

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NUCLEAR ENERGY INSTITUTE)

Petitioner,)

v.)

Case No. 19-1240

UNITED STATES NUCLEAR)
REGULATORY COMMISSION,)
and UNITED STATES OF)
AMERICA,)

Respondents.)

PETITION FOR REVIEW

The Nuclear Energy Institute (“NEI”) petitions this Court under the Atomic Energy Act, 42 U.S.C. § 2239, the Hobbs Administrative Orders Review Act, 28 U.S.C. §§ 2341-2344, the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and Rule 15(a) of the Federal Rules of Appellate Procedure, for review of an action of, or the failure to act by, the United States Nuclear Regulatory Commission’s renewed adherence and substantive alteration to Regulatory Issue Summary 2016-11 (“RIS 2016-11” or just “the RIS”). RIS 2016-11 is attached to this Petition as Exhibit A, and the NRC’s renewed adherence and substantive alteration of the RIS in a September 16, 2019 letter to NEI is attached to this Petition as Exhibit B.

Under Section 274 of the Atomic Energy Act, the NRC can transfer to the States via agreement portions of its regulatory authority to license and regulate specific categories of nuclear materials. The NRC did so in 10 C.F.R. § 150.10, which, as relevant here, exempted persons in “Agreement States” from the NRC’s regulatory authority over the disposal of very low-level radioactive waste. In 10 C.F.R. § 150.15(a)(1), however, the NRC reserved for itself regulatory authority over the storage and handling of radioactive waste at reactor facilities.

In 1986, the NRC issued Information Notice No. 86-90 (the “1986 Information Notice,” attached to this Petition at Exhibit C), by which the NRC concluded that it “did not have a legal basis” for regulating the disposal of very low-level radioactive waste for reactor facilities in Agreement States. That conclusion was based on § 150.15(a)(1) reserving to the NRC only regulation of “handling and storage” of very low-level radioactive waste—not disposal. As a result, since 1986, reactor facilities have requested approval to dispose of very low-level radioactive waste in an Agreement State only from the Agreement State, and not from NRC.

In 2016, the NRC issued RIS 2016-11, which—without citing §§ 150.10 or 150.15—declared that “any licensee’s request for approval to dispose of licensed material under . . . Agreement State regulations, must be submitted to the regulatory authority that issued the license for use of the radioactive material.”

The RIS was not published in the *Federal Register* and the NRC never provided a comment period before or after its issuance.¹

Two years later, during a 2018 inspection of an NEI member, the NRC informed the licensee that the NRC was considering issuing a minor violation because, although the State (an Agreement State) had approved the licensee's disposal of very low-level radioactive waste before RIS 2016-11 was issued, there was no separate approval by the NRC. When the licensee asked for clarification, the NRC relied on RIS 2016-11 as the basis for its conclusion that the licensee was required to obtain approval from the NRC even though it had already received approval from the State. *See* Ltr. from NRC 1–2 (Oct. 31, 2018), attached as Exhibit D. The NRC further stated that based on the issues the NEI member raised with “prior guidance” (apparently a reference to the 1986 Information Notice), “[t]he NRC is evaluating the issue generically to provide further clarity.” *Id.* at 2. And, “[i]n view of that effort,” the NRC exercised enforcement discretion with

¹ The RIS had no legal consequence at the time it was issued. It stated that it “requires no action or written response,” and that it was “strictly voluntary” (or at least that it was “voluntary” until, as discussed below, the NRC started using the RIS as justification for enforcement action).

respect to the licensee’s “past non-compliance” and future disposal “while the NRC staff evaluates regulatory options to address this issue.”² *Id.*

In response to the NRC’s statement that it was evaluating its regulatory options with respect to RIS 2016-11, and in light of the NRC’s reliance on the RIS to justify enforcement actions, NEI wrote the NRC about its concerns. *See* NEI Ltr. to NRC (Feb. 28, 2019), attached as Exhibit F. NEI requested that the NRC reinstate its prior position from the 1986 Information Notice.

