

# Seneca Nation of Indians

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## PRESIDENT'S OFFICE

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Mr. Hal Brodie, Deputy Counsel  
New York State Energy Research & Development Authority  
17 Columbia Circle  
Albany, NY 12203-6399RDA

SUBJECT: Seneca Nation of Indians' Comments on NYSERDA's Draft West Valley  
Remediation Act, July 2004

Dear Mr. Brodie:

I write on behalf of the Seneca Nation of Indians (the "Nation") to provide you with the Nation's comments on the New York State Energy Research and Development Authority's ("NYSERDA") draft legislation, the "West Valley Remediation Act," which seeks to resolve the responsibilities and requirements for decontaminating and decommissioning the West Valley nuclear site at Ashford, New York. While the Nation believes that this draft legislation is an important step in cleaning up the West Valley radioactive waste and contamination which threatens the lands, waters, resources and people of western New York -- and potentially the entire Great Lakes region -- the Nation has concerns that the current draft will not adequately accomplish these goals. Thus, the Nation provides the following comments explaining our areas of greatest concern. The Nation also encloses a redline version of the draft legislation showing our suggested changes. As the draft legislation develops and more research into these questions is conducted, the Nation will continue to provide its comments and suggestions.

We respectfully request that these comments be given the appropriate level of review and consideration by NYSERDA given the Nation's status as a federally-recognized tribe, its long history and presence in western New York, and its cultural relationship to and dependence on the lands, waters and other resources of the natural environment.

A. Interests of the Seneca Nation of Indians

The Seneca Nation is a sovereign, federally-recognized Indian tribe residing on the Allegany, Cattaraugus and Oil Spring Reservations -- territories which are secured to the Nation by the Treaty of November 11, 1794, 7 Stat. 44. The Nation's traditional

homeland includes all lands in western New York, as well as parts of northern Pennsylvania and Ohio. The Seneca Nation is one of six Indian nations that form the Iroquois Confederacy and has resided in the area of western New York since time immemorial. The United States government has an inherent trust responsibility to ensure the continued viability of the Nation's culture, traditions, and natural resources.

Seneca culture and religion depend on a continuing relationship with the lands, waters, plants and animals (including fish, birds and waterfowl), all of which provide sustenance, medicines, and other resources necessary to our cultural, ceremonial, and religious activities. We hold strong beliefs that it is our responsibility to protect the natural environment, the fish, the wildlife, the waters, the trees and the plants. It is our duty to future generations to preserve the earth and the environment for them.

The close relationship between Seneca culture and the environment means that impacts to the environment are also impacts to tribal cultural interests and identity. Because radioactive contamination continues for tens to thousands of years, the Seneca Nation is deeply concerned about the impacts this contamination will have on future generations of its people and on the natural world. How will future Senecas be able to hunt, fish and gather medicines if the lands, waters and plants are contaminated with radiation? If we cannot continue these cultural traditions, then our identity and responsibilities as Seneca people will not be able to continue.

B. General Principles and Areas of Concern

1. Responsibility for Decontamination and Decommissioning the West Valley site

The Seneca Nation agrees with NYSEERDA that the decontamination and decommissioning of the West Valley site must be undertaken and the Nation supports the State's view that financial and regulatory compliance obligations should rest largely with the U.S. Department of Energy ("DOE"). This is wholly justified by the fact that the nuclear processing facility at West Valley was undertaken with the encouragement and support of the federal government and that regulation of nuclear facilities, waste disposal, transportation, and virtually every aspect of nuclear energy is dictated by the federal government.

Further support for federal responsibility in this matter is the trust responsibility owed by the United States to the Seneca Nation, which responsibility has repeatedly been held to require federal protection of Tribal rights and resources. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *United States v. Mitchell*, 463 U.S. 206, 225 (1983); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d. 1206, 1213 (9<sup>th</sup> Cir. 1999). Under the trust responsibility, federal agencies, including the DOE, must order their actions to avoid adverse impacts on tribes. Federal agencies are further required to meet "obligations of the highest responsibility and trust" and satisfy "the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *see also United States v. Payne*, 264 U.S. 446, 448 (1924). Indeed, the DOE itself has acknowledged its duties to

Indian Nations in its consultation policy with Indian tribes. *See* Department of Energy American Indian and Alaska Native Tribal Government Policy, and Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments. Thus, the Nation agrees that the DOE is the appropriate party to guarantee the decontamination and decommissioning of the West Valley site.

2. Standards applicable to remediation and decommissioning

The draft legislation must next specifically delineate what actions the DOE must undertake to accomplish the remediation. It must also specify objective standards.

