

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 considered your requests, but for the reasons described in the Enclosure, does not believe that a revision of the WVPS is warranted, and remains confident that the decommissioning criteria set forth in the WVPS are fully protective of public health and safety and the environment. Also, although the NRC staff is working to finalize the draft SRP, codifying the guidance would not be appropriate since it does not establish any requirements.

Sincerely,

/RA/

Martin J. Virgilio
Deputy Executive Director for Materials, Research,
State and Compliance Programs
Office of the Executive Director for Operations

Enclosure: NYSERDA Requests for
Revision of the WVPS

cc: Governor George E. Pataki
Catharine M. Young, New York State Senate
Joseph Giglio, New York State Assembly
P. A. Giardina, U.S. EPA
S. Hammond, NYSDEC
P. L. Piciulo, NYSERDA
B. C. Bower, U.S. DOE
R. Armstrong, Seneca Nation of Indians

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. Piciulo 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, are met in classifying waste as WIR; and (2) the dose requirements of the LTR are met after integrating the resulting doses from the incidental waste with other calculated doses from material remaining at the NRC-licensed site.

It should be noted that the classification scheme in 10 CFR Part 61.55 is intended to be applied generally and that alternate classifications are allowed under Part 61.58. Further, it is important to note that the NDAA does allow for on-site disposal of waste that exceeds Class C concentration limits, provided that the performance objectives can be met and DOE performs additional consultation with NRC. The Commission believes that the West Valley Demonstration Project Act (WVDP Act), and the associated memorandum of understanding between DOE and NRC, and the decommissioning process for the West Valley site provide an appropriate level of consultation to address such matters.

3.

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 Federal Government is responsible for the disposal of GTCC material. DOE is the government agency responsible for implementing that provision of the LLRWPA. Section 3(b)(2) of the LLRWPA provides that the disposal of GTCC material resulting from NRC licensed activities, such as the GTCC from West Valley, must be in a facility licensed by the NRC. Specifically, the material must be disposed of at a facility that the NRC determines to be adequate to protect the public health and safety. NRC will make a licensing decision concerning the WIR material when the site is returned to NRC regulatory oversight, if NYSERDA seeks license termination. The disposal of any GTCC material in a manner that meets the Commission's WIR guidance together with the LTR should, as noted above, be protective of the public health and safety, and be consistent with the protection afforded by 10 CFR Part 61 and the LTR. In our view, this process will satisfy the requirements of section 3(b)(2) of the LLRWPA. If the WIR determination cannot be made at the time of license termination, then the responsibility of the Federal Government/DOE to dispose of GTCC material will need to be satisfied.

2. Provide for Concurrent NRC Determinations under the Atomic Energy Act (AEA) and WVDP Act

NYSERDA repeats a request it originally made in a November 18, 2003, letter, to the NRC staff, that the WVPS and its Implementation Plan be revised to reflect a process wherein DOE and NYSERDA would concurrently conduct their respective decommissioning activities for the cleanup of the Western New York Nuclear Service Center (Center), rather than sequentially, as is currently envisioned in the WVPS. This would also mean that NRC would fulfill its responsibilities, under the WVDP Act governing DOE's decommissioning activities for the West Valley Demonstration Project (WVDP), concurrently with its responsibilities under the AEA governing NYSERDA's decommissioning activities and termination of its license. NYSERDA believes that under the present sequential process "NRC will make a WIR determination for residual waste in the H[igh] L[evel] W[aste] tanks under NRC's WVDP Act authority, and will subsequently make another WIR and licensing determination under NRC's AEA authority." NYSERDA objects to this because "...[r]epetitive 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." For this reason, NYSERDA "...urge[s] 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."

As NRC stated in its response to NYSERDA's 2003 letter, "...this sequential approach is consistent with the thrust of the [WVDP Act], which provides, *inter alia*, that the State and DOE will enter into an agreement wherein the State will make available the facilities of the Center necessary for the completion of the project 'for such period as may be required for completion of the project.' Section 2(b)(4)(A) of the [WVDP Act]." [See Letter to Paul L. Piciulo from John T. Greeves, March 9, 2004]. NRC's letter further explained why a concurrent process would not be practical:

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 protective of NYSERDA's or New York State residents' interests nor for why a sequential process would be less transparent than a concurrent process. The WVPS prescribes NRC's LTR criteria as the decommissioning goal for the entire site such that DOE is subject to the LTR as the surrogate for NYSERDA in decommissioning facilities used for the project, and NYSERDA is subject to the LTR after NYSERDA's NRC license is reactivated at the conclusion of the WVDP. Further, the LTR public notification and public participation provisions of 10 CFR 20.1403(d) and 20.1405 are included in the decommissioning criteria established in the WVPS, and NRC expects both DOE and NYSERDA to implement these provisions.

Finally, NYSERDA misperceives NRC's role in the decommissioning process at West Valley by suggesting that "NRC will make a WIR determination for residual waste in the HLW tanks under NRC's WVDP Act authority" and that NRC will make a decision whether to approve any DOE "action to meet the LTR standards." NRC's WVDP Act authority with respect to DOE is limited, to prescribing decontamination and decommissioning criteria and commenting on DOE's decommissioning plan. Thus, DOE, not NRC, will be making any necessary WIR determination on which NRC will likely provide comment. As indicated above, NRC will make a licensing decision concerning the WIR material when the site is returned to NRC regulatory oversight, if NYSERDA seeks license termination. NRC does not have licensing authority over DOE, under the WVDP Act, and so may not approve or disapprove a DOE decommissioning action, although NRC fully expects to verify whether DOE's plans for decommissioning meet the decommissioning criteria set forth in the WVPS. The differences between NRC's limited authority, under the WVDP Act, and its licensing authority, under the AEA, further underscores the need for the sequential decommissioning process envisioned in the WVPS.

3. 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)

NYSERDA requests the Commission to direct the NRC staff to codify the procedures and requirements, set forth in the draft SRP, to ensure uniform application to all sites where WIR determinations are permitted. The staff is currently looking to resolve comments on the draft SRP in order to finalize it. This guidance does not establish any "requirements" for NRC or DOE. As noted in the draft SRP, the NRC staff intends to use this guidance for reviews of waste determinations for all incidental waste sites, which will help ensure consistency across different reviews and different reviewers. Therefore, the Commission does not believe that codifying the procedures in the SRP is necessary.

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.