On September 16, 2019, the NRC responded “that RIS 2016-11 correctly stated” the requirement to seek approval for very low-level radioactive waste disposal from the licensing authority “based on the NRC’s jurisdiction over the operation of nuclear power plants, which cannot be delegated to an Agreement State.” *See* Ex. B at 1. In addition to providing a new substantive legal theory for the RIS, the NRC also substantively altered the position in the RIS 2016-11—which stated that it “requires no action or written response” and was “strictly voluntary”—by using compulsory language when referring to the agency’s new position. *See* Ex. A at 3. Although the letter stated that the NRC is considering (and will seek comment on) “a streamlined approach” for the NRC approval

² Among other things, the NRC held a public meeting on September 6, 2019, “[t]o discuss the NRC’s proposed path forward to address concerns regarding RIS 2016-11.” *See* Public Meeting Agenda (Sept. 6, 2019), attached as Exhibit E.

process, the NRC did not say that it intends to revisit the requirement outlined in the RIS or accept additional public comments on that requirement. *See* Ex. B at 1.

NEI respectfully requests that this Court review and vacate the NRC's renewed adherence and substantive alteration to RIS 2016-11, which it expressed in the September 16, 2019, letter to NEI, and grant any relief that the Court may deem just and appropriate. NEI maintains that the NRC's issuance of a new rule via the RIS without a comment period, either pre- or post-promulgation, violated the Atomic Energy Act and the NRC's own rules and regulations, and that it was arbitrary and capricious and abuse of discretion for the NRC to conclude, without explanation, that authority over very low-level radioactive waste disposal was reserved to the NRC. Venue for this petition is appropriate within this Court under 28 U.S.C. § 2343.

NEI is the policy organization of the nuclear technologies industry. NEI's members include companies that own or operate nuclear power plants and fuel service companies, among others. This Court has recognized that NEI as a property entity to represent the collective interests of the nuclear technologies industry under Article III in the past. *See, e.g., Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251, 1278–80 (D.C. Cir. 2004) (holding that NEI had associational and prudential standing to challenge EPA ground water standards on behalf of its members).

Date: November 15, 2019.

Respectfully submitted,

/s/ Jonathan M. Rund

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Jerry Bonanno
Jonathan M. Rund*
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COUNSEL FOR THE
NUCLEAR ENERGY INSTITUTE

* Counsel of Record

RULE 26.1 DISCLOSURE STATEMENT

NEI submits this disclosure statement as required by Rule 26.1 of the Federal Rules of Appellate Procedure, and D.C. Circuit Rule 26.1. NEI is a nonprofit organization founded in 1994 and incorporated in the District of Columbia. NEI is a “trade association” as that term is defined in Rule 26.1(b). NEI has no parent company, and no publicly held company has any ownership interest in NEI. NEI represents the policy interests of its members in the nuclear power industry, including nuclear power plants, reactor designers and advanced technology companies, architect and engineering firms, fuel suppliers and service companies, consulting services and manufacturing companies, companies involved in nuclear medicine and nuclear industrial applications, radionuclide and radiopharmaceutical companies, universities and research laboratories, law firms, labor unions and international electric utilities.

Dated: November 15, 2019.

Respectfully submitted,

/s/ Jonathan M. Rund

Jonathan M. Rund
Nuclear Energy Institute
1201 F Street, N.W., Suite 1100
Washington, D.C. 20004
Phone: 202-739-8144
Email: jmr@nei.org

CERTIFICATE OF SERVICE

I certify that on November 15, 2019, a copy of the foregoing Petition for Review was served by U.S. mail, first class, postage prepaid upon the following persons:

Marian Zobler
General Counsel
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

