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February 1, 2001

U.S. Nuclear Regulatory Commission
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Dear Mr. Ting:

I am writing to attempt to expedite active consideration and approval of Western Nuclear, Inc.'s (WNI's) Site Closure Plan and Site Ground Water Characterization and Evaluation Report (Site Closure Plan) for its Split Rock facility. In this letter I will describe the interaction on the Site Closure Plan between WNI, Nuclear Regulatory Commission (NRC) staff and the Department of Energy (DOE) Grand Junction staff and for your convenience will attach certain referenced documents. I will not, of course, attach the Site Closure Plan, which is voluminous, and certain other referenced documents (NRC Federal Register publications).

WNI submitted its Site Closure Plan on October 29, 1999. NRC responded to WNI's submittal by letter of December 15, 2000 over the signature of Mr. Thomas H. Essig, then Chief of the Uranium Recovery and Low-level Waste Branch, Division of Waste Management, Office of Nuclear Materials and Safeguards (NMSS). Mr. Essig stated that in order for NRC to proceed with its *acceptance review* of WNI's Site Closure Plan and its groundwater compliance proposals, NRC wished additional information on the so-called "Red Mule" area and on the utilization of institutional controls. WNI was asked, "How would these controls be durable, permanent and enforceable?"

WNI responded to Mr. Essig's inquiries by filing a Supplement to the Site Closure Plan dated January 14, 2000 prepared by our technical consultant, Shepherd Miller, Inc. (SMI). SMI's technical submittals were again supplemented by a letter to Mr. Essig of January 17, 2000. Those submittals were further supplemented by a memorandum of February 1, 2000 to Mr. Essig from Anthony J. Thompson and Warren U. Lehrenbaum of Shaw Pittman addressing the legal and regulatory bases for WNI's proposed institutional controls (ICs) to eliminate access to groundwater for domestic drinking water purposes.

A meeting between WNI's representatives and NRC staff was held on February 3, 2000. And in response to staff inquiries at that meeting, SMI prepared two additional submittals dated February 25, 2000.

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Finally, on June 7, 2000, WNI representatives met with NRC staff, including Stewart Treby, Esq. and Maria Schwartz, Esq. to further discuss legal and policy issues associated with ICs.

This letter is intended to provide additional support for WNI's proposed ICs in combination with informational deed notations and a funded alternate water supply for the "Red Mule" area should it be deemed necessary to protect public health some 100 plus years in the future from slightly elevated site-derived uranium levels in groundwater that could be used for drinking water.

It is readily apparent that in developing and finally promulgating its "Radiological Criteria for License Termination" regulations (D&D regulations) (62 Fed. Reg. 39058, July 21, 1997) NRC specifically addressed the need for ICs to limit long term public exposure by allowing *restricted use* at sites where the presence of large volumes of soil contaminated with long lived radionuclides make off-site disposal exorbitantly expensive. Indeed, "stringent" ICs, "such as legally enforceable deed restrictions" and/or controls backed up by government ownership should be established "with the objective of lasting 1,000 years" (i.e., "durable" ICs). *Id* at p. 39070. See also p. 39071, subsection C ["Durable institutional controls must be in place. These controls could include significant engineered barriers and/or State, local or Federal Government control of sites or maintenance of site deed restrictions so that site access is controlled."]

In conjunction with the development of the final D&D regulations NRC also developed guidance to address various components of the regulations including restricted use through ICs and mixes of engineered controls and ICs. Draft Regulatory Guide 4006, that initially addressed these issues, has been superseded by the "NMSS Decommissioning Standard Review Plan", NUREG 1727, September 2000, Chapter 16.0. I will not attempt in this letter to set forth in detail how WNI's proposed Site Closure Plan satisfies the criteria in Chapter 16.0, but suffice it to say that WNI has established that all other alternatives considered in its Site Closure Plan would result in significant potential adverse impacts on public health and the environment (including ecological impacts) at exorbitant costs. The legally enforceable ICs for 97% of the site (either through fee ownership or enforceable deed covenants running with the land) are precisely the kind of durable ICs enforceable by a long term custodian envisioned by NRC in Chapter 16.0.

