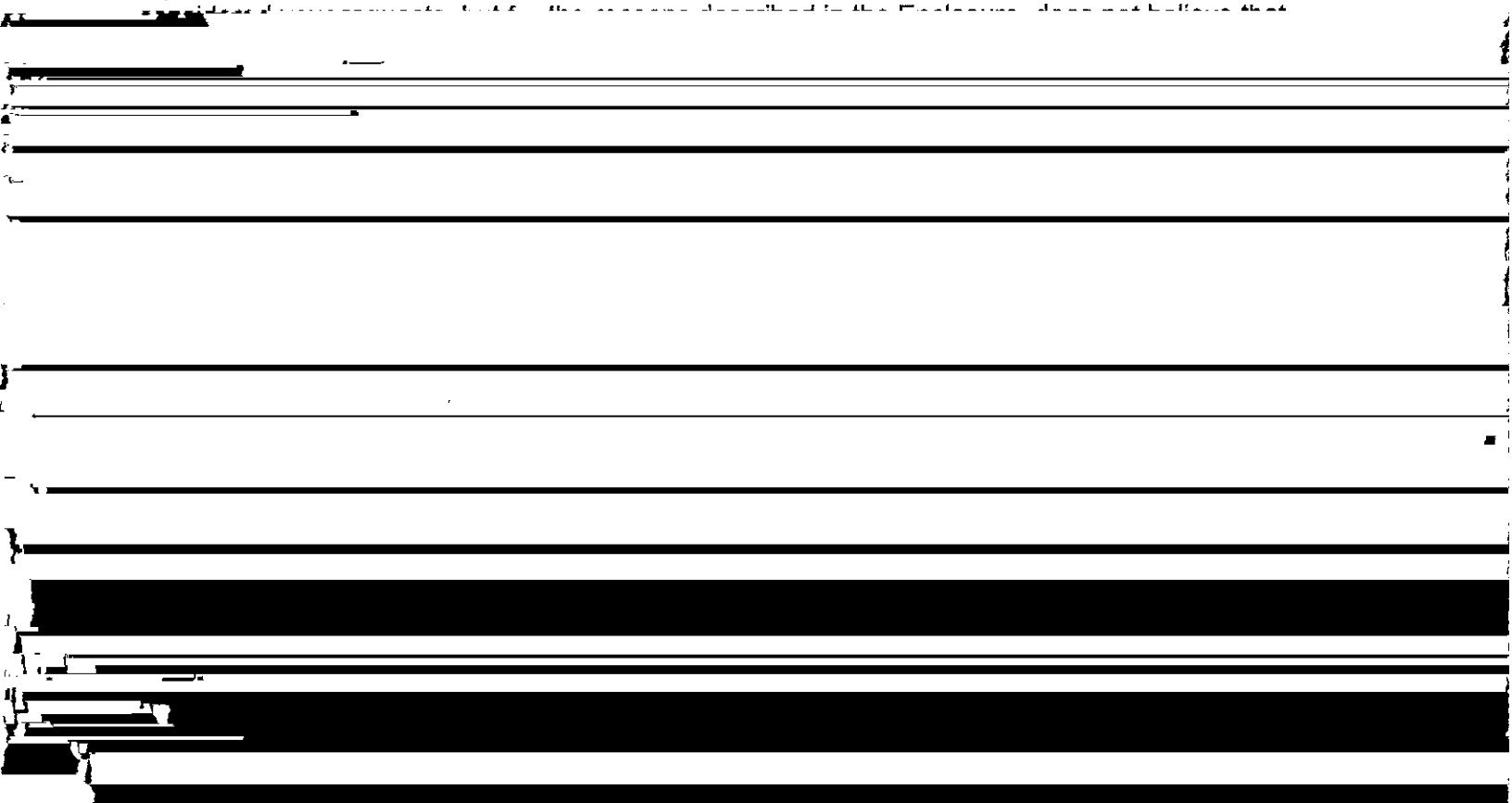


October 25, 2006

Peter R. Smith, President  
New York State Energy Research  
and Development Authority  
17 Columbia Circle  
Albany, New York 12203

Dear Mr. Smith:

I am responding, on behalf of the U.S. Nuclear Regulatory Commission (NRC), to your letter of August 4, 2006. Your letter requested that the Commission revise the West Valley Policy Statement (WVPS) published on February 1, 2002 (67 FR 5003), and direct the NRC staff to codify the procedures and requirements set forth in "NUREG-1854, Standard Review Plan for Activities Related to U.S. Department of Energy Waste Determinations, Draft Report for Interim Use and Comment" (SRP), which was issued for public comment in May 2006. Your letter also repeated several requests that were made in prior correspondence. The Commission



## NYSERDA Requests for Revision of the West Valley Policy Statement

### 1. Revise the Waste Incidental to Reprocessing Criteria

The New York State Energy Research and Development Authority (NYSERDA) requests that the U.S. Nuclear Regulatory Commission (NRC) revise the West Valley Policy Statement (WVPS) to amend the criteria that should be applied to waste incidental to reprocessing (WIR) determinations so that the criteria will be "...at least as prescriptive and protective" as the WIR criteria specified in section 3116 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (NDAA) and U.S. Department of Energy (DOE) Order 435.1. NYSERDA would like the criteria to be amended in two ways: (1) to require compliance with the performance objectives of 10 CFR Part 61, Subpart C; and (2) to include a criterion that considers whether waste exceeds the concentration limits for Class C low-level waste, as set out in Part 61.

