

August 4, 2006

Dale E. Klein, Chairman  
U.S. Nuclear Regulatory Commission  
11555 Rockville Pike  
Rockville, MD 20852

Dear Chairman Klein:

**SUBJECT: NYSERDA Requests Revision of West Valley Policy Statement**

The New York State Energy Research and Development Authority (NYSERDA) has recently completed our review of *NUREG-1854, Standard Review Plan for Activities Related to U.S. Department of Energy Waste Determinations, Draft Report for Interim Use and Comment (SRP)*. We commend the U.S. Nuclear Regulatory Commission (NRC or Commission) staff for having produced a high quality document that provides for a thorough and technically sound review of U.S. Department of Energy (DOE) Waste Incidental to Reprocessing (WIR) determinations. We have submitted a few comments on the SRP to NRC staff, but we believe the Commission must address our more significant issues. Specifically, we are requesting that the Commission: (1) revise the West Valley Policy Statement to provide a set of WIR criteria that are at least as prescriptive and protective as the WIR criteria that have been established for DOE-owned sites, under 3116 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (NDAA) and DOE Order 435.1; (2) revise the West Valley Policy Statement and direct NRC staff to exercise its Atomic Energy Act (AEA) authority concurrent with its WVDP Act authority; and (3) direct NRC staff to codify the procedures and requirements set forth in the SRP to ensure uniform application to all sites where WIR determinations are permitted.

NYSERDA requests a revision of the WIR criteria in the West Valley Policy Statement in spite of serious doubts about whether WIR criteria can be applied to reclassify residual high-level radioactive waste (HLRW) that may remain in tanks at West Valley. The West Valley Demonstration Project (WVDP) Act has a unique definition of HLRW, and West Valley differs from DOE sites in South Carolina and Idaho where 3116 of the NDAA applies, in that West Valley is a state-owned site. However, assuming for purposes of argument, that WIR criteria could be applied at West Valley, NYSERDA believes those criteria should be clear and detailed enough to apply in a transparent manner and certainly no less stringent than criteria to be applied at other sites. Accordingly, we submit the following statements in support of our request for a revision to the West Valley Policy Statement.

### Compliance with Performance Objectives of 10 CFR 61, Subpart C

The HLRW tanks in the states of South Carolina and Idaho are located on federally-owned land for which the federal government will be responsible in perpetuity. Under the NDAA, any residues in those tanks must be disposed of in compliance with the performance objectives in 10 CFR Part 61, Subpart C. The HLRW tanks at West Valley are located on state-owned land for which the federal government denies any long-term maintenance responsibility. Yet, under the West Valley Policy Statement, residues in those tanks only need to be "... managed so safety requirements comparable to the performance objective in 10 CFR Part 61, Subpart C, are satisfied." NYSERDA requests that the "comparable" standard in the West Valley Policy Statement be replaced with a "compliance" standard. NYSERDA believes that 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.

### Closure of HLW Tanks In-Place Creates a New Disposal Unit

Section 3116 of the NDAA acknowledges that the actions being taken in the states of South Carolina and Idaho to stabilize and to close in-place the residual radioactive waste in HLW tanks are disposal actions, and that a new disposal facility is being created. NYSERDA requests that the Commission 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.

### Greater than Class C Waste

When the Commission initially developed criteria for WIR, those criteria contained a specific requirement that the waste "not exceed the applicable concentration limits for Class C low-level waste as set out in 10 CFR Part 61." (Denial of Petition for Rulemaking: States of Washington and Oregon, 58 FR 12342.) This criterion was consistent with the structure of Part 61, which states that waste exceeding the concentration limits in Table 1 in Part 61.55 "is not generally acceptable for near-surface disposal." The NRC system clearly saw some value in having a separate and distinct concentration criterion in determining whether near-surface disposal of radioactive waste was acceptable.