Under the Uranium Mill Tailings Radiation Control Act (UMTRCA) program a perpetual NRC licensee (DOE or the State) will have the obligation and authority to

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maintain compliance with the proposed ICs. DOE certainly recognizes this obligation as the attached excerpt from its 1999 "Long Term Surveillance and Maintenance Program Report" demonstrates. However, I am aware that DOE too is reviewing and analyzing IC issues in conjunction with its UMTRCA and other long-term stewardship responsibilities. Indeed, as I will report below, WNI has had important correspondence and face-to-face discussions with DOE's Grand Junction Office regarding the Split Rock Site Closure Plan.

With respect to WNI's proposed ICs, I recognize that, strictly speaking, NRC's D&D regulations are not applicable to uranium recovery (UR) facilities. However, under Section 84(c) of the AEA, as amended by UMTRCA, and the Introduction to Appendix A of 10 CFR Part 40, licensees can propose *alternatives* to any NRC or EPA requirement if the *alternative* provides equivalent or greater protection of public health, safety and the environment. As the attached memorandum from Hugh L. Thompson, Jr., Director NMSS to Robert D. Martin, Regional Administrator, Region IV, (June 27, 1988) indicates, the reasons underlying certain regulatory options that, strictly speaking, are not available to Title II UR licensees can, nevertheless, be used to justify a finding that an *alternative* provides the necessary reasonable assurance of adequate protection.

I am also enclosing some other relevant materials regarding ICs and "informational notices or devices" in the following documents:

- a. "Institutional Controls: A Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Changes" (September 29, 2000).
 - [Non-engineered instruments such as administrative and/or legal controls that minimize the potential for human exposure from contamination by limiting land or resource use;
 - Even in the unusual case where a CERCLA Record of Decision (ROD) only requires implementation of ICs, it is considered to be a 'limited action', not a 'no action' ROD;
 - Informational devices are most likely to be used as a secondary "layer" to help insure the overall reliability of other ICs.]

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- b. "Protecting Health and Safety with Institutional Controls, Larry Snapf, Natural Resources and Environment "(Spring)".
- [Thus, it is important that the instrument creating the institutional control identify the party who will have the right to enforce the restrictions and be responsible for maintaining and repairing the controls. Responsibilities of the enforcer may include making periodic site inspections to ensure that prohibited activities are not taking place; checking the integrity of caps, fencing and other barriers; ensuring that site use has not extended into prohibited areas; and inspecting drinking water wells to make sure that they are not being used;
 - Though not technically considered institutional controls, informational notices can be an effective mechanism for limiting exposure to contaminants.]

Finally, I am attaching a letter from Harley W. Shaver to Cooper H. Wayman, Senior Counsel, DOE Grand Junction Office dated October 26, 2000.

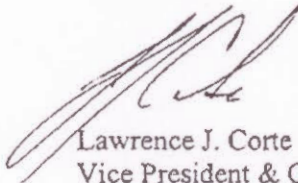
There had been statements made by members of the NRC staff to WNI representing that DOE personnel had expressed concerns about WNI's Site Closure Plan and a reluctance to accept the site as long term custodian because of the proposed ICs and alternate water supply to the Red Mule area. In order to address any concerns first hand that the DOE staff might have, WNI representatives met with DOE staff in the Grand Junction Office on October 13, 2000. The attached letter from Mr. Shaver to Mr. Wayman was in response to certain questions which arose as a result of that meeting. Subsequent to sending Mr. Shaver's letter and transmitting to DOE copies of WNI's submittal to NRC, I attended a follow-up meeting with DOE staff in Grand Junction on November 27, 2000. At the conclusion of that meeting, I understood DOE staff to state that DOE has no objection to taking the Split Rock Site with WNI's proposed alternate water supply to Red Mule and proposed ICs as set forth in its Site Closure Plan submitted to the NRC fifteen (15) months ago. DOE did express an interest in fine tuning some property boundaries, but this would not affect the central issues and can be accommodated easily.

In conclusion, it seems that every concern expressed by the NRC has been addressed thoroughly from an analytical, technical and legal standpoint. I strongly believe that WNI is entitled to have its Site Closure Plan move expeditiously through NRC review. I would like to schedule a meeting with NRC staff in the near future to

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discuss any remaining generic or site specific concerns to optimize the license termination process for all concerned.

Sincerely,



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