NYSERDA correctly notes that the WIR criteria set forth in the WVPS specify that the waste should be managed so that safety requirements comparable to the performance objectives in Part 61, Subpart C, are satisfied, whereas the WIR criteria in the NDAA provide that the waste be disposed of in compliance with those performance objectives. The NDAA criteria are only applicable to DOE sites in South Carolina and Idaho. NYSERDA requests that the "comparable" standard in the WVPS be replaced with a "compliance" standard because "...the residents of New York State should be provided a compliance-based safety standard that is at least as stringent as that being applied to protect the residents of other states."

As NRC explained at the time the WVPS was issued:

[The WIR] criteria are risk-informed and performance-based in that the criteria allow DOE the flexibility to develop innovative approaches to meeting the performance objectives in Part 61. In effect, DOE should undertake cleanup to the maximum extent that is technically and economically practical and should achieve performance objectives consistent with those we demand for the disposal of low-level waste. If satisfied, these criteria should serve to provide protection of the public health and safety and the environment and the resulting calculated dose would be integrated with the resulting calculated doses for all other remaining material at the NRC-licensed site. [67 FR 5009 (February 1, 2002)]

Unlike the NDAA, the WVPS requires two separate but complementary evaluations. DOE will first need to show that the waste satisfies the WIR criteria, and then will need to integrate the doses from that waste with other residual radioactive material remaining on the NRC-licensed site to show that the goal of compliance with the requirements of the License Termination Rule (LTR) is met. NRC fully expects DOE to satisfy the Part 61 performance objectives, but recognizes that the unique nature of the West Valley site may require alternative approaches to meeting these performance objectives. Thus, we believe the use of the term "comparable to" is appropriate. Given the need to conform the WIR determination to safety requirements comparable to the Part 61 performance objectives and overall site performance with the goal of meeting the LTR requirements, the Commission is confident that the WVPS provides an equivalent level of protection for the residents of New York State as that established in the NDAA.

NYSERDA also requests that the WVPS WIR criteria be amended to include a criterion that was deleted from NRC's original 1993 WIR criteria that considers whether the waste exceeds Class C concentration limits. Even though, as NYSERDA points out, this criterion permits the radionuclide concentrations to exceed the Class C limits in certain circumstances if additional activities are undertaken (both under the NDAA and in Order 435.1), NYSERDA is concerned that since the WVPS WIR criteria do not include this requirement, there will be no similar evaluation of any additional protections that could compensate for higher concentrations. NYSERDA also believes that there must be consideration of whether the waste is Greater-Than-Class C (GTCC) to determine who is responsible for its disposal because the Federal Government, rather than the State, is responsible for the disposal of GTCC waste.

