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Subject: Supplementary Comments on Applicability of 10 CFR Part 61.58

My letter to you of September 30, 1999, contains lengthy comments on criteria for closure of high-level waste tanks especially from the perspective of oversight of the closure process by the Nuclear Regulatory Commission (NRC). Those comments discussed concentration averaging and performance assessment but did not address specifically a question that you have put to me; Does Part 61.58 apply or not to waste evaluations under Part 61.55 for tank closure? I intend to address that question with this supplementary letter of comment.

The present form of Part 61.58 is unchanged from the original:

“61.58 Alternative requirements for waste classification and characteristics.
The Commission may, upon request or its own initiative, authorize other provisions for the classification and characteristics of waste on a specific basis, if, after evaluation, of the specific characteristics of the waste, disposal site, and method of disposal, it finds reasonable assurance of compliance with the performance objectives in Subpart C of this part.”

By Part 61.58 the NRC reserves the option to “authorize”, or to approve special cases individually, provided there is reasonable assurance they meet the waste disposal performance requirements. This is reflected in Part 61.7, Concepts, at Part 61.7(b)(5) where it says; There may be some instances where waste with concentrations greater than permitted for Class C would be acceptable for near-surface disposal with special processing or design. These will be evaluated on a case-by-case basis.”

The concepts and requirements of Part 61 clearly provide for special cases where waste, that is possibly unsuitable for near-surface disposal, may be accepted for such disposal based on evaluation of the specific characteristics of the waste, the site, and the method of disposal. Part 61.58 is specifically framed that NRC can formally “authorize”, presumably by a formal NRC licensing action. However, recall that Part 61 specifically addresses “Licensing Requirements for Land Disposal of Radioactive Waste” The entire regulation is speaking of licensed activities. The NRC has already clearly applied Part 61 standards to DOE determinations for the closure of HLW tanks, in the three criteria for determining incidental waste. Those tank closure actions are definitely not NRC-licensed activities. The three criteria constitute a Part 61.58-like evaluation applied to an unlicensed situation. The criteria are, of course, consistent with the concepts of Part 61.7.

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A literal reading of Part 61.58 permits NRC to "authorize other provisions" by other than overt licensing actions, for example, by reviewing a DOE determination without objection.

Based on the preceding I believe that a Part 61.58-like evaluation is appropriate for unlicensed DOE HLW tank closures. For the West Valley case there is subsequent NRC licensing authorization, when the NRC reinstates the West Valley site license after having reviewed DOE tank closure without objection.

Part 61.55(a)(2)(iv) also applies to wastes that may be unsuitable for near-surface disposal. In the original version of 1982 it referred the question to Part 61.58. In the revised version, it conforms with the Low-Level Radioactive Waste Policy Amendments Act of 1985 (LLRWPA), Section 2021c.(b)(1)(D) and 2021c(b)(2), and requires that waste that exceeds the Class C limits established by Part 61.55 shall be disposed of in a geologic repository or in a "disposal site licensed pursuant to this part" if the waste results from activities licensed by the NRC. In the West Valley case, the waste was generated by activities licensed by the NRC. If the DOE determination at West Valley is that such waste is acceptably disposed *in situ*, and the NRC raises no objection to that determination, the LLRWPA requirements can be met. West Valley is licensed later when NRC reinstates the license after DOE's work is done. As I noted in my September 30 letter, NRC has recently promulgated regulations for restricted release of licensed sites with *in situ* disposed waste under 10 CFR Part 20.1403, not under Part 61. For other DOE sites, formal compliance with these LLRWPA requirements is not necessary since the wastes were not produced in NRC-licensed activities. There is, of course, no doubt that closures of this type can be completely compliant with criteria and guidance NRC has provided and continues to provide for DOE tank closure.

I hope these comments are a useful response to your request.

Sincerely,

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