William Barr
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

/s/ Jonathan M. Rund

Jonathan M. Rund
Nuclear Energy Institute
1201 F Street, N.W., Suite 1100
Washington, D.C. 20004
Phone: 202-739-8144
Email: jmr@nei.org

EXHIBIT A

UNITED STATES
NUCLEAR REGULATORY COMMISSION
OFFICE OF NEW REACTORS
OFFICE OF NUCLEAR REACTOR REGULATION
OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS
WASHINGTON, DC 20555-0001

November 13, 2016

**NRC REGULATORY ISSUE SUMMARY 2016-11
REQUESTS TO DISPOSE OF VERY LOW-LEVEL RADIOACTIVE WASTE
PURSUANT TO 10 CFR 20.2002**

ADDRESSEES

All NRC licensees. All Agreement State Radiation Control Program Directors and State Liaison Officers.

INTENT

The U.S. Nuclear Regulatory Commission (NRC) is issuing this Regulatory Issue Summary (RIS) to correct the information provided in Information Notice (IN) 1986-90, "Requests to Dispose of Very Low-Level Radioactive Waste Pursuant to 10 CFR 20.302." This RIS clarifies the application process for obtaining approvals to dispose of low-level waste (LLW) in accordance with Title 10 of the *Code of Federal Regulations* (10 CFR) 20.2002 regulations, or equivalent Agreement State regulations.

The NRC expects recipients to review the information for applicability to their facilities and to consider actions, as appropriate. However, this RIS requires no specific action or written response on the part of an addressee. The NRC is providing this RIS to the Agreement States for their information and distribution to their licensees as appropriate. This RIS supersedes Information Notice (IN) 1986-90.

BACKGROUND INFORMATION

On November 3, 1986, the NRC issued IN 1986-90, "Requests to Dispose of Very Low-Level Radioactive Waste Pursuant to 10 CFR 20.302," to inform nuclear reactor licensees of the authority of Agreement States in reviewing and approving requests to dispose of low-level radioactive waste pursuant to 10 CFR 20.302 (now 10 CFR 20.2002¹). IN 1986-90 incorrectly stated that in cases where a nuclear reactor facility is located in an Agreement State, the NRC does not have the legal basis for performing the reviews and granting approvals. The NRC performed a regulatory review of the 10 CFR 20.2002 process and determined that IN 1986-90 did not provide the correct information regarding regulatory approval to dispose of very low-level waste. The NRC issued an official clarification of the process to Agreement State regulators on March 13, 2012, entitled, "Clarification of the Authorization for Alternate Disposal of Material Issued Under 10 CFR 20.2002 and Exemption Provisions in 10 CFR (FSME-12-025)." This letter was issued to clarify the use of 10 CFR 20.2002 and similar Agreement State processes

¹ 10 CFR 20.2002 replaced 10 CFR 20.302 on May 21, 1991 (56 FR 23403).

for the disposal of radioactive materials in Resource Conservation Recovery Act disposal facilities or other unlicensed facilities when the unlicensed facility is located in another State. This clarification confirmed that an Agreement State would need to provide an exemption under its 10 CFR 20.2002-equivalent State regulations to a licensee seeking to dispose of waste at a facility in another State. The Agreement State where the facility is located, or the NRC in the case of non-Agreement State facilities, would need to license or exempt the unlicensed facility accepting the waste. This "All Agreement States" letter is accessible to the public in NRC's Agencywide Documents Access and Management System (ADAMS) under Accession No. ML12065A038.

