

February 23, 1999

SECY-99-057

FOR: The Commissioners

FROM: Karen D. Cyr /s/  
General Counsel

William D. Travers /s/  
Executive Director for Operations

SUBJECT: SUPPLEMENT TO SECY-98-251, "DECOMMISSIONING CRITERIA  
FOR WEST VALLEY"

PURPOSE:

To provide supplemental information on the decommissioning criteria for the West Valley site.

SUMMARY:

This paper provides additional information and recommendations on West Valley decommissioning criteria, as requested in the Staff Requirements Memorandum dated January 26, 1999. The staff now recommends the following with respect to West Valley:

1. Approve either of the following options:
  - a) Prescription of the License Termination Rule (LTR) now as the final decommissioning criteria applicable to the Department of Energy (DOE) West Valley Demonstration Project (WVDP); or
  - b) Issuance of the criteria in SECY-98-251, as proposed criteria, with the final criteria to be prescribed after issuance of the final Environmental Impact Statement (EIS), but before the record of decision.

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301-415-6700

2. Approve transmittal of the Commission decision to DOE by public letter.
3. Approve the staff's plan to enter into a cooperative agreement with the New York State Department of Environmental Conservation (NYSDEC) regarding the West Valley site.

BACKGROUND:

In the public Commission briefing on January 12, 1999, the Commission was briefed by the staff on SECY-98-251, "Decommissioning Criteria for West Valley," dated October 30, 1998, and also heard comments on SECY-98-251 from DOE; New York State Energy Research and Development Authority (NYSERDA); NYSDEC; and the West Valley Citizen Task Force.

In the Staff Requirements Memorandum dated January 26, 1999 (Attachment 1, WITS # 199800178), the Commission requested that the staff: (1) review the Nuclear Regulatory Commission's (NRC's) authority, obligations, and limitations under the West Valley Demonstration Project (WVDP) Act and inform the Commission of the results; (2) inform the Commission of the scope of NRC's licensing of the site, before the license was placed in abeyance, including the size of the area and range of activities under the license; (3) supplement SECY-98-251 with a more expansive discussion of the options for the manner and timing of how NRC might prescribe the final decommissioning criteria--and discuss the pros and cons of each option, their resource implications, how they relate to the Environmental Impact Statement (EIS) process, and the possible need for a separate NRC EIS; (4) distinguish between waste disposal and decommissioning criteria; (5) inform the Commission of the regulatory options available (e.g., by policy statement or rule) for finalizing the decommissioning criteria, and how that process relates to the timing for finalizing the criteria; (6) inform the Commission about the implications of the decommissioning criteria options for the NYSERDA post-WVDP revival of the NRC license, if any; and, (7) assess whether a cooperative agreement with NYSDEC is necessary and appropriate in light of potentially shared regulatory responsibilities over areas of radioactive contamination at West Valley affected by both NRC- and NYSERDA-regulated activities.

DISCUSSION:

1. Review of NRC's Authority, Obligations, and Limitations Under the WVDP Act

An analysis of the authority, obligations, and limitations of the NRC under the WVDP Act is provided in Attachment 2. From that analysis, we conclude that the NRC has only limited authority and responsibility under the WVDP Act. Pursuant to that Act, the NRC: (1) is required to enter into a memorandum of understanding with DOE to coordinate informal consultation on the safety of DOE's activities under the WVDP Act; (2) may informally review and comment on DOE's activities under the project and request information and analyses from DOE; (3) may seek access to the site and monitor project activities; (4) may prescribe decontamination and decommissioning criteria that DOE is to meet; (5) may designate materials, other than those defined in the statute, as high-level waste (HLW); and (6) may prescribe concentrations of transuranic elements as contaminants in materials to be treated as transuranic waste. NRC is not authorized to: (1) regulate DOE activities at the project site; (2) enforce DOE's compliance with the decontamination and decommissioning criteria that NRC may prescribe; or (3) determine whether or when DOE has completed decontamination and

decommissioning for the WVDP. The actions for the NRC, described in the Memorandum of Understanding with DOE to implement the WVDP Act, executed in September 1981 and in effect today, are consistent with these authorities and responsibilities.

## 2. Scope of NRC's License Before It Was Placed in Abeyance

The original license (CSF-1, dated April 19, 1966) states that the license applies to "the irradiated nuclear fuel processing plant (the 'facility') located at the Western New York Nuclear Service Center, Cattaraugus and Erie Counties, New York, and described in Part B of the revised license application, as amended, filed by Nuclear Fuel Services, Inc...." The description in Part B of the revised license application (now the Final Safety Analysis Report) describes the 77-hectare (190-acre) plant site as being located in the center of a 1335-hectare (3300-acre) exclusion area. The exclusion area corresponds to the area of the Western New York Nuclear Service Center. The staff believes that the license principally covers the smaller 77-hectare (190-acre) area around the facility and to a more limited degree, the exclusion area. Although the license is suspended, the staff expects NYSERDA to coordinate with DOE; maintain and control the exclusion area; and address any radioactive contamination in the exclusion area which may have resulted from licensed activities, as necessary, to protect public health and safety.