Our preference would have been legislation requiring that the development of standards and criteria for remediation and decommissioning of the site, and regulatory authority to approve a remediation and decommissioning plan be vested jointly in the Nuclear Regulatory Commission (NRC) and the Environmental Protection Agency (EPA), whose work would then be done in consultation with the State. However, we recognize that the NRC, EPA and the State have, in recent years, reached a general agreement on their respective responsibilities and regulatory authority with regard to the site, as well as the decontamination and decommissioning standards to be applied. *See* Regulators Communication Plan on Application of Cleanup Requirements for Decommissioning the West Valley Site (May 20, 2003) ("Regulators Communication Plan"). In these circumstances, and given the considerable work that has gone into the development of this general agreement, we do not suggest here revisions to the draft legislation that would alter the allocation of regulatory authority. However, we do believe that it is important that the legislation include provisions recognizing the regulatory authority that has been exercised and which should continue to be exercised by EPA and the State in connection with this site. For these reasons, we propose revisions to the draft legislation (reflected in Section 7 of the enclosed red-line draft) that would more clearly define the consultation requirements between DOE, EPA and the State, and also recognize and confirm the respective regulatory authority of the NRC, EPA and the State.

As is also reflected by the Regulators Communication Plan, the standards applicable to this site are not limited to those under the Atomic Energy Act but include the more stringent standards applicable under the Comprehensive Environmental Response Compensation and Liability Act and the Safe Drinking Water Act administered by the EPA and as required by New York law. *See also* General Accounting Office, *Report to Congressional Requesters: Nuclear Waste, Agreement Among Agencies Responsible for the West Valley Site is Critically Needed*, at 25-26 (GAO-010314 May 2001). Given the recognized applicability of these laws, the standards and criteria applicable to decontamination and decommissioning of this site should not be based exclusively on incorporation of the License Termination Rule published initially in 62 Federal Register 39058. In keeping with the Regulators Communication Plan, we recommend that Section 6 be revised to qualify application of the License Termination rule to further require that "all groundwater at the Center will meet the 4 millirem per year dose standard established under the Safe Drinking Water Act and that all dose standards which were agreed to in

the Regulators Communication Plan on Application of Cleanup Requirements for Decommissioning the West Valley Site be satisfied.”

In addition, we object to the use of the License Termination Rule to the extent that it will be applied to include authority for the DOE to use, and NRC to permit, incidental waste reclassification. Indeed, the NRC’s Final Policy Statement for Decommissioning Criteria for the West Valley Demonstration Project, 67 Federal Register 5003 (February 1, 2002) specifically allows those incidental waste reclassifications to occur as part of the application of the License Termination Rule to the West Valley Demonstration Project. As you know, DOE’s incidental waste reclassification was held by the U.S. District Court for the District of Idaho, to be contrary to the requirements of the Nuclear Waste Policy Act. *See Natural Resources Defense Council v. Abraham*, No. 01-413-S-BLW (D. Idaho July 2, 2003). That decision is now on appeal to the Court of Appeals for the Ninth Circuit with the State of New York along with other states supporting affirmance of the District Court decision. While the appeal is pending, DOE is seeking to avoid the effect of that ruling by securing site-specific federal legislation that would authorize reclassification – as illustrated by the recent Graham amendment to the Senate version of the Defense Authorization bill as it applies to the Savannah River Project. Any legislation regarding the West Valley Demonstration Project should not have the effect of adopting by statute a DOE reclassification rule that would leave DOE with the discretion to dispose of high level radioactive wastes based on its own views of the cost effectiveness of such measures, potentially compromising the health and safety of the people living in western New York. Our proposed revision to Section 6 would qualify use of the LTR to exclude “any portions of the License Termination Rule or any other rules of policies regarding its implementation that provide for reclassification of waste incidental to reprocessing or other high-level radioactive wastes subject to the Nuclear Waste Policy Act.”

3. State obligations should be maintained.

The Nation acknowledges that the State of New York has contributed more financial resources to the maintenance and decontamination of the site than has been required of any other State for comparable facilities. For that reason, the Nation fully supports the State’s interest in federal legislation that will free the State from that financial burden and also make clear that the State will not be required to pay disposal fees in connection with the removal of radioactive waste from the site. Similarly, the DOE should not be able to impose costs on the State for any future work required for remediation, decommissioning or waste disposal.

However, the State still has a responsibility to its citizens and to the Seneca Nation to ensure that the West Valley site is properly and fully remediated. Thus, the Nation does not, at this time, agree that the legislation should provide that the State be free of any obligations and responsibilities that may arise from the State’s past activities or ownership of this site. Our revisions to Sections 3 and 4 reflect our position on these issues.

4. Transfer of land title to the U.S. Department of Energy

The Nation understands that the State seeks to transfer title of the Center to DOE as a means for making sure that the United States retains responsibility for remediation of the site. However, the Nation opposes a transfer of title to the DOE as the Nation is concerned that a transfer of title may open questions about the DOE's obligation to comply with state environmental laws as well as limit the ability of the State (or EPA) to access the Center for compliance inspections, sampling or other purposes. In our view, because of the very important role that the State has played to date in ensuring public disclosure of DOE activities as well as DOE compliance with applicable environmental laws, the State should retain ownership of the Center. We want the State to continue to have full and effective oversight to ensure proper long-term stewardship of the land and protection of the health and safety of the people of New York.