SUMMARY OF ISSUE

NRC regulations in 10 CFR 20.2002 provide that a licensee or applicant for a license may apply to the Commission for approval of procedures to dispose of licensed material not otherwise authorized in 10 CFR Part 20 for disposal. Licensees have used 10 CFR 20.2002 to dispose of very LLW on a site-specific basis. This RIS makes the clarification that any licensee's request for approval to dispose of licensed material under 10 CFR 20.2002, or the equivalent Agreement State regulations, must be submitted to the regulatory authority that issued the license for use of the radioactive material. For licensees under 10 CFR Part 50, "Domestic Licensing of Production and Utilization Facilities," or Part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants," this request should be made to the NRC in accordance with 10 CFR 50.4, "Written Communications" or 10 CFR 52.3, "Written Communications." For NRC-issued licenses under 10 CFR Parts 30 ("Rules of General Applicability to Domestic Licensing of Byproduct Material"), 40 ("Domestic Licensing of Source Material"), and 70 ("Domestic Licensing of Special Nuclear Material"), the request should be made in accordance with 10 CFR 30.6, 10 CFR 40.5, or 10 CFR 70.5, "Communications." For Agreement State licensees, this request should be made directly to the Agreement State regulatory authority. If the Agreement State has not adopted regulations equivalent to 10 CFR 20.2002, then the State may accomplish the same regulatory authorization through application of its specific exemption authority, which could approve the request to dispose of licensed material using procedures not otherwise authorized. Also, radioactive material licensees receiving a 10 CFR 20.2002 approval must follow other permitting requirements.

Details related to exemption request requirements and the involvement of the NRC and Agreement States are discussed in FSME-12-025, "Clarification of the Authorization for Alternate Disposal of Material Issued under 10 CFR 20.2002 and Exemption Provisions in 10 CFR." These details include a discussion of several situations where the NRC and an Agreement State or multiple Agreement States would be involved in reviewing requests for and authorizing alternate procedures to dispose of licensed material under 10 CFR 20.2002 (or the equivalent Agreement States regulations).

Unlicensed disposal (or other) facilities that intend to take possession of licensed material must either obtain a license or an exemption from the requirement to have a license to possess the material. In Agreement States, this license or exemption must be obtained from the regulatory authority in the Agreement State. In non-Agreement States, the license or exemption must be obtained from the NRC. NRC staff practice is to issue an exemption from the requirement for a license for possession of the radioactive material to the facility intended to take possession of the material in conjunction with issuance of the 10 CFR 20.2002 authorization to the licensee disposing of the material.

In some cases, the involvement of the NRC or Agreement State may not be required because the licensed materials may be exempt from NRC or Agreement State licensing requirements. In this case, the unlicensed facility does not need a specific exemption or license to dispose of the material. For example, items meeting the criteria in 10 CFR 30.15, "Certain items containing byproduct material," would not require a license or an exemption from either the NRC or the Agreement State.

Also, a source material licensee may transfer or dispose of unimportant quantities² of source material under the regulations of 10 CFR 40.51(b)(3) and (4) to persons exempt under 10 CFR 40.13(a). Licensees are not required to request and receive NRC approval for these transfers. However, if requested, NRC staff will, on a case-by-case basis, review and approve such transfers. Additional information on NRC staff reviews of requests to transfer material under 10 CFR 40.51(b)(3) and (4) to persons exempt under 10 CFR 40.13(a) can be found in an Office of Nuclear Material Safety and Safeguards (NMSS) procedure, "Review, Approval, and Documentation of Low-Activity Waste Disposals in Accordance with 10 CFR 20.2002 and 10 CFR 40.13(a)" (ADAMS Accession No. ML092460058). If licensees have questions related to the necessity of a 10 CFR 20.2002 exemption with regard to disposing exempt materials, they can contact the NRC or Agreement State for clarification.

BACKFITTING THE ISSUE AND FINALITY DISCUSSION

This RIS requires no action or written response. Any action that licensees take to implement changes or procedures in accordance with the information contained in this RIS ensures compliance with current regulations, is strictly voluntary, and, therefore, is not a backfit under any of the backfitting provisions contained in 10 CFR 50.109, 70.76, 72.62, 76.76, or the issue finality provision of 10 CFR Part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants." Consequently, the staff did not perform a backfit analysis.