The license authorized Nuclear Fuel Services, Inc., as the operator of the facility, and NYSERDA's predecessor agency, as the owner of the facility, to: (a) store irradiated fuel elements and radioactive waste (including liquid HLW); (b) reprocess spent nuclear fuel; and (c) dispose of solid radioactive waste generated at the facility by burial in soil. After the passage of the WVDP Act, the license was amended twice. The first amendment (number 31, dated September 30, 1981) permitted the licensees to transfer the facility to DOE and put the technical specifications of the license into abeyance as of the date of the transfer. The second amendment (number 32, dated February 11, 1982) terminated the responsibility and authority of Nuclear Fuel Services, Inc., as the operational licensee of the facility, leaving NYSERDA as sole licensee.

## 3. Options for the Timing of Prescribing the Final Decommissioning Criteria

In developing the decommissioning criteria recommended in SECY-98-251, the staff took a broad view by proposing criteria that would be applicable to both DOE (for the WVDP) and NYSERDA (for the site after reinstatement of the license). This broad approach is consistent with the DOE/NYSERDA joint EIS which considers both the completion of the WVDP by DOE and the closure or long-term care of the remaining NYSERDA portion of the site licensed by NRC. Under the staff's broad approach, DOE's decommissioning of WVDP facilities would need to be in accordance with the decommissioning criteria that would also be applicable to NYSERDA after reactivation of the license. The proposed criteria would also be applicable to any remaining areas of the site not decommissioned by DOE under the WVDP. Therefore, using the staff's broad approach, the decommissioning criteria, as proposed in SECY-98-251, could be used in the site-wide joint EIS.

The staff notes the Commission could follow a narrow approach, more limited than the recommendations in SECY-98-251. As noted above, NRC's authority to prescribe

decommissioning criteria under the WVDP Act is focused on prescribing such criteria for DOE.<sup>1</sup> Therefore, under a narrow approach, the Commission could prescribe criteria at this time only for DOE under the WVDP Act and could limit the criteria just to decommissioning (i.e., not address requirements for potential onsite waste disposals).<sup>2</sup> However, the narrow approach would not address clean-up for the entire site and would not cover NYSERDA's responsibilities.

In the briefing, the staff presented three options for timing of the Commission decision relative to the preparation of an EIS. These were described as:

- a) Make the Commission decision and prescribe the criteria before the final EIS and record of decision are issued by DOE/NYSERDA;
- b) Make the Commission decision and prescribe the criteria after the final EIS but before the record of decision is issued by DOE/NYSERDA; and
- c) Make the Commission decision and prescribe the criteria after the final EIS and Record of Decision are issued by DOE/NYSERDA.

Each of these options has pros and cons regarding policy and timeframe implications. The three procedural options for the timing of the Commission decision for prescribing the decommissioning criteria and their pros and cons are provided in Attachment 3.

#### 4. Decommissioning Criteria vs. Waste Disposal Criteria

The WVDP Act contains separate paragraphs describing the disposal of low-level radioactive waste and decommissioning criteria [Sec. 2(a)(4) specifies that waste should be disposed of in accordance with applicable licensing requirements, and Sec. 2(a)(5) states that DOE should follow decommissioning criteria that NRC may prescribe]. SECY-98-251 used the term "decommissioning criteria" broadly to include criteria for both decommissioning and potential waste disposal at the West Valley site. This was done because disposal of WVDP or West Valley site waste (if onsite) would be part of decommissioning similar to the onsite disposal of radioactive waste (under 10 CFR 20.2002) that has been undertaken at other NRC-licensed sites as a part of decommissioning. Although SECY-98-251 defined the term "decommissioning criteria" broadly, it proposed different criteria for each of several activities: the closure of areas of residual contamination and existing waste disposal (LTR); material remaining in the HLW tanks after closure and any future onsite disposal of solidified liquid supernate waste from the HLW tanks (incidental waste criteria); and other stored project wastes (performance objectives of 10 CFR Part 61). The Commission has the option to omit waste disposal criteria, but that will leave open the question of what "licensing requirements" apply to

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<sup>1</sup> NRC's authority to prescribe criteria for NRC's licensee, NYSERDA, comes from the Atomic Energy Act, not from WVDPA.

<sup>2</sup>Because the WVDP Act directs DOE to decommission project facilities in accordance with such requirements as NRC may prescribe, the scope of the proposed decommissioning criteria could be limited to just the LTR. Onsite waste disposal requirements, if needed, could be requested separately by DOE and NYSERDA through the process described in 10 CFR 20.2002, "Methodology for Obtaining Approval of Proposed Disposal Procedures."

any DOE waste disposal proposals at the site. Because the waste disposal criteria proposed in SECY-98-251 are compatible with the proposed decommissioning criteria, the staff believes that it is feasible to cover both in a comprehensive manner.

