

New York State Department of Environmental Conservation

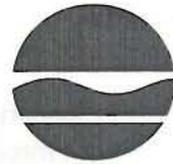
Division of Environmental Remediation

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Alexander B. Grannis
Commissioner

SEP 21 2010

Mr. Bryan C. Bower, Director
West Valley Demonstration Project
10282 Rock Springs Road
West Valley, NY 14171-9799

Mr. Paul J. Bembia, Program Director
West Valley Site Management Program
New York State Energy Research and Development Authority
10282 Rock Springs Road
West Valley, NY 14171

Dear Messrs. Bower and Bembia:

Re: *Comments on the Protocol for Identifying and Conducting Potential Phase-One Studies on the Decommissioning and/or Long-Term Stewardship of the West Valley Demonstration Project and Western New York Nuclear Service Center (referred to as "Protocol Document")*

New York State Department of Environmental Conservation (Department) staff has reviewed the above referenced document received by the Department via e-mail on July 28th. As promised in our August 25 e-mail, the Department provides the enclosed detailed comments on the Protocol Document.

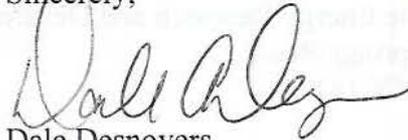
Of significant concern to the New York State Department of Environmental Conservation (Department) is that the Protocol Document, apparently deemed "Final," was advanced to this stage without prior input from the regulatory agencies or the public. The protocol identified in the Protocol Document, as well as the very development of the protocol, represents a dramatic step away from the successfully utilized Core Team (CT) process, (as used during development of the D&D EIS for the WVDP/WNYNSC). While some need by the Department of Energy (DOE) and the New York State Energy Research and Development Authority (NYSERDA) to control the process is understandable, the proposal lacks the pivotal component that allowed the CT process to work: responsible, obligatory, stakeholder- involvement with a goal of consensus-building. Unacceptably, the vast majority of the CT members, in the Protocol Document, appear to be simply "consultants" or "afterthoughts" to already-made decisions. Discussions were held during the CT process regarding the process for determining the Phase 1 studies and establishing the protocol for the regulatory agency involvement. The Department left those meetings with the assurance that this would be an open and collaborative process. This "final" Protocol Document does not accomplish that goal.

While this may not be the intent of the DOE/NYSERDA, a plain reading of the document does not provide support for an alternate reading. Moreover, while not controlling, the

Department notes that various stakeholders, namely environmental groups, have recently commented on the Protocol Document expressing similar concern with this shift. (see September 13, 2010 letter for Barbara Warren, Citizens' Environmental Coalition et. al.) The Protocol Document should be revised to embrace the successful Core Team process.

The Department looks forward to a revised draft which fully embraces the CT process and is responsive to the Department's other comments. If you have any questions regarding any of the above, please contact Lynn Winterberger or David O'Hehir, at (518) 402-8594, or Pat Concannon, at (716) 851-7220.

Sincerely,



Dale Desnoyers
Director
Division of Environmental Remediation

Enclosure - NYSDEC Comments on the *Protocol for Identifying and Conducting Potential Phase-One Studies on the Decommissioning and/or Long-Term Stewardship of the West Valley Demonstration Project and Western New York Nuclear Service Center*

ec: J. Collins, NYSDOH
K. McConnell, NRC
A. Everett, US EPA Region 2
A. Park, USEPA Region 2
P. Giardina, USEPA Region 2

**NYSDEC Comments on the
*Protocol for Identifying and Conducting Potential Phase-One Studies on the
Decommissioning and/or Long-Term Stewardship of the West Valley Demonstration Project
and Western New York Nuclear Service Center***

General

Of significant concern to the New York State Department of Environmental Conservation (Department) is that the “Protocol for Identifying and Conducting Potential Phase One Studies on Decommissions and/or Long-Term Stewardship of the West Valley Demonstration Project and Western New York Nuclear Service Center” (Protocol Document”) apparently deemed “Final,” was advanced to this stage without prior input from the regulatory agencies or the public. The protocol identified in the Protocol Document, as well as the very development of the Protocol Document, represents a dramatic step away from the successfully utilized Core Team (CT) process, (as used during development of the D&D EIS for the WVDP/WNYNSC). While some need by DOE/NYSERDA to control the process (and dialogue, et. al.) is understandable, the Protocol Document lacks the pivotal component that allowed the CT process to work: responsible, obligatory, stakeholder- involvement with a goal of consensus-building. Unacceptably, the vast majority of the CT members, in the Protocol Document, appear to be simply “consultants” or “afterthoughts” to already-made decisions. Another major concern is that the proposed protocol differs vastly from discussions held in the Core Team that lead to our agreement with the Phased Decisionmaking Alternative. While this may not be the intent of the Department of Energy (DOE) or the New York State Energy Research and Development Authority (NYSERDA), a plain reading of the Protocol Document does not provide support for an alternate reading. Moreover, while not controlling, the Department notes that various stakeholders, namely environmental groups, have recently commented on the Protocol Document expressing similar concern with this shift. (see September 13, 2010 letter for Barbara Warren, Citizens’ Environmental Coalition et. al.) The Document should be revised to embrace the successful Core Team process.