The Nation further objects to a transfer of title to DOE to the extent that this would allow DOE to make decisions regarding the use of the property to store, treat or dispose of hazardous or radioactive materials generated at other sites and by other facilities – a risk that we believe is very real if title to the Center transfers to the federal government.

For these reasons, our enclosed draft omits provisions for a transfer of title from the State to DOE. In making this change, we recognize that without a transfer of title, the State will continue to be subject to a license under the NRC. However, in our view, the status of that license would remain unchanged. As now, that license would be held in abeyance while the DOE has control over and responsibility for remediation and decommissioning. Further, in the event that the Center, or some portions of it are not released for unrestricted use, the NRC would have authority to either continue, amend, or terminate and issue new licenses for such portions of the Center that remain subject to restricted use, with long-term responsibility for stewardship of such portions of the Center in the DOE. (See Sections 6(d), (e) of the enclosed reline draft.)

5. Decontamination of site should include clean-up and restoration of environmental systems which have been degraded and complete removal of all radioactive waste from site

The Nation agrees with the provisions of the NYSEDA draft that set, as a first priority, the removal of radioactive wastes from the site to an off-site facility – as intended by the 1980 West Valley Demonstration Project Act. However, because the availability of such off-site storage is becoming questionable, the Nation believes that the wastes should be removed to secure, controlled, aboveground retrievable storage units until transportation is possible to an off-site federal waste repository, or other off-site disposal facilities.

Furthermore, due to the longevity and complex nature of radioactive and nuclear wastes, the federal government is the only entity with the resources and expertise to safeguard the public and the environment from their effects. Thus, even though the State retains title to the lands, it is the responsibility of the federal government to maintain the long-term

stewardship and care of the West Valley site and its radioactive and nuclear wastes. We have included draft language in Section 4(b) to expressly so state.

6. Third party review and consultation

The Nation generally agrees with the draft bill's provisions regarding DOE consultation with the State although we recommend revising this to also require consultation with EPA. We further suggest revisions to this section to make clear that consultation can be initiated by any of the involved agencies.

Further, given the federal government's trust responsibility, and its established policies requiring consultation with Indian tribes on matters that may affect tribal rights and resources, the Nation recommends that the proposed legislation expressly recognize that nothing in it affects those federal obligations. We have added language to do this in Section 12(c) of our enclosed redline draft.

The Nation also agrees with the provisions for independent review of the Draft Environmental Impact Statement and Decommissioning Plan Studies such as the National Academy of Sciences. In connection with such independent empirical review, the Seneca Nation would like to see one member of the reviewing body have first-hand knowledge or expertise that would ensure consideration of the impact of any remediation plan on the cultural and historic resources and the health and welfare of the Seneca people.

7. Definitions

It appears that the definitions, set out in Section 2, generally replicate the definitions provided in the 1980 West Valley Demonstration Project Act. However, there are a few places in which those definitions do not reflect the law as it exists today, and thus, we suggest that the definitions be revised as follows.

First, subsection 2(d), which defines "high level radioactive waste," should be revised to delete the word "dry" immediately preceding the words, "solid material." Neither the Atomic Energy Act of 1954 nor the Nuclear Waste Policy Act – nor any other federal statute concerned with nuclear materials – uses the word "dry" to describe "solid material." Thus, for purposes of consistency and clarity, we suggest deleting the word "dry" from this definition.

Second, subsection 2(f), which defines "low level radioactive waste," should be revised to add the words "spent nuclear fuel," immediately after the words "high level radioactive waste." The Atomic Energy Act of 1954 and the Nuclear Waste Policy Act exclude spent nuclear fuel from the definition of low level radioactive waste, 42 U.S.C. § 10101(16)(A), and thus it should similarly be excluded in the draft West Valley legislation.

Third, we recommend that subsection 2(j), which defines the term "nuclear materials," only refer to and rely on the Atomic Energy Act. It should not refer to or rely on the

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NRC regulation, 40 C.F.R. Part 40. In our view, to avoid the risk of codifying a regulation that might change in the future, the West Valley legislation should rely on statutory authority rather than a specific regulation

We appreciate the opportunity to provide you with the Nation's views of the current draft legislation and urge your careful consideration of our comments, concerns and recommended changes. The Seneca Nation is committed to ensuring that all steps are taken to maximize remediation of this site, and we welcome the opportunity to work with you on legislation that will ensure the protection of our people and the essential natural resources on which our future so dearly depend. Please keep us advised as you proceed with your work on this very important matter.