5. Regulatory Options for Finalizing the Decommissioning Criteria and How the Options Relate to Timing

The decommissioning criteria could be finalized (prescribed) by: (a) rulemaking; (b) adjudication (i.e., order); (c) policy statement; or (d) letter to DOE. The estimated timeframe for each of these regulatory options is presented in Attachment 4. As a general matter, rulemaking or adjudication would be appropriate to prescribe criteria if the Commission determines that site-specific criteria other than already-established standards are needed for both DOE and NYSERDA for the West Valley site<sup>3</sup>. If the Commission is applying its pre-existing, generally applicable criteria (i.e., the LTR, 10 CFR Part 20, the disposal criteria in Part 61, the incidental waste criteria) at West Valley, then any of the options may be used.<sup>4</sup> These options are described below.

a. Rulemaking

Under this option, the Commission would conduct a notice-and-comment rulemaking to prescribe the criteria. The criteria would be finalized when the final rule becomes effective. Normally, a rulemaking takes 1-2 years and 3 full-time equivalents (FTE) or more to complete. The advantage of this method is that it would make any new criteria that are different from existing regulations legally binding on the West Valley licensee (NYSERDA)<sup>5</sup>. Another advantage is that this option would involve a well-defined process for obtaining public input. The disadvantage is that this would be a time-consuming and resource-intensive method for setting the criteria. In general, NRC does not have authority to enforce its rules against DOE. However, it does have authority to promulgate a rule for the West Valley site that is binding on

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<sup>3</sup> If the Commission opts for applying existing criteria (e.g., LTR, incidental waste criteria, Part 61 performance standards) at West Valley in general (i.e., to DOE and the West Valley licensee, NYSERDA), then additional NRC rulemaking or adjudication is not necessary. In addition, since DOE is not a person subject to Commission jurisdiction and regulation, with regard to the WVDP, NRC could prescribe any new decommissioning criteria, for DOE alone, by an informal means such as a policy statement or letter to DOE.

<sup>4</sup>Normally, NRC imposes new, legally binding requirements by rule, order, or license condition. Since DOE is generally not subject to NRC regulation and licensing requirements, (with certain exceptions not pertinent here) but is subject to decommissioning criteria that NRC may prescribe by operation of Section 2(a)(5)(C) of the WVDP Act itself, a rule, order, or license condition is not necessary to impose legally binding decommissioning criteria for DOE's WVDP cleanup. A rule, order, or license condition would be needed to impose new legally binding decommissioning criteria on NYSERDA.

<sup>5</sup>Of course, if the rule would impose new criteria different from existing regulations and not covered by prior environmental reviews, an environmental analysis would be needed, although such analysis presumably could rely on the environmental analysis being prepared by DOE and NYSERDA for the WVDP.

NYSERDA. At the time of promulgation, the Commission could indicate that the site-specific criteria in the rule are the criteria that NRC is “prescribing” for DOE’s use under the WVDP Act.

b. Adjudication

NRC also does not have the authority to issue an order to DOE to decontaminate the site according to prescribed criteria. However, it does have authority to issue such an order to NYSERDA, which retains its license (albeit in abeyance) for the facility. The order could include criteria for the West Valley site and a statement indicating that the site-specific criteria in the order are the criteria that NRC is “prescribing” for DOE’s use under the WVDP Act. The adjudicatory process would involve an opportunity for a hearing by a person whose interest might be affected by the order. The resource implications of this option and the time it would take to complete would depend upon whether a hearing were held, but if a hearing is held, this approach could be time and resource consuming and might take longer than rulemaking.<sup>6</sup>

c. Policy Statement

This option could be selected if the Commission uses, for West Valley (DOE and NYSERDA), its pre-existing, generally applicable criteria, or prescribes new criteria for DOE alone. This option could be used to provide public notice that the Commission has elected to use its existing criteria as the criteria for the West Valley site (DOE and NYSERDA).<sup>7</sup> The advantage of this option is that it could be accomplished quickly after the Commission has made its determination as to the appropriate criteria. A policy statement can be issued first as a draft, which would give the public an opportunity to comment. If a policy statement is issued final without public comment, less than one FTE would be required. However, if public comments are solicited, the resources would depend on the number of comments received, and resource requirements would probably exceed one FTE.

d. Letter to DOE

This would be the least formal method for prescribing the criteria for DOE’s cleanup of the WVDP. Public notice would be accomplished by publishing a notice of the letter in the Federal Register. It would be a one-step process (indicating, in final form, the criteria that will be used)

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<sup>6</sup>In addition, if the criteria imposed by order are new and different from existing regulations and not supported by prior environmental review, including the ongoing environmental review (EIS) being prepared by DOE and NYSERDA for the WVDP; an environmental analysis would be needed to support the new criteria.

<sup>7</sup>The policy statement or letter approach could also be used to “prescribe” new (i.e., not currently existing) decommissioning criteria for DOE alone.

as opposed to a two-step process (i.e., draft and final). Only a fraction of an FTE would be required to implement this option. The disadvantage is that it would not allow any new public comment beyond the opportunities already provided for comment on the criteria.