However, when the Commission issued the West Valley Policy Statement, the Commission dropped the concentration limit criterion and only required that the waste be managed so safety requirements comparable to the performance objective in 10 CFR Part 61, Subpart C, are satisfied. NYSERDA objected to the deletion of the concentration criterion in its April 24, 2004 letter from Dr. Paul Piciulo to Dr. Richard Meserve. Both the NDAA and DOE Order 435.1 at least consider the concentration of the waste and require certain additional activities if the waste exceeds the Class C concentration limits. The SRP sets forth guidance for determining whether these additional activities under the NDAA would be sufficient. However, if no comparison with Class C concentrations is necessary under the West Valley Policy Statement, then there will be no similar evaluation of any additional protections that could compensate for higher concentrations. NYSERDA believes that a concentration criterion should be restored to the West Valley WIR criteria.

In addition to the issue of consistency with other WIR criteria, NYSERDA believes that there must be consideration of whether the waste is greater than Class C to determine who is responsible for its disposal.

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Section 3(b)(1)(D) of the Low Level Radioactive Waste Policy Amendments Act (LLRWPA) provides that the federal government is responsible for disposal of GTCC waste. This determination is critical to decide whether the tank waste can remain on State-owned property and to ascertain stewardship responsibilities that would be integral to any decision concerning the waste if it remains at the West Valley site. Moreover, the LLRWPA provides that all such GTCC waste be disposed of in a facility licensed by the NRC. Properly characterizing this waste would be essential to determining the appropriate licensing requirements.

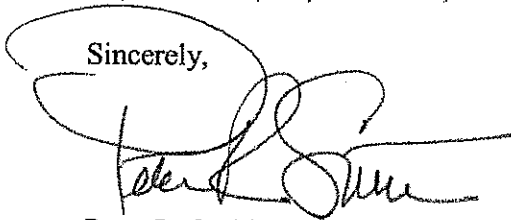
Concurrent NRC Determinations Under AEA and WVDP Act Authorities

The West Valley Policy Statement and associated Implementation Plan currently describe a sequential process whereby NRC will make a WIR determination for residual waste in the HLW tanks under NRC's WVDP Act authority, and will subsequently make another WIR and licensing determination under NRC's AEA authority. Repetitive decisions under separate authorities and administrative processes are not protective of NYSERDA's or New York State residents' interests, nor are they entirely transparent to the public. We urge NRC to consider and exercise all statutory and legal responsibilities that may be applicable to what are in effect single decisions, such as a WIR determination and/or approval of a decommissioning action to meet license termination rule standards. NYSERDA made a similar request of NRC staff in a November 18, 2003 letter from Paul L. Piciulo to John T. Greeves, and the Citizen Task Force (CTF) recently raised the same issue during their July 26, 2006 meeting and in their comment package on the SRP.

We strongly urge the Commission to revisit the West Valley Policy Statement and to issue a revised policy statement that corrects the inconsistencies in the WIR criteria and to replace the sequential imposition of NRC's statutory authorities with a comprehensive decision that fulfills NRC's obligations under all applicable authorities, as described above. In addition, we encourage the Commission to codify the WIR procedures and requirements set forth in the SRP to ensure uniform application to all sites.

Thank you for your consideration. We would welcome the opportunity to further discuss these concerns with the Commission. If you have any questions, please contact me at (518) 862-1090 extension 3320 or Dr. Paul Piciulo, Director of NYSERDA's West Valley office at (716) 942-9960, ext 4378.

Sincerely,



Peter R. Smith  
President and CEO

cc: E. McGaffigan, U.S. NRC Commission  
J. S. Merrifield, U.S. NRC Commission  
G. B. Jaczko, U.S. NRC Commission  
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U.S. Senator Hillary R. Clinton

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U.S. Senator Charles Schumer  
U.S. Representative Brian M. Higgins  
U.S. Representative John R. Kuhl, Jr.  
U.S. Representative Thomas R. Reynolds  
U.S. Representative Louise M. Slaughter  
Governor George E. Pataki  
Catharine M. Young, New York State Senate  
Joseph Giglio, New York State Assembly  
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CTF Members  
P. L. Piciulo, Ph.D., NYSERDA-WVDP