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June 29, 2010

The West Valley Citizen Task Force
c/o The Logue Group
P.O. Box 270270
West Hartford, Connecticut 06107

Re: State of New York et al., v. the United States, et al., 06 CV 0810 (West Valley Site)

Dear Citizen Task Force Members:

Thank you for your December 4, 2009 letter providing comments on the draft Consent Decree ("CD") in the above-referenced court case ("Comment Letter"). Before responding, we thought it might be helpful to summarize the legal claims asserted by the State of New York (the State) in the lawsuit, as well as the settlement terms contained in the CD.

Summary of the Complaint and the Consent Decree

As explained in the Notice seeking public comment that we published in the Environmental Notice Bulletin and in several newspapers in early November 2009:

- The State, The New York State Research and Development Authority (NYSERDA), and U. S. Department of Energy (DOE) are engaged in certain public processes, including a process to develop an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA) and the State Environmental Quality Review Act (SEQRA) (collectively referred to in this response as the "NEPA /SEQRA Process") to address environmental contamination at the Site.

- or a number of years the State and the federal government have disputed the extent of the responsibility of the DOE for cleanup of the Site under the West Valley Demonstration Project Act (WVDPA), Pub.L. 96-368, enacted by Congress in 1980, as well as which government is liable for perpetual care of any remaining wastes after decontamination activities are complete.

- In order to resolve this impasse, the State, NYSERDA and the New York State Department of Environmental Conservation (DEC) filed a complaint against the United States and DOE on December 11, 2006. The complaint: (a) asserted claims for cost reimbursement and damages to the State's natural resources under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. 9601 et seq. (CERCLA or federal Superfund law); (b) sought a delineation by the court of DOE's responsibilities under the WVDPA; and (c) requested a ruling under the Nuclear Waste Policy Act (NWPA), 42 U.S.C. 10107, that the federal government must pay the fee for offsite disposal of the high level radioactive waste stored at the Site.

- The complaint did not seek an order requiring the federal government to perform any cleanup measures. Nor did the complaint include a claim under NEPA or SEQRA regarding the ongoing NEPA process or any past NEPA process. The State concluded then that it had no legal basis for these claims, and that continues to be the State's view at this time.

- The CD resolves many of the long-standing disagreements between the State and the Federal government regarding each government's share of financial responsibility for cleanup of the Site. The CD identifies a specific cost share for each government for specified facilities and known areas of contamination, and sets forth a process for determining cost shares for contamination that may be identified in the future. The Consent Decree also requires NYSERDA and DOE to develop detailed plans to assure continued consultation between the agencies during the remainder of the cleanup.

- The CD does not resolve either the State's CERCLA natural resource damages claim, the State's claim regarding the scope of DOE's responsibility under Section 2(a)(5) of the WVDPA for contaminants that remain in or on the HLRW tanks, hardware and facilities used during the Project, or its Nuclear Waste Policy Act claim. The State reserves its right to pursue its natural resource damage claim and this portion of its WVDPA claim in further litigation. The Nuclear Waste Policy Act claim is not settled or dismissed by the Consent Decree, so that claim is still pending in this case.

- The settlement relates only to allocation of financial responsibility and does not affect in any way the cleanup alternatives that are being or may be developed in the ongoing NEPA/SEQRA process or any other process. Thus, for example, the Consent Decree states 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 wastes in place or some other remedy. The federal and State governments have similarly reached allocation agreements regarding other facilities at the Site, as stated in the Consent Decree.

- Since the appropriate remedy for each of these facilities will be determined through the NEPA/SEQRA Process, comments on how the Site should be cleaned up are not relevant to the Court as it reviews the Consent Decree. In addition, the court has no legal authority in this case to decide cleanup issues as they are not raised in the complaint. As part of the continuing NEPA/SEQRA Process, on January 21, 2010, DOE and NYSERDA issued a Final EIS for the Site, entitled "Decommissioning and/or Long-Term

stewardship at the West Valley Demonstration Project and Western New York Nuclear Service Center." The Final EIS, which is available at www.westvalleyeis.com, has identified Phased Decision-making as the preferred alternative for the Site; that is, completion of Site remediation in two phases.

CTF's Comments and the State's Responses

1. "On Page 1 the third "Whereas" clause states that "from 196**2** until 1975, Nuclear Fuel Services,... conducted nuclear fuel reprocessing and nuclear waste disposal activities on the site." It is our understanding that waste disposal began in 1963 and reprocessing activities were initiated three years later. We agree that waste disposal at the site ended in 1975, about three years after reprocessing ceased."

Response: Nuclear Fuel Services, Inc. (NFS) purchased an option for developing the Center in the fall of 1962. We do not believe that the date of commencement of operations by NFS is material to the settlement and thus have opted not to change the date in the referenced Whereas Clause.