#### 6. Possible Implications for Reinstating the NRC License

In developing the recommendations in SECY-98-251, the intent of the staff was that the same decommissioning criteria would apply to DOE, and to NYSERDA under a reactivated NRC license. In SECY-98-251, the staff identified three potential alternatives for long-term control of the site, in anticipation of the possibility of some type of long-term control being identified as part of the preferred alternative. The long-term control alternatives identified were: (1) keep a long-term license on the site; (2) seek new legislative authority to allow State or Federal ownership of the site to constitute suitable long-term control without requiring a continued license; and (3) transfer the regulation of the decommissioning of the site to the U.S. Environmental Protection Agency under the Comprehensive Environmental Response, Compensation, and Liability Act.

The possible implications for NYSERDA, post-WVDP, of any long-term control alternative, would be to what extent NYSERDA has a continued obligation to provide institutional control and to be subject to licensing. The Cooperative Agreement between DOE and NYSERDA indicates that the WVDP and DOE's responsibilities at the site are not complete until NRC reinstates the license, allowing NYSERDA to resume possession and control of the site. The extent to which DOE completes its work (including decommissioning) under the project and supports NYSERDA in its post-WVDP obligations under a preferred alternative is not a matter within NRC's jurisdiction or authority, but rather, would be a point of negotiation between DOE and NYSERDA. Therefore, the implications for NYSERDA, post-WVDP, are up to NYSERDA to determine and negotiate with DOE. When NYSERDA and DOE reach agreement on the completion of the WVDP, they are to inform NRC, and NRC will reinstate the license and resume regulatory oversight.

#### 7. Cooperative Agreement With the NYSDEC

In the Commission briefing of January 12, 1999, and in a letter to the Chairman dated January 6, 1999, commenting on SECY-98-251, NYSDEC identified a cooperative agreement, between NRC, NYSDEC, and Cintichem, Inc. (Cintichem), on the decommissioning of the Cintichem facility, as an example of the type of agreement that it would like to establish for West Valley (details of the Cintichem facility and licensing and how it compares with West Valley are provided in Attachment 5).

Although the West Valley case is not identical to the Cintichem case, the staff believes that a cooperative arrangement on West Valley is appropriate. The agreement could address NRC and NYSDEC roles with regard to contamination for which jurisdiction is unclear, and areas of the site that could be affected by both the NRC-licensed and State-licensed areas. An understanding would also be useful for the exchange of information and for notification of meetings and site safety reviews. There are also shared responsibilities for areas of the sites

that contain hazardous waste. The mechanism for setting out these understandings, however, may not require a formal Memorandum of Understanding, or Cooperative Agreement, as was prepared in the Cintichem case. The staff believes that an Office-level agreement between NRC and NYSDEC would be a suitable mechanism for documenting Agency understandings and would minimize staff resources to prepare it. The resources to execute the agreement would be less than 0.2 FTE.

RECOMMENDATIONS:

The staff recommends that the Commission:

1. Approve either of the following options:
  - a) Prescription of the License Termination Rule (LTR) now as the final decommissioning criteria applicable to the Department of Energy (DOE) West Valley Demonstration Project (WVDP); or
  - b) Issuance of the criteria in SECY-98-251, as proposed criteria, with the final criteria to be prescribed after issuance of the final Environmental Impact Statement (EIS), but before the record of decision.
2. Approve transmittal of the Commission decision to DOE by public letter.
3. Approve the staff's plan to enter into an Office-level cooperative agreement with NYSDEC regarding the West Valley site.

original /s/ by

Karen D. Cyr  
General Counsel

original /s/ by

William D. Travers  
Executive Director  
for Operations

Attachments:  
See next page



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2. Approve transmittal of the Commission decision to DOE by public letter.
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 Karen D. Cyr  
 General Counsel  
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 William D. Travers  
 Executive Director  
 for Operations

Attachments:  
 See next page

**TION:TICKET:N199900034 - WITS: 199800178**

<b>Central File</b>	<b>LLDP r/f</b>	<b>DWM r/f</b>	<b>DWM t/f</b>	<b>NMSS r/f</b>	<b>NMSS Dir.Off. r/f</b>
<b>RJohnson</b>	<b>PUBLIC</b>	<b>CPoland</b>	<b>MBridgers</b>	<b>JLinehan</b>	<b>KDattilo</b>
<b>PLohaus</b>	<b>GPangburn, RI</b>	<b>PTressler</b>			

**PATH AND FILE NAME:**

**\*SEE PREVIOUS CONCURRENCE**

OFC	LLDP*	LLDP*	LLDP*	T.ED.*	DWM*
NAME	JParrott/cv	TCJohnson	JHickey	EKraus	JGreeves
DATE	2/3/99	2/3/99	2/9/99	2/5/99	2/9/99

OFC	NMSS	NMSS*	DEDR*	OGC	EDO*
NAME	MVirgilio	CPaperiello	FMiraglia	KCyr	WTravers
DATE	2/ /99	2/11/99	2/18/99	2/ /99	2/18/99

Attachments:

1. Staff Requirements Memorandum, Dated 1/26/99
2. Authority, Obligations, and Limitations of NRC  
Under the WVDP Act
3. Options for the Timing for Prescribing Decommissioning  
Criteria for West Valley
4. Length of Time to Accomplish Regulatory Options for  
Finalizing Decommissioning Criteria
5. Cintichem Details and Cooperative Agreement, with Attachment

