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November 4, 2016

Attn: Document Control Desk
Director
Office of Nuclear Material Safety and Safeguards
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Louisiana Energy Services, LLC
NRC Docket No. 70-3103

Subj: Concerns of URENCO USA Regarding the NRC Staff's Proposal in SECY 16-0106 to Issue a Final Rule on "Low-Level Radioactive Waste Disposal" (RIN 3150-AI92; Docket ID NRC-2011-0012)

Dear Mr. Chairman and Commissioners:

On September 15, 2016, the Executive Director for Operations ("EDO") of the Nuclear Regulatory Commission ("NRC") issued SECY 16-0106 ("SECY") requesting Commission approval of a final rule amending 10 C.F.R Part 61, "Licensing Requirements for Land Disposal of Radioactive Waste." As the SECY acknowledges, the public demonstrated significant interest, for example as shown by the receipt of 2,401 comment letters. A review of the draft final rule indicates that the NRC staff made a number of substantive modifications to the rule proposed on March 26, 2015 (80 *Fed. Reg.* 16081) in response to the public comments. The review also reveals that the draft rule (and the associated regulatory analysis) submitted with the SECY rejected or ignored a number of important comments. URENCO USA is particularly concerned that the NRC staff appears to reject comments concerning the need for a backfit analysis and the need to evaluate the cost impacts on other participants in the nuclear fuel cycle, such as enrichment facilities, that would occur as a result of the rulemaking as written. URENCO USA believes that not addressing these matters is, at best is inconsistent with the NRC's own Principles of Good Regulation (as they are underpinned by Executive Orders 12866 and 13563), and also inconsistent with the Administrative Procedure Act.

This rulemaking was initiated as a result of the URENCO USA licensing proceeding to address the disposal of large quantities of depleted uranium from enrichment facilities. URENCO USA has thoughtfully and diligently participated in the multi-year process of considering this rulemaking. We have submitted formal written comments throughout the process as allowed, we have actively participated in public meetings, and we have even participated in public briefings before the Commission regarding our concerns. We are concerned that the NRC staff narrowly interprets its own implementing regulations and thus, effectively the applicability of cost-benefit analysis directives stated in the aforementioned Executive Orders.

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With regard to the two issues stated above, the NRC summarily dismisses them by stating:[1]

> Some commenters asserted that the rule changes would result in financial impacts to licensees where facilities were licensed under regulations other than 10 CFR Part 61 (e.g., uranium enrichment facilities), and therefore the NRC should have conducted a backfit evaluation. The staff has reviewed the issue and determined that because 10 CFR Part 61 does not contain a backfit provision and given that the backfit rule has never required the NRC to analyze costs to parties that may experience "passed along," costs (i.e., those costs experienced by entities not directly subject to the rule changes; for example, impacts to waste generators affected by a rule on the licensing of land disposal facilities), a backfit evaluation is not required.

Executive Order 12866, in Section 1(b)(5), clearly states that an agency "shall design its regulations in the most cost-effective manner to achieve the regulatory objective ... [and] shall consider ... the costs of enforcement and compliance ... to the government, regulated entities, and the public." This is a broad policy mandate in favor of detailed cost-benefit analyses before new rules are promulgated,[2] and there is no mention in the Executive Order that such obligations should only consider the most narrow impacts of a proposed rule.

Enrichment facilities clearly fall within these expansive categories as the very type of facility that created the need for this rulemaking and thus, it appears in direct conflict with the philosophy of the Executive Order that serious impacts to these facilities are not addressed. Executive Order 13563 supplements and reaffirms Executive Order 12866. Importantly, in this regard, in Section 1(b), it goes on to point out that an agency "must ... propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs." The above-quoted reasoning for why the NRC is choosing not to conduct a backfit analysis or any other evaluation of the economic impacts on fuel cycle entities such as enrichment facilities does not represent a reasonable or reasoned determination consistent with the Executive Orders' directives.[3] Rather, it represents a narrow interpretation of NRC's obligations that, in turn, result in an incomplete cost-benefit analysis for this rule.