Specific

Project Background

- 1) The phraseology “facilitate interagency decision-making” needs to be defined/clarified. Certain decision making (i.e. regulatory process) does not need facilitation.
- 2) The use of “Subject Matter Experts” (SMEs) and an “Independent Scientific Panel” (ISP or Panel) may be problematic; it implies some agencies/entities may be incapable of decision-making without said “expertise,” as well as a concern, perceived or otherwise, that objective regulatory decision-making would be controlled by non-regulatory entities (i.e. the “Panel”). While we appreciate that the SMEs and Panel may facilitate decision making as and between DOE and NYSEERDA, the document needs to be clear that this is the role of the SMEs and Panel and that neither the SMEs nor the Panel have decision making authority relative to regulatory agencies. Also, please provide the process for

selecting said “Experts” and “Panel,” and explain why both SMEs and the Independent Panel are necessary.

- 3) The Protocol Document needs to set forth the process for “input” by regulatory agencies and the public.
- 4) NYSERDA’s findings included a discussion of exhumation, which is not listed here. This would appear to contradict information previously provided to the Department and Barbara Warren of the Citizens’ Environmental Coalition, respectively, by NYSERDA.

Guiding Principles

- 1) The studies must also include a basis grounded in regulatory requirements.
- 2) The data and results will be made available for “professional review.” Will the studies (draft proposals, RFPs, plans) also be made available?
- 3) Key issues, as recommended by the “SMEs” and “ISP” should be developed cooperatively with the public and all involved agencies, prior to being finalized.
- 4) It is not clear what is meant by “needs of the site” relative to the other “needs” listed.
- 5) Timing of findings should be due to their respective availability, as well as needs envisioned during Phase 2, and not simply stated as “within 10 years.” Of interest are how far ahead of the Phase 2 decisions will the studies be available, and what process will exist for them to be vetted by the agencies and the public.

Core Values of DOE/NYSERDA Team

- 1) As pointed out in the General comment, the Protocol Document should better reflect the “Core Team” process. Will this “Team” consist solely of DOE and NYSERDA personnel?
- 2) The Protocol Document needs to provide clarity relative to how the understanding of respective positions flowing from the Protocol Document will translate to decision-making?
- 3) The Protocol Document needs to explain the use of the word “transparency”; specifically, does this include participation by other entities, including regulators and/or the public, and will all meetings be publicly available?

Expert Support and Facilitation

- 1) See previous comments. In addition, it is unclear from the Protocol Document whether the “experts in specific disciplines” include regulatory expertise? As stated in the Department’s August 25 email, it is important that regulatory requirements be addressed

early in the process in order to avoid conflicts and delays. In this regard, involving regulatory agencies early and often in the process is critical, to a timely and appropriate plan of action.

Regulatory and Public Input/Interaction

- 1) See previous comments. To reiterate, there is nothing concrete in the document relative to the form these interactions will take nor, how the competing needs for free and open dialog between DOE/NYSERDA, regulators, and technical experts, and the need for transparency and public involvement, will be handled.
- 2) If this "Final" version of the Protocol Document is actually only an initial presentation of the general process of involvement by the agencies and the general public as envisioned by NYSERDA and DOE, it should have been made clear and our comments set forth herein need to be addressed prior to the finalization of this Protocol Document. In which event, it is requested that a revised version be circulated for review prior to finalization. If that is not the case, then the process is flawed and needs to be retracted and reevaluated with input from the agencies and the public consistent with the successful CT process.

Potential Areas of Study

- 1) The potential study areas all point towards a predetermined goal of closing in place some or all of the facility. For example (and without prejudice), including a study area titled: "Determination of preferred method of exhumation based on review of precedents throughout the DOE Complex" may have been considered appropriate by some non-members of the team. The list needs to be expanded to include all potential work at the site, and then focused later in the process, providing a clearer discussion of details of said studies and work.

Phase 1 Study Process

- 1) The Department does not recall providing agreement to this process. Has this process been agreed to during prior discussions at recent Regulatory Roundtable meetings?
- 2) During the Core Team process, discussions were held regarding the process for determining the Phase 1 studies and establishing the protocol for the regulatory agency involvement. The Department left these meetings with the assurance that this would be an open and collaborative process. This "final" Protocol Document failed to satisfy those basic obligations.
- 3) It is unclear as to what will happen during the Investigation Plan and Implementation? Is all of this included in the Study Work Plan so that Department staff can review and, as appropriate, comment on the proposed study?