IN RESPONSE, PLEASE  
REFER TO: M990112

January 26, 1999

MEMORANDUM FOR: William D. Travers  
Executive Director for Operations

Karen D. Cyr  
General Counsel

FROM: Annette L. Vietti-Cook

SUBJECT: STAFF REQUIREMENTS - BRIEFING ON DECOMMISSIONING  
CRITERIA FOR WEST VALLEY, 9:00 A.M., TUESDAY,  
JANUARY 12, 1999, COMMISSIONERS' CONFERENCE  
ROOM, ONE WHITE FLINT NORTH, ROCKVILLE, MARYLAND  
(OPEN TO PUBLIC ATTENDANCE)

The Commission was briefed on options for decommissioning West Valley by the NRC staff, Department of Energy (DOE), New York State Energy Research and Development Authority (NYSERDA), New York State Department of Environmental Conservation (NYSDEC), and the West Valley Citizen Task Force.

The Commission requested that the staff perform a review of NRC's authority, obligations, and limitations under the West Valley Demonstration Project (WVDP) Act and inform the Commission of the results. Additionally, the staff should inform the Commission of the scope of NRC's license of the site before it was placed in abeyance, including the size of the area and range of activities under the license.

(OGC/EDO)

(SECY Suspense: 2/12/99)

The Commission requested that the staff supplement SECY-98-251 with a more expansive discussion of the options for the manner and timing of how NRC might prescribe the final decommissioning and decontamination (D&D) criteria. This discussion should include the pros and cons of each option, their resource implications, how they relate to the environmental impact statement process, and the possible need for a separate NRC EIS. The supplemental paper should distinguish between waste disposal and decommissioning criteria. The discussion should also inform the Commission of the regulatory options available, e.g., by policy statement or rule, for finalizing the D&D criteria and how that process relates to the timing for finalizing the criteria. The staff should also inform the Commission about the implications of the D&D criteria options for the post-WVDP revival of the NRC license by NYSERDA, if any. The staff also should assess whether a cooperative agreement with NYSDEC is necessary and appropriate in light of potentially shared regulatory responsibilities over areas of radioactive contamination at West Valley affected by both NRC and NYSERDA

Attachment 1

regulated activities.  
(EDO/OGC)

(SECY Suspense: 2/12/99)

## The Authority, Obligations, and Limitations of NRC Under the WVDP Act

This analysis responds to the Commission's January 26, 1999, Staff Requirements Memorandum issued subsequent to its briefing, on January 12, 1999, on staff's proposals in SECY-98-251 for decommissioning criteria for the West Valley Demonstration Project (WVDP) site. The purpose of this analysis is to describe the legal authority, including obligations and limitations, granted to the Nuclear Regulatory Commission (NRC) under the WVDP Act, Pub.L. 96-368, enacted October 1, 1980.

The primary purpose of the WVDP Act is to direct the Secretary of Energy to carry out a high-level radioactive waste (HLW) management project at the Western New York Service Center (the Center) in West Valley, New York. The Center was the site of a commercial nuclear fuel reprocessing plant which had ceased operation, but which, in 1980, remained under an NRC Part 50 production facility license possessed by the New York State Energy Research and Development Authority (NYSERDA) and Nuclear Fuel Services, Inc. (NFS)<sup>8</sup>. Operation of the plant had resulted in the production of liquid HLW stored in tanks at the facility. Congress passed the WVDP Act both for the purpose of demonstrating solidification techniques which could be used for preparing HLW for disposal and for the purpose of taking remedial action in response to potential dangers associated with storing liquid HLW in tanks.<sup>9</sup> The WVDP Act assigns a limited regulatory role to the NRC, primarily that of consultation.<sup>10</sup>

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<sup>8</sup>NFS was licensed as the operator of the facility and NYSERDA was licensed as the owner and lessor. While the intent of the licensees was to establish a commercial reprocessing business, in fact about 61% of the 624 metric tons of spent fuel processed during the six years the facility operated came from the Atomic Energy Commission's national production reactor at Hanford, Washington.

<sup>9</sup>The legislative history indicates that Congress intended to provide Federal assistance to New York exclusively for the purpose of resolving problems created by the storage of liquid HLW at the site, and not with respect to other potential health and safety problems. Thus, for example, the Report of the House Committee on Interstate and Foreign Commerce states:

In reporting a Bill which establishes a program to solidify the [HLW] at West Valley, this Committee was aware that there are health and safety questions regarding other conditions at the site. Specifically, the condition of the [LLW] burial ground and the disposal of spent fuel in the NRC licensed burial grounds are matters of major concern which could affect the public health and safety. In confining the program to the solidification of the [HLW], this Committee intends that the responsibility for monitoring, maintaining and correcting any additional public health and safety problems remain exclusively with the licensees.

H.R. REP. No. 96-1100, Part II, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1980) (H. REP.II) at 15-16. This intent is reflected in section 5 of the WVDP Act which states that "[t]his Act shall not apply or be extended to any facility or property at the Center which is not used in conducting the project."

