 1987, §4**, "The parties hereby agree that the closure Environmental Impact Statement process—including the scoping process—shall begin no later than 1988 and that this process shall continue without undue delay and in an orderly fashion consistent with applicable law, the objectives of the West Valley Demonstration Project, available resources and mindful of the procedural processes (including public input) needed to complete the aforesaid Environmental Impact Statement...." This provision of the Compromise Settlement creates an obligation for DOE to conduct the EIS (now in progress) in a manner that is consistent with both the West Valley Demonstration Project Act and the National Environmental Policy Act (NEPA). NEPA requires, among other things, the consideration of a reasonable range of alternatives. We would find it unacceptable for DOE to allow reasonable alternatives to be eliminated before the current EIS process is complete. In particular, we consider disposal of some of the Demonstration Project wastes on portions of the Center outside the current Project Premises to be a reasonable alternative that must remain available for consideration in the ongoing EIS, especially in view of the large amount of land at the Center that is unsuitable for waste facilities due to topography or geology. As outlined above in nos. 1 and 2, DOE clearly has a right to choose how to proceed here. If New York passes its West Valley LLRW bill, DOE will have to decide whether to honor the obligation it has made to us—among other things, to be "mindful of the procedural processes (including public input) needed to complete the [current] Environmental Impact Statement"—or whether to give away one of the reasonable EIS alternatives so that a new LLRW

facility can be built. As a party to the Stipulation of Compromise Settlement, we would certainly have legal standing to challenge DOE if it chose the latter option.

5. According to the **CWVNW-DOE Stipulation of Compromise Settlement of May 1987, §11**, DOE "agrees to expeditiously seek and abide by a determination or prescription provided for under the West Valley Demonstration Project Act from the Nuclear Regulatory Commission (NRC) as to whether waste material (other than high-level waste) intended for disposal by the Department of Energy in conjunction with the West Valley Demonstration Project which waste material contains elements having an atomic number greater than 92 in concentrations greater than ten (10) nanocuries per gram but less than or equal to 100 nanocuries per gram, are transuranic wastes or low level wastes within the meaning of the West Valley Demonstration Project Act, Public Law 96-368 for disposal at the Center. For disposal at locations other than the Center, such disposal shall be in accordance with applicable law. This determination or prescription shall be binding on all parties except that plaintiffs [CWVNW] reserve the right to seek judicial review of such determination or prescription of the Nuclear Regulatory Commission to the extent that such determination or prescription is arbitrary and capricious, an abuse of discretion or otherwise reviewable as not in accordance with the law." This rather technical yet seemingly straightforward obligation is not yet resolved. In letters dated August 18, 1987 (from M. Knapp of NRC to W. Bixby of DOE), February 26, 1988 (from M. Knapp to me), and June 8, 1988 (from R. Bangart to me), NRC outlined the manner in which it intended to make the determination specified in the Stipulation of Compromise Settlement. Further details of the NRC's determination process were given in a meeting with DOE on April 27, 1988, and in the **Task Plan** prepared by T. Johnson of NRC that was presented at that meeting. (The Task Plan is available from the NRC Public Document Room in Washington as ACN 8806280243.) One of the key concepts of the NRC determination will be a decision on the concentration of transuranic material, particularly material now in the Drum Cell, "that may be disposed of safely in consideration of the performance of the West Valley site as a whole." This criterion seems to tie the NRC Task Plan to some of the other obligations listed above, esp. no. 3. Insofar as it intends to evaluate the post-Demonstration Project performance of the site as a whole, including the two existing burial grounds that are not part of the Demonstration Project, the Task Plan seems to imply that it is not in DOE's interest to allow any new wastes to be located at the Center, for two reasons: 1) the incremental addition of new wastes would decrease the likelihood that the existing Demonstration Project wastes would meet the Task Plan, and 2) the use of a portion of the Center for new wastes would foreclose at least one option for relocating existing wastes, especially non-Demonstration Project wastes that may need to be moved for the Task Plan to be met. Whether we would have legal standing to challenge DOE for failing to consider these two reasons is unclear, but as a party to the Stipulation of Compromise Settlement we believe we would have legal standing to challenge DOE for any failure to abide by NRC's Task Plan decision, and likewise to challenge NRC for any failure to make its decision in a rational and consistent manner.

In the above paragraphs we have attempted to outline (without going into much detail) our current understanding of the existing obligations at West Valley. The situation is complex, and we will continue to review it.

We trust that you understand our position in this matter. For many years we have acted as 'watchdogs' who intend to see the West Valley site stabilized and decontaminated as completely and as safely as possible. We are not in favor of having the ongoing cleanup trend at West Valley reversed by having a new facility constructed and new wastes brought in—but, more to the point, we will not allow such a reversal to happen by default. It appears to us that various state and federal agencies do not want to rock the boat right now and are trying to keep a low profile as the NYS legislature and governor attempt to reach a decision on legislation for siting a LLRW facility at West Valley. Part of our role, therefore, is to remind agencies of their existing obligations, especially in relation to the West Valley Demonstration Project.

We cannot be complacent about the Demonstration Project. It is at the same time a very good project and an appalling project. On the good side, it stands as a great example of federal, state, and public cooperation in dealing with a complex problem (though we must note that it fails to include parts of the problem such as the two old West Valley burial grounds). At the same time we are appalled by the fact that the Project has been operating for about ten years but is only about 25% complete, and by the fact that it will have consumed at least $10 for every man, woman, and child in the U.S. by the time it is complete. It is a good project and a necessary project, yet it will do nothing more than repackage a very long-term problem. Perhaps you can understand, even if you disagree, that adding to this problem strikes us as a poor idea.

During recent months we have tried by various means to initiate discussion of the existing obligations outlined in this memo (including discussion of whether our views of these obligations are correct), but we have had virtually no response. Whether the reluctance of state and federal officials to discuss these issues is due to a lack of understanding, or to a belief that silence is the best way to avoid controversy, we cannot say. But we believe that silence at this time is a mistake. It is certainly not in the public interest.

Discussion of the pitfalls that may follow passage of a West Valley LLRW siting bill is essential now rather than in court after such a bill becomes law. We invite you, and any of your staff members and colleagues who may be interested, to respond to the various substantive points we have raised.