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OFFICE OF THE ATTORNEY GENERAL**

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DIVISION OF SOCIAL JUSTICE  
ENVIRONMENTAL PROTECTION BUREAU

October 27, 2009

The Honorable John T. Curtin  
United States District Court  
Western District of New York  
68 Court Street  
Buffalo, New York 14202

Re: State of New York et al., v. the United States, et al., 06 CV 0810

Dear Judge Curtin:

The parties to this action, State of New York, the Commissioner of the New York State Department of Environmental Conservation (DEC) and the New York State Energy Research and Development Authority (NYSERDA) (collectively, the State) and the United State Department of Energy (DOE) and the United States of America (collectively, the United States) have reached an agreement settling two of the four causes of action in the Complaint. The terms of the settlement are contained in the proposed Consent Decree (Consent Decree) submitted herewith. The general terms of the Consent Decree and a proposed procedure for seeking court approval of the Consent Decree, including a public comment period, are described below.

The parties reached agreement after the Court stayed this litigation at the parties' request to allow the parties to engage in a confidential mediation process. Mediation sessions began in September 2007, and after a half dozen mediation sessions and subsequent negotiations involving compromises from both sides, the parties reached the settlement set forth in the Consent Decree.

## **Background <sup>1</sup>**

This case arises from activities at the Western New York Nuclear Service Center located on 3,300 acres in West Valley, Cattaraugus County owned by NYSERDA on behalf of New York State (the Center or the Site). The Center was established in the 1960s to reprocess spent nuclear fuel from power reactors. From 1966 to 1982 a private company, Nuclear Fuel Services (NFS), leased the Site from NYS. NFS ceased operations in 1972 leaving behind two disposal areas and lagoons, contaminated buildings, and 600,000 gallons of high level radioactive waste (HLRW) generated by reprocessing activities. The Site never reopened.

Congress enacted the West Valley Demonstration Project Act (WVDPA or Project) in 1980, directing the federal government to solidify the liquid HLRW remaining from the reprocessing operation, decontaminate and decommission the facilities used in accordance with requirements prescribed by the NRC; transport the solidified HLW to a federal repository, and dispose of the low-level and transuranic waste produced from the Project. The State is obligated to pay 10% of the costs of the Project as defined in the Act. In accordance with that statute, DOE solidified most of the HLRW and has started to decontaminate the facilities used during the Project. The solidified waste remains in canisters at the Site because there is presently no federal facility available for long-term disposal of HLRW. NYSERDA currently manages about 3,100 acres within the Site, as well a disposal area known as the State-licensed Disposal Area (SDA). DOE manages the remaining 200 acres which are the focus of WVDPA activities.

Although the federal and state governments have spent several billion dollars remediating the Site to date, significant contamination remains at the Site.

## **Remedial Activities/Environmental Impact Statement Process**

DOE and NYSERDA, as joint lead agencies, have been involved in developing an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) and the New York State Environmental Quality Review Act (SEQRA) for nearly two decades. Pursuant to an agreement between DOE and NYSERDA, DOE has management responsibility for the EIS. The federal Nuclear Regulatory Commission (NRC), Environmental Protection Agency (EPA), and DEC are participating in the preparation of the EIS as cooperating agencies. The EIS and SEQRA processes, not the terms of the Consent Decree, will determine the appropriate steps to be taken in the remediation and decommissioning of the Site. The Consent Decree focuses on how DOE, NYSERDA, and the State of New York will share the cost of those steps.

## **The Consent Decree**

The Consent Decree resolves the first cause of action for allocation of response costs pursuant to the Comprehensive Environmental Response Compensation and Liability Act

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<sup>1</sup> In *Coalition on West Valley Nuclear Wastes v. DOE*, 625 F.Supp. 2d 109 (WDNY 2007), aff'd 2009 U.S. App. LEXIS 14942 (August 31, 2009), this Court further described Site background events.

(CERCLA), 42 U.S.C. § 9601, et seq., and the third cause of action concerning the responsibilities of DOE pursuant to the West Valley Demonstration Project Act, Pub.L. 96-368 (WVDPA). The settlement of these two claims allocates costs between the state and federal governments, but does not impact in any way the cleanup alternatives that are being or may be developed in the EIS process. For example, the parties have agreed that each government will pay 50% of the long-term costs of remediating the NRC-licensed Disposal Area, one of two landfills at the Site, regardless of whether the final remedy involves exhumation of landfill wastes, maintenance of the landfill in place, or some alternative cleanup program.

The second cause of action for CERCLA natural resource damages is not resolved; however, the parties have agreed to its dismissal without prejudice based on their agreement to enter into a tolling agreement (to become effective upon entry of the Consent Decree) tolling the statute of limitations for three years. The fourth cause of action for a declaration that the United States is responsible for any paying disposal fees due under the Nuclear Waste Policy Act 42 U.S.C. § 10107(b), is neither settled nor dismissed and remains in litigation.

The Consent Decree also contains consultation provisions to facilitate cooperation among the parties in carrying out whatever remedy is ultimately selected for the Site. Dispute resolution provisions which provide for a progression of procedures from informal negotiations among the parties to possible submission to the Court, under certain specific circumstances, are also included in the Consent Decree.

### **Next Steps**

The parties are hereby providing the Consent Decree for lodging with the Court, but do not seek consideration of the decree by the Court at this time so as to allow a thirty-day period for the State to accept public comments on the settlement. A Notice of Lodging of Consent Decree is enclosed. The State intends to publish the Notice of Lodging in the State's Environmental Notice Bulletin, and in the Buffalo News, Springville Journal, and the Olean Times Herald. In addition, the State will provide email notice to those who have expressed an interest in this litigation.

The State will post the Consent Decree, the complaint, and this letter on the New York State Attorney General's website and provide printed copies of the Consent Decree and the complaint to interested parties on request, as described in the Notice of Lodging.

At the close of the public comment period, the State will review the comments and move the Court for entry of the proposed Consent Decree if this is appropriate in light of the comments received. Following consideration of the Consent Decree by the Court, the parties will submit a proposed case management plan to address the remaining claim or claims.

The undersigned is authorized to represent that all of the parties concur in the process described in this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Linda E. White". The signature is written in a cursive style with a large initial "L".

Linda E. White  
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cc: Sheila D. Jones  
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