<sup>10</sup>The only role given to the NRC in the initial Bills, as introduced, into each House of Congress on March 19, 1980, S. 2443 and H.R. 6865, was that of consultation and no

Section (c) of the Act requires the Department of Energy (DOE) and NRC to enter into an agreement to establish arrangements for NRC's review and consultation activities. Certain elements of the agreement are mandated in the statute: (1) NRC is to provide comments on various aspects of DOE's plan for conducting the project and "must specify with precision its objections to any provision of the plan" (Section 2(c)(1)); (2) DOE is to consult with NRC on the form for solidification of the wastes and the containers to be used for permanent disposal (Section 2(c)(2)); (3) DOE is to submit for NRC review safety analysis reports and such other information as NRC may require (Section 2(c)(3)); and (4) DOE must afford NRC access to the Center for the purpose of monitoring DOE's activities (Section 2(c)(4)). The Act further provides that NRC's review and consultation activities "shall be conducted informally by the Commission and shall not include, nor require, formal procedures or actions by the Commission pursuant to the Atomic Energy Act of 1954, as amended [AEA], the Energy Reorganization Act of 1974, as amended [ERA], or any other law."

In addition to its consulting role, the WVDP Act provides the NRC with certain other authorities:

- \* NRC may prescribe requirements which DOE shall use for its decontamination and decommissioning activities (Section 2(a)(5));
- \* NRC may designate materials at West Valley, other than those specified in the statute, as HLW (Section 6(4));
- \* NRC may prescribe concentrations of transuranic elements as contaminants in materials at West Valley to be treated as transuranic waste (Section 6(5)).

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specificity was given as to how, or on what, consultation should occur. The respective Bills were favorably reported, with the same amendment, by the Senate Committee on Energy and Natural Resources on May 20, 1980, and by the House Committee on Science and Technology on

June 18, 1980, and each committee left NRC's consulting role in place. See S. REP. No. 96-787, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1980) (S. REP); H. REP. No. 96-1100, Part I, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1980) (H.REP. I) The amendment added provisions designed to give the State of New York (NY) a greater role in the project, striking a provision calling for transfer of title to the HLW to the Federal Government and substituting a provision requiring DOE to enter into a cooperative agreement with NY pursuant to the Federal Grant and Cooperative Agreement Act of 1977. The amendment required, among other things, that the cooperative agreement call for joint submission by DOE and NY of an application for a license amendment to the NRC providing for the project. That this provision was not intended to give NRC licensing authority over DOE is evidenced by the fact that both committees emphasized that, while NRC's consulting role was left in place, DOE was to have ultimate decision-making authority. See S. REP. at 8; H. REP. I at 9. The House Committee on Interstate and Foreign Commerce substantially revised H.R. 6865 and then, on September 15, 1980, favorably reported the Bill. See H. REP. II. This Committee's revision of the Bill included the provisions of Section (c) noted above which added a great deal of specificity to NRC's consulting role but did not replace it with a more formal role.

Two other provisions of the statute could implicate the NRC:

\* DOE shall transport, in accordance with applicable provisions of law, the solidified waste to a Federal repository for permanent disposal (Section 2(a)(3)); and

\* DOE shall, in accordance with applicable licensing requirements, dispose of low-level radioactive waste (LLW) and transuranic waste produced by solidification of the HLW (Section 2(a)(4)).

The authorities delineated above are limited by the fact that the WVDP Act does not provide NRC with licensing authority over DOE. The statute itself specifies that “[n]othing in this Act shall be construed as affecting any applicable licensing requirement of the [AEA or ERA].” Section 5(a). The NRC does not have licensing authority over DOE under either of these statutes for this facility. Moreover, the detailed consulting provisions in Section 2(c) of the WVDP Act, in particular the requirement that NRC’s review and consultation activities “shall be conducted informally ... and shall not include nor require formal procedures or actions by the Commission pursuant to the [AEA or ERA],” are inconsistent with the notion that the WVDP Act gives the NRC licensing authority over DOE.<sup>11</sup>

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<sup>11</sup>Shortly after Congress had passed the WVDP Act, John Dingell and Richard Ottinger, members of the House of Representatives who had played leading roles in passage of this legislation, sent a letter to the Commission expressing their view that, under the WVDP Act, DOE is “under the authority of the [NRC] in regard to this project, and the Commission is then to place [DOE] in the position of any other licensee, and is thus free to subject [DOE] to all applicable regulatory requirements in regard to any and all aspects of the authorized project.” Letter from John Dingell and Richard Ottinger to John Ahearne, September 30, 1980. The Congressmen based their view on the following analysis: (1) Section 5 of the Act provides that the Act is not to be construed as affecting any applicable licensing requirements and the West Valley facility is a licensed facility; (2) the activities authorized by the Act will require an amendment to the license which, under Section 2(b)(4)(D) is to be submitted jointly by DOE and NYSERDA, and the Report of the House Committee on Interstate and Foreign Commerce notes that “[t]he Commission must determine the appropriate procedures for considering this application for an amendment and, if it deems it appropriate, for approving an amendment subject to such terms and conditions as the Commission believes to be in accord with its existing statutory authority” (H. REP. II at 22); (3) the Commission’s ability to condition the license amendment, together with the direction in Subsection 2(c) for the NRC and DOE to enter into an agreement with respect to certain aspects of the project, “vest the Commission with all the requisite authority needed to act as the final arbiter of health and safety issues related to this program and affords the Commission the authority to attach such terms and conditions to the license amendment as may be necessary to exercise this authority.” Letter at 2.