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[1] We note that the idea of considering collateral economic impacts on other licensees, such as those that might result from pass-through costs, raises a novel policy issue of the type recognized in Executive Order 12866 and is therefore a significant regulatory action. Likewise, we note that the pass-through cost concern may substantively impact the Department of Energy's ("DOE") ultimate disposal cost for the thousands of metric tons of depleted uranium awaiting such final disposal; as such, the Part 61 rulemaking could have a material impact on DOE planned action and adversely affect the entire U.S. enrichment sector and thus, for these reasons too constitutes a significant regulatory action under Executive Order 12866.

[2] NRC guidance confirms the Commission's "expressed desire to meet the spirit of Executive Orders related to regulatory reform and decisionmaking," which would include Executive Orders 12866 and 13563. *See* NUREG/BR-0058, "Regulatory Analysis Guidelines of the U.S. Nuclear Regulatory Commission," at 1 (Aug. 2004). There is no reason why, given the complex and comprehensive nature of the Part 61 rulemaking, that this same approach should not be applied to this rulemaking.

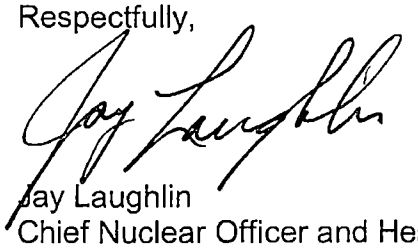
[3] Executive Order 12866 at section 6(a)(3)(C)(ii) states that for significant regulatory actions the agency must prepare a detailed analysis of costs, including indirect costs such as the "adverse effects on the efficient functioning of the economy [and] private markets" from the rulemaking. Even though the NRC staff has asserted that the Part 61 rule is not a significant regulatory action, Executive Order 12866 makes clear that the need for such thorough analyses is not reserved for certain rules, but instead should be conducted anyway "as part of the agency's decision-making process," to determine which rules are significant. We believe that once the full implications of the new Part 61 rule are considered, the rule should be appropriately characterized as a significant regulatory action. *See* note 1.

As has been previously discussed with the Commission, the tails generated at URENCO USA's enrichment facility represent the most significant liability on the company's balance sheet, and the U.S. subsidiary is no exception. The post-Fukushima market presents a substantial challenge to current and future sale of enrichment services. Ignoring the potential adverse collateral economic impacts on licensees outside of the specific confines of Part 61 can result in a *de facto* economic discrimination of one genre of licensee over another. As such, this approach threatens the long-term viability of URENCO USA, and it presents a clear threat to energy and national security within the U.S. should the ultimate result be to challenge domestic U.S. enrichment capability.

With specific regard to NRC's position that Part 61 does not contain a backfit provision and therefore the agency is not required to conduct such a review, URENCO USA believes this position does not account for the broad flexibility the Commission has under its organic statutory authority. As explained in *Union of Concerned Scientists v. NRC*, 824 F.2d 108 (D.C. Cir. 1987), when considering safety enhancements beyond those required for adequate protection (which is exactly the case here as supported by statements in the Regulatory Analysis and others made by NRC Staff), the agency may consider economic costs or any other factor. Stating that there is not an implementing regulation that currently directs the agency to consider such matters in the context of a Part 61 rulemaking is not a reasoned position under the circumstances. There are collateral impacts to the waste generators like enrichment facilities. This was clearly recognized at the time URENCO USA's license was being issued and why, in part, that the NRC was directed to conduct the evaluation of an expanded Part 61 rule.

URENCO USA believes the issues discussed above are relevant and important to the Part 61 rulemaking and we request that the Commission give serious consideration to these matters before making a final decision to issue the Part 61 rule.

Respectfully,



Jay Laughlin
Chief Nuclear Officer and Head of Operations

cc:

The Honorable Stephen G. Burns
Chairman

The Honorable Kristine L. Svinicki
Commissioner

The Honorable Jeff Baran
Commissioner

Victor M. McCree
Executive Director for Operations

Annette L. Vietti-Cook
Secretary of the Commission