FEDERAL REGISTER NOTIFICATION

A notice of opportunity for public comment on this RIS was not published in the *Federal Register* because it is informational and pertains to a staff position that does not represent a departure from current regulatory requirements and practice.

CONGRESSIONAL REVIEW ACT

This RIS is not a rule as defined in the Congressional Review Act (5 U.S.C. §§ 801-808).

PAPERWORK REDUCTION ACT STATEMENT

This RIS does not contain new or amended information collection requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget (OMB), approval numbers 3150-0009, 3150-0011, 3150-0014, 3150-0017, 3150-0020, and 3150-0151.

² There have been cases where licensees decontaminate material to exempt concentration levels as defined in 10 CFR 30.70, "Exempt Concentrations."

PUBLIC PROTECTION NOTIFICATION

The NRC may not conduct or sponsor, and a person is not required to respond to, an information collection unless the requesting document displays a currently valid OMB control number.

CONTACTS

This RIS requires no specific action, or written response. If you have any questions about this summary, please contact the technical contacts listed below or the appropriate regional office.

/RA Pamela Henderson for /

Daniel S. Collins, Director
Division of Material Safety, State, Tribal,
and Rulemaking Programs
Office of Nuclear Material Safety
and Safeguards

/RA/

Louise Lund, Director
Division of Policy and Rulemaking
Office of Nuclear Reactor Regulation

/RA/

Michael C. Cheok, Director
Division of Construction Inspection
and Operational Programs
Office of New Reactors

Technical Contacts:

Donald Lowman, NMSS
(301) 415-5452
Donald.Lowman@nrc.gov

Stephen Poy, NMSS
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Stephen.Poy@nrc.gov

Micheal Smith, NRR
(301) 415-3763
Micheal.Smith@nrc.gov

Note: NRC generic communications may be found on the NRC public Web site,
<http://www.nrc.gov>, under NRC Library/Document Collections

PUBLIC PROTECTION NOTIFICATION

The NRC may not conduct or sponsor, and a person is not required to respond to, an information collection unless the requesting document displays a currently valid OMB control number

CONTACTS

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This RIS requires no specific action, or written response. If you have any questions about this summary, please contact the technical contacts listed below or the appropriate regional office.

/RA Pamela Henderson for /

Daniel S. Collins, Director
Division of Material Safety, State, Tribal,
and Rulemaking Programs
Office of Nuclear Material Safety
and Safeguards

/RA/

Louise Lund, Director
Division of Policy and Rulemaking
Office of Nuclear Reactor Regulation

/RA/

Michael C. Cheek, Director
Division of Construction Inspection
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Office of New Reactors

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Note: NRC generic communications may be found on the NRC public Web site, <http://www.nrc.gov>, under NRC Library/Document Collections

ADAMS Accession No. ML16007A488

*via email

OFC	NMSS/MSTR/ASPB	NMSS/MSTR/ASPB	*NMSS/MSTR/MSEB	*NMSS/FCSE	*NRR/DRA/ARCB/BC
NAME	SPoy	PMichalak	AMcIntosh	KRamsey	UShoop
DATE	1/20/16	1/27/16	9/11/15	1/05/16	3/14/16
OFC	*QTE	*OCIO	*OGC (NLO)	NMSS/DUWP/D	*NMSS/DSFM/D
NAME	CHsu	DCullison	OMikula	JTappert	MLombard
DATE	1/08/16	4/04/16	10/20/16	5/5/16	9/19/16
OFC	*NRO/DSEA/RPAC/BC	*NRO/DCIP/D	*NRR/DPR/PGCB/LA	*NRR/DPR/PGCB/BC	NRR/DPR/D
NAME	LBurkhart	MCheok	ELee (ABaxter for)	SStuchell	LLund
DATE	08/02/16	10/06/16	09/27/16	10/06/16	10/21/16
OFC	NMSS/MSTR/D				
NAME	PHenderson for DCollins				
DATE	11/13/16				