On January 13, 1981, the General Counsel sent the Commission a legal analysis of the Act rejecting the views expressed by Congressmen Dingell and Ottinger because, among other reasons, the detailed review regime for NRC’s consultation in Section 2(c) and the authorization

Given that the WVDP Act does not put DOE in the position of an NRC licensee, the NRC does not have the authority to order DOE to take, or refrain from taking, specific actions.<sup>12</sup> Thus, while the WVDP Act authorizes the NRC to prescribe Decontamination and Decommissioning (D&D) criteria and directs DOE to observe such criteria, the Act does not give NRC a role, other than providing comments, in enforcing adherence to the criteria or in determining when DOE's decommissioning has been completed or whether it is satisfactorily completed.<sup>13</sup> Rather, the NRC license, currently in abeyance, contains a provision requiring

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for NRC to prescribe decontamination and decommissioning (D&D) requirements in Section 2(a)(5) would have been unnecessary if the intent of the Act was to have DOE treated as an NRC licensee. See SECY-81-24, "West Valley Demonstration Project Act" (January 13, 1981). The Commission did not adopt the position advanced by the Congressmen and the license amendment issued by the Commission simply authorized the licensees to transfer the facility to DOE subject to the condition (on the licensees) that DOE would assume exclusive possession of the facility until such time as the licensees would reacquire and possess the facility at the completion of the project.

<sup>12</sup>The House Committee on Interstate and Foreign Commerce, during its consideration of the bill, attempted to add just such a provision. Under section 2(e), as incorporated by the Committee, the NRC would have been given the authority to order DOE to not undertake or to cease any activity which the Commission determined posed a danger to public health or safety, or to take any action which the Commission thought necessary for public health or safety. DOE would have been required to obey such an order. See H. REP. II at 2. This provision was removed in the compromise bill considered by the full House and did not appear at all in the Senate bill.

<sup>13</sup>The House Committee on Interstate and Foreign Commerce added the provision to the bill calling for DOE to conduct its d&d activities "in accordance with such requirements as the Commission may prescribe." The Committee explained its rationale for doing so as follows:

As the facility and those portions of the site used in the course of the project would revert to the exclusive control of the licensee at the conclusion of the project, the licensee would then be responsible for all costs which would be incurred in eliminating any violations which were not corrected prior to the termination of the project. The Committee believes that the cost of correcting any violations or acts of noncompliance which were a consequence of the activities conducted during the course of the project should be a part of the cost of the project, and not be imposed exclusively on the licensee. Thus, the project will not be considered to be terminated under (*sic*) the Commission has decided that the Secretary has, to the extent practicable, utilizing the most appropriate technology available, performed the [D&D] activities in the manner which complies with all applicable requirements.

H. REP. II at 19. While this Committee appears to have envisioned some Commission determination that its D&D requirements had been successfully followed, the fact remains that the Act gives the NRC no authority to enforce such a determination. Presumably, if NRC had



the licensee (NYSERDA) to reacquire and possess the facility upon completion of the project. At that time, the NRC will be able to exercise its full authority over the licensee under the Atomic Energy Act to ensure that the licensee is in conformity with the Commission's regulations and, in particular, if the licensee desires to terminate the license, to ensure that NRC's Decontamination & Decommissioning (D&D) requirements applicable to the licensee have been met.

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licensing authority over DOE, the NRC could ensure that there were no violations "not corrected prior to termination of the project" and there would be no need to protect NY from such costs.

## Options for the Timing for Prescribing Decommissioning Criteria for West Valley

### Option A - Prescribe Criteria Before the DOE/NYSERDA Final EIS and Record of Decision (ROD) Are Issued

Under this option NRC would prescribe the LTR and inform DOE and NYSERDA that onsite waste disposal requirements, if needed, could be requested separately by DOE and NYSERDA through the process described in 10 CFR § 20.2002, "Methodology for obtaining approval of proposed disposal procedures." The NRC staff does not consider that an EIS would be necessary for this option, because NRC would be informing DOE to use existing requirements.