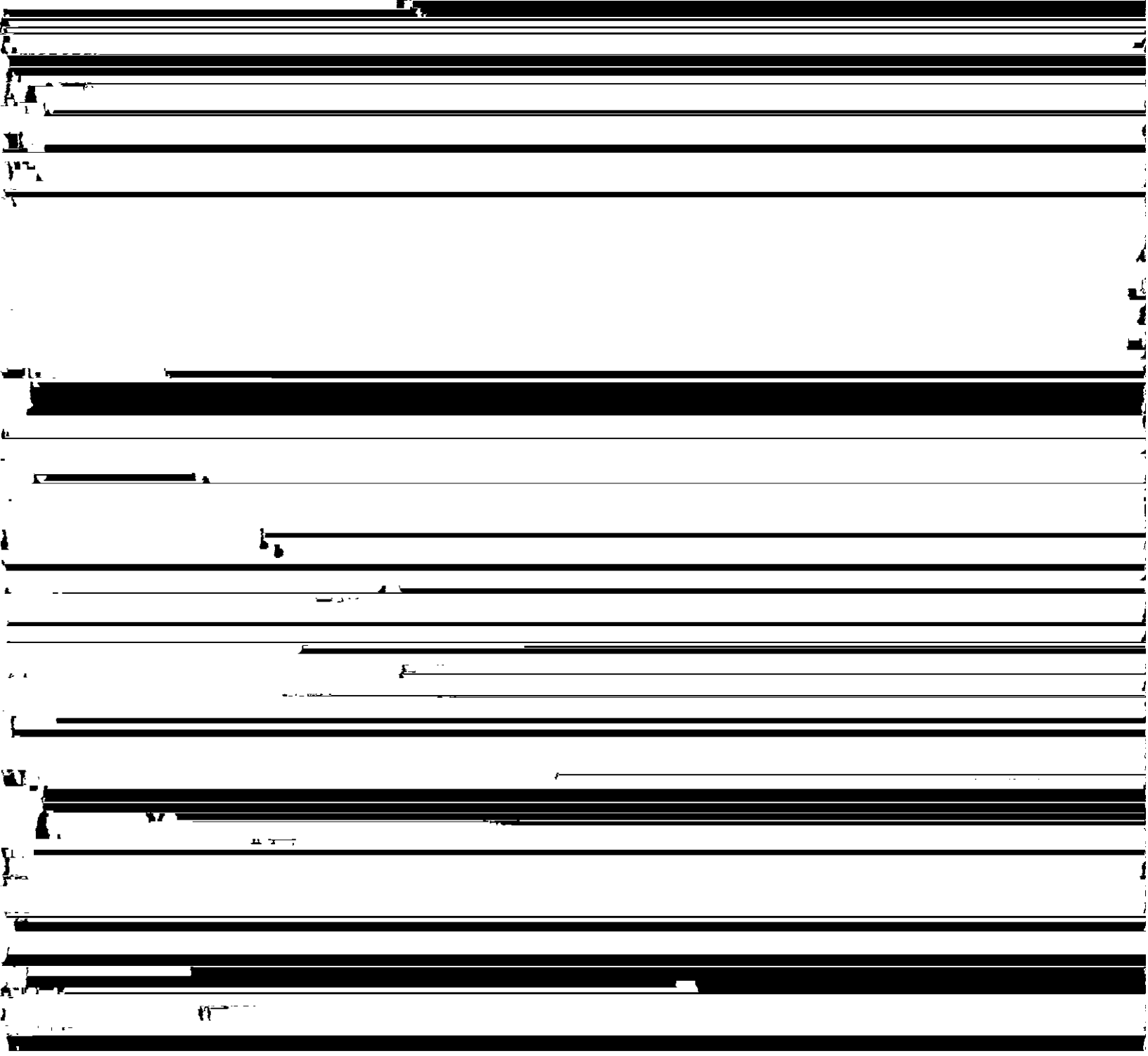
On June 20, 2002, NRC responded, as follows, to NYSERDA's April 24, 2002, letter objecting to the elimination of this requirement from the WIR determinations at West Valley:

NYSERDA correctly states that the criteria for WIR determinations at Hanford included the criterion that the waste "... not exceed the applicable concentration limits for Class C low-level waste as set out in 10 CFR Part 61." .... When the Commission considered the incidental waste issue at Savannah River, this criterion was dropped because the Commission adopted a risk-informed and performance-based approach to meeting the performance objectives in Part 61 that focuses attention on the potential health consequences of leaving waste on-site (i.e., doses which might occur), rather than considering more indirect measures of health risk, such as meeting specific radionuclide concentration limits. The Commission has adopted this same approach for West Valley. In effect, DOE should undertake cleanup to the maximum extent that is technically and economically practical and should achieve performance objectives consistent with those that the Commission demands for the disposal of low-level waste. [Letter to Paul L. Piculo from Richard A. Meserve, June 20, 2002]

The radionuclide concentrations of wastes are considered under the WVPS WIR criteria even if they are not explicitly classified. However, for WIR determinations, NRC does not believe that concentration limits are essential in determining whether public health and safety and the environment are protected. Therefore, the WVPS focuses on potential health effects (i.e., dose) from material remaining on site, rather than concentrations of various radionuclides. This approach applies a more direct metric for ensuring protection of the public health and safety and the environment. In the Commission's view, the public and the environment should be protected if: (1) performance objectives, comparable to the performance objectives for Part 61,