OFFICIAL RECORD COPY

EXHIBIT B



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

September 16, 2019

Ms. Ellen C. Ginsberg
Vice President, General Counsel
& Secretary
Nuclear Energy Institute
1201 F Street, NW, Suite 1100
Washington, DC 20004

SUBJECT: RESPONSE TO YOUR FEBRUARY 28, 2019, LETTER, "COMMENTS ON
REGULATORY ISSUE SUMMARY 2016-11, 'REQUESTS TO DISPOSE OF
VERY LOW-LEVEL RADIOACTIVE WASTE PURSUANT TO 10 CFR 20.2002'"

Dear Ms. Ginsberg:

I am responding to your February 28, 2019, letter to Ho Nieh and Scott Moore, "Comments on Regulatory Issue Summary 2016-11, 'Requests to Dispose of Very Low-Level Radioactive Waste Pursuant to 10 CFR 20.2002'" (Agencywide Documents Access and Management System [ADAMS] Accession No. ML19086A320), where you requested that the U.S. Nuclear Regulatory Commission (NRC) rescind Regulatory Issue Summary (RIS) 2016-11.

We have reviewed the information you provided and the history of this issue and determined that RIS 2016-11 correctly stated that any licensee's request for approval to dispose of licensed material under Title 10 of the *Code of Regulations* (10 CFR) Section 20.2002, or the equivalent Agreement State regulations, must be submitted to the regulatory authority that issued the license for use of the radioactive material. In the case of 10 CFR Part 50 or 52 licensees, this requirement is based on the NRC's jurisdiction over the operation of nuclear power plants, which cannot be delegated to an Agreement State.

For Very Low-Level Waste (VLLW) at unlicensed facilities such as Resource Conservation Recovery Act disposal facilities that have received appropriate exemptions from VLLW disposal requirements, the NRC staff intends to avoid an unnecessarily complicated approval process. Therefore, as indicated during a public meeting on September 6, 2019, the staff plans to provide updated guidance describing a streamlined approach for reviewing 10 CFR 20.2002 requests, particularly in cases where an Agreement State may have already approved or exempted a facility that would receive the VLLW that is subject to the 20.2002 request. The NRC staff envisions an approach that appropriately considers the Agreement State's review and approval in the NRC staff's review. The staff will solicit stakeholder comments before issuing final guidance on this issue.

For any 10 CFR Part 50 or 52 licensees that have used Agreement State approvals in the past in lieu of an NRC 10 CFR 20.2002 approval, the NRC staff will consider enforcement discretion on a case-by-case basis, as appropriate.

E.

Ginsberg

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In addition to the streamlined approach to 10 CFR 20.2002 reviews for VLLW discussed above, the NRC staff plans to review the scope of acceptable disposal of VLLW under 10 CFR 20.2001. The staff will also seek public and stakeholder comments as part of this review before finalizing guidance.

In accordance with 10 CFR 2.390 of the NRC's "Agency Rules of Practice and Procedure," a copy of this letter will be available electronically for public inspection in the NRC Public Document Room or from the Publicly Available Records component of NRC's ADAMS. ADAMS is accessible from the NRC Web site at <https://www.nrc.gov/reading-rm/adams.html>

Thank you for submitting your comments. If you have any questions, please contact Stephen Dembek at stephen.dembek@nrc.gov or 301-415-2342.

Sincerely,

//RA//

John W. Lubinski, Director
Office of Nuclear Material Safety
and Safeguards

E.
Ginsberg

3

SUBJECT: RESPONSE TO YOUR FEBRUARY 28, 2019, LETTER, "COMMENTS ON
REGULATORY ISSUE SUMMARY 2016-11, 'REQUESTS TO DISPOSE OF
VERY LOW-LEVEL RADIOACTIVE WASTE PURSUANT TO 10 CFR 20.2002'"
DATE: September 16, 2019