2. "On Page 7 Paragraph 17 describes possible Remedy Actions that, if selected, will be considered part of the Main Process Plant allocation. Subparagraph 17.b. includes cutting off the associated Main Process Plant pilings. There are more than 100 of these I-beam (H-beam) pilings driven through the Lavery Till. These beams provide a possible pathway for fluid transport of contamination into and through the Till which could impact the Kent Recessional Sequence. The Consent Decree, by limiting consideration of allocation responsibility at the cutoff level of the beams, does not sufficiently address the possibility of how the parties would be responsible for cleanup work made necessary by migration of contamination along the beams."

Response: The Consent Decree does not limit responsibility at the cutoff level of the pilings, it just doesn't set forth a specific allocation for that situation. Instead, if contaminants have migrated into soils below the Main Process Plant via pilings located below the building, the Consent Decree addresses that situation in paragraphs 24-26 by providing criteria and a means for determining how the parties will allocate costs if those soils (like other such soils that are not otherwise addressed in the Consent Decree) need to be remediated. See also, response to issue 3, below.

3. "On Pages 9 and 10 paragraph 26 identifies 3 classifications of contaminated soil. We believe this distinction does not sufficiently address contamination that might be discovered in the future, such as mentioned above concerning the steel pilings, or such as the North Plateau Ground Water Plume, or in other such cases where the responsibility for initial release of contamination may differ from the responsibility for allowing it to spread. Where responsibility is not addressed in advance it could lead to situations where, as with the plume, the disagreement resulted in delays and inaction during which the contamination spread and significantly increased possible cleanup costs. We see these delays as a direct result of the limited regulatory supervision of the Nuclear Regulatory Commission at WVDP."

Response: Paragraphs 24-26 establish a process for allocating financial responsibility for cleanup of soils that are determined in the future to be contaminated. The CD does allocate responsibility now, based on whether it is later determined that the soil became contaminated: (1) solely as a result of the operations of NFS (which operated the Site as the State's tenant), in which case NYS must pay 100% of costs; (2) solely as a result of DOE operations at the Site, in which case the allocation is 90/10; and finally (3) due to operations at the Site by both governments, in which responsibility is split 50/50. If the parties disagree as to which of these categories the contaminated soils fall under, the Consent Decree provides a detailed process for resolving any disputes, including the sharing of documents and interviewing witnesses in order to determine which government or entity conducted the operations that resulted in the contamination of the soil in question. If the parties cannot resolve the dispute, they can seek a ruling from the Court, if necessary. Moreover, if it is determined that one party allowed contamination to spread (e.g. the groundwater plume), the other party will certainly contend that such acts or omissions weigh in favor of an increased allocation. In addition, the Consent Decree provides a mechanism for quickly determining which agency is responsible for newly discovered contamination, and therefore, eliminates or significantly reduces the possibility that the implementation of an action to limit the spread of contamination would be delayed by responsibility or liability issues.

4. "Related to the above comment is the strong objection of some members of the Citizen Task Force concerning the 50/50 allocation for the North Plateau Groundwater Plume. This objection is based on the fact that the West Valley Demonstration Project Act has been interpreted as giving NRC the authority to monitor but not the authority to demand cleanup. When NYSERDA and DOE could not agree, the plume was allowed to spread significantly for several years, thereby increasing the danger and the cost. Because the lack of effective action is due primarily to the federal regulatory gap that limits NRC's role, a number of members believe the State of New York and its citizens should not have to assume the burden of those costs now, much less far into the future as the plume continues to spread."

Response: We agree that contaminants have spread during the time that DOE has had control of a portion of the Site; however, the contamination was caused by spills and disposal that occurred while Nuclear Fuel Services, Inc., the State's tenant, controlled the Site. We believe that both governments share responsibility for the contamination, and that an even split is a reasonable allocation under the circumstances.

5. "On pages 12 and 13 in paragraph 31, and at least two other locations in the document, there is a reference to Remedy Actions 'in accordance with such requirements as the Nuclear Regulatory Commission may prescribe.' This phrase is apparently taken directly from the West Valley Demonstration Project Act. In view of its origin, we believe that the phrase should be followed in every instance by the additional wording, 'under authority of the West Valley Demonstration Project Act.' We want to avoid any possibility that the phrase 'in accordance with such requirements as the Nuclear Regulatory Commission may prescribe,' could be misinterpreted in the future to allow NRC to prescribe other requirements inconsistent with the West Valley Demonstration Project Act."

Response: We agree with your comment #5 and will add the following language to our proposed order for approval of the Consent Decree:

> In each instance where the phrase "in accordance with such requirements as the [Nuclear Regulatory] Commission may prescribe" appears in the Consent Decree, that phrase shall be interpreted as including the following language: "as provided in the West Valley Demonstration Project Act."

We appreciate the time taken by the CTF to review and comment on the CD.

Sincerely,

Linda E. White

Linda E. White
Assistant Attorney General
Environmental Protection Bureau