Pros	Cons
<ul style="list-style-type: none"> <li>• Would provide early basis for DOE to develop remediation alternatives</li> <li>• Is most consistent with Part 20, Subpart E</li> <li>• Would not require an EIS for NRC action</li> <li>• Reduces fee burden on other NRC licensees</li> <li>• Would support Citizens' Task Force recommendation</li> </ul>	<ul style="list-style-type: none"> <li>• Does not address current options, being considered by DOE/NYSERDA, that use long-term institutional controls</li> <li>• If long-term institutional controls are considered at a later time, an EIS would need to be prepared if institutional controls are not adequately addressed in the DOE/NYSERDA EIS.</li> </ul>

### Option B - Prescribe Criteria After DOE-NYSERDA Final EIS, But Before the Record of Decision Is Issued

Under this option, decommissioning criteria would be proposed so that they could be treated and considered in the DOE/NYSERDA EIS. Following issuance of the final EIS, but before the record of decision, NRC would finalize (prescribe) decommissioning criteria.

Pros	Cons
<ul style="list-style-type: none"> <li>• Enables DOE/NYSERDA to use NRC prescribed criteria in final decision on remediation approach documented in ROD</li> <li>• Consistent with DOE/NYSERDA schedule</li> <li>• Consistent with approach in NRC-DOE MOU</li> <li>• Enables public input on EIS to be considered in Commission decision</li> <li>• Consistent with comments from NYSDEC and DOE</li> </ul>	<ul style="list-style-type: none"> <li>• Some groups perceive this option as being less independent than Option A above</li> <li>• Inconsistent with Citizens' Task Force recommendations</li> <li>• Does not provide DOE, NYSERDA, or the public with an early NRC decision on criteria</li> </ul>

Option C - Prescribe Criteria After DOE-NYSERDA Final EIS and Record of Decision Are Issued

Pros	Cons
<ul style="list-style-type: none"><li>• NRC has advance knowledge of DOE/NYSERDA preferred alternative and basis for decision</li><li>• Enables public input to be considered in Commission decision</li></ul>	<ul style="list-style-type: none"><li>• DOE/NYSERDA make remediation decision without benefit of Commission criteria</li><li>• Could require DOE/NYSERDA to reassess remediation decision if Commission criteria is inconsistent with proposed remediation approach</li><li>• NRC decision could be perceived as a “rubber stamp,” if it is consistent with the DOE/NYSERDA decision</li></ul>

## Length of Time to Accomplish Regulatory Options for Finalizing Decommissioning Criteria

These regulatory options for finalization would be the methods by which the Nuclear Regulatory Commission would “prescribe” the criteria.

### Rulemaking - total 26 months

8-months to publish a proposed rule

6-months public comment period

6-months to evaluate public comments and prepare Commission paper for approval of final rule

4-months to approve final rule

2-months to publish final rule

Resources: At least 3 FTE.

Adjudication - 4-6 months, if no hearing requested; 10 months to 30 months if hearing is requested

6 to 8-weeks to prepare a proposed order for the Commission

6-weeks for Commission to approve the order

3-weeks to publish the order in the Federal Register

6-months to 2 years to finalize order, if a hearing is requested

Resources: Less than 1 FTE without hearing. If hearing is held, 3 FTE or more

### Policy Statement - total 4 months

6 to 8-weeks to prepare a proposed statement to the Commission

6-weeks for Commission to adopt the policy

3-weeks to publish the policy statement in the Federal Register

[If public comment is sought, an additional 5-6 months would be added.]

Resources: Less than 1 FTE without public comment. More than 1 FTE if public comments are requested.

### Letter to DOE - total 4 months

6 to 8-weeks to prepare a proposed letter for the Commission

6-weeks for Commission to approve the letter

3-weeks to publish a Federal Register notice on the letter

Resources: less than 0.5 FTE

## Cintichem Compared to West Valley

The Cintichem facility was a medical isotope production reactor and hot lab facility in Tuxedo, New York. The facility produced primarily medical radioisotopes by irradiating high-enriched uranium targets, in a 5 MW research reactor, and chemically processing the irradiated targets to separate the desired isotopes. Cintichem had an Nuclear Regulatory Commission (NRC) license for its reactor and an NRC special nuclear material license for possession and use of the enriched uranium. Cintichem also had a byproduct material license issued by the State of New York. At Cintichem, due to the configuration of the operations that took place, there was no clear physical demarcation between the different licensed activities. In 1990, after leaks were found in the reactor coolant pool system, Cintichem decided to decommission the facility. On October 19, 1990, Cintichem submitted, to the NRC, a license amendment application for approval of a decommissioning plan.

The New York State Department of Environmental Conservation (NYSDEC) requested a hearing related to the license application requesting approval of the decommissioning plan. Under the Cintichem Cooperative Agreement between NYSDEC, NRC, and Cintichem (attached), NYSDEC withdrew its request for hearing. The parties also agreed to: (1) open exchanges of information; (2) notification of NYSDEC prior to NRC meetings and inspections; (3) the use of NRC decommissioning criteria, and (4) a process for commenting on decommissioning issues and resolving any regulatory differences.

At West Valley, NRC and NYSDEC jurisdictions are more clearly defined. NRC regulates all radioactive material on the site except the State Disposal Area (SDA). NYSDEC, and other New York Agreement State agencies, regulate the SDA at the site as well as non-radioactive solid waste and hazardous waste for the entire site. There are no shared NRC/NYSDEC responsibilities for radioactive materials at the West Valley site.

Attachment: As stated