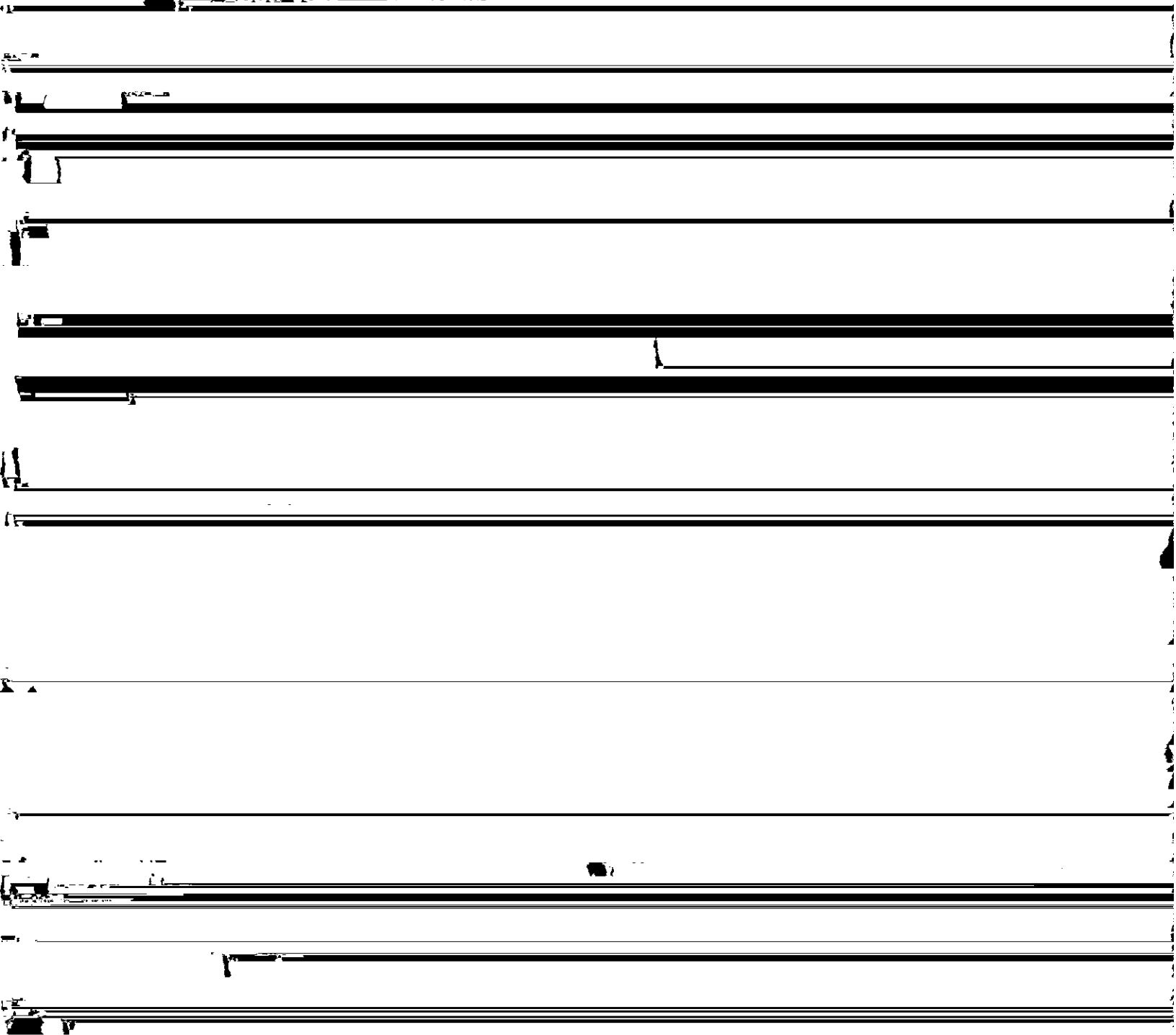
As a result of NRC's not including a GTCC limitation, NYSERDA raises the question of DOE's obligations under the Low Level Radioactive Waste Policy Amendments Act (LLRWPA). NRC has previously addressed this issue. [See Letter to Paul J. Merges from John T. Greeves, October 9, 2002]. As NRC then stated, Section 3(b)(1) of the LLRWPA provides that the

... disposed of GTCC material. DOE is the government



The end state of DOE actions will not be known until DOE has completed its decontamination activity under the [WVDP Act], since it is not unusual for changes to occur during decommissioning that may impact dose assessments. It would be an inefficient use of limited NRC resources and inconsistent with the requirements of the LTR to review NYSERDA's approach to license termination before our review and acceptance of DOE's decommissioning plans, as well as the implementation of those plans. In sum, a decision on the NYSERDA decommissioning plan could not be given finality until DOE's decontamination and decommissioning actions are completed and the project area is returned to NYSERDA. [March 9, 2004, Letter at 3]

NYSERDA provides no explanation for its view that the sequential process in the WVPS is not



#### 4. Acknowledge that Disposal activities at West Valley Create a New Disposal Unit

NYSERDA requests the Commission to acknowledge that tank closure activities, if performed in the State of New York at the West Valley site, are also disposal actions, thereby creating a new disposal unit that must comply with appropriate licensing criteria.

Residual radioactivity remaining at a licensed site is not considered low-level waste subject to Part 61. The LTR provides the applicable decommissioning requirements for material remaining at an NRC-licensed site. Residual radioactivity that meets the LTR is not subject to further NRC regulation, except in the case where a long-term license is used as a means of institutional control.