ADAMS Accession No.: ML19224A774

***via email**

OFFICE	DUWP	MSST	DUWP	OE	NRR
	SKoenick*	PMichalak*	BPham*	JPeralta*	RPascerelli
DATE	9/12/19	9/12/19	9/11/19	9/11/19	9/11/19*
OFFICE	OGC	TECH ED	NMSS		
NAME	BHarris*	CGoode	JLubinski		
DATE	9/11/19	9/12/19	9/16/19		

OFFICIAL RECORD COPY

EXHIBIT C

LIS ORIGINALSSINS No.: 6835
IN 86-90UNITED STATES
NUCLEAR REGULATORY COMMISSION
OFFICE OF INSPECTION AND ENFORCEMENT
WASHINGTON, D.C. 20555

November 3, 1986

IE INFORMATION NOTICE NO. 86-90: REQUESTS TO DISPOSE OF VERY LOW-LEVEL
RADIOACTIVE WASTE PURSUANT TO 10 CFR 20.302Addressees:

All nuclear power reactor facilities holding an operating license or a construction permit and research and test reactors.

Purpose:

This notice is to inform nuclear reactor licensees of the authority of Agreement States in reviewing and approving disposals of waste that in the past might have been reviewed by the NRC pursuant to 10 CFR 20.302(a). In those cases where the reactor facility was in an Agreement State, the NRC did not have a legal basis for performing the reviews and granting approvals.

It is suggested that recipients review the information provided for applicability to their facilities. However, information contained in this notice does not constitute NRC requirements; therefore, no specific action or written response is required.

Discussion:

In February 1983, the NRC issued IE Information Notice 83-05, "Obtaining Approval for Disposing of Very Low-Level Radioactive Waste - 10 CFR Section 20.302." The purpose of this information notice was to call attention to the little-used section of NRC regulations, 10 CFR 20.302(a), that provides a method for obtaining approval of proposed procedures for disposing of radioactive material in a manner not otherwise authorized in the regulations. The notice identified NRR as the NRC Office to receive and process utility applications. Neither the Notice nor 10 CFR 20.302(a) addresses NRC versus Agreement State jurisdiction. As a matter of practice, reactor licensees who requested such approvals from the NRC for radioactive waste disposal in Agreement States were advised that they also must obtain the approval of the Agreement State. However, in a recent legal opinion regarding regulatory jurisdiction, the NRC's Executive Legal Director made it clear that in Agreement States NRC approval is not necessary for disposal within or outside of the exclusion area of low-level radioactive waste from a reactor facility. Such approval is within the jurisdiction of the Agreement State. For disposal of very low-level radioactive waste in States that are not Agreement States, only NRC approval is required.

8610290045

IN 86-90

November 3, 1986


Page 2 of 2

In Agreement States, regulation of the handling and storage (including waste treatment) at the reactor site of low-level waste resulting from the reactor operation is reserved to the NRC pursuant to 10 CFR 150.15(a)(1). For this purpose, the reactor site includes the exclusion area since it represents specifically the area of greatest and most immediate public health and safety concern in the operation of the reactor.

Therefore, applications for disposal by reactors in Agreement States should be submitted to the Agreement State. Applications for disposal pursuant to 10 CFR 20.302 by reactors in Non-Agreement States should be submitted to the NRC Office of Nuclear Reactor Regulation.

This may change at some point in the future since NRC staff is presently drafting a change to 10 CFR 150.15 that would clearly establish the NRC as having sole authority over all low-level radioactive waste activities, including disposal, within the exclusion area at NRC-licensed reactors and at certain fuel cycle facilities.

No specific action is required by this information notice. If you have any questions about this matter, please contact one of the individuals listed below or this office.


Edward L. Jordan, Director
Division of Emergency Preparedness
and Engineering Response
Office of Inspection and Enforcement

Technical Contacts: Faith N. Brenneman, NRR
(301) 492-7856

John D. Buchanan, IE
(301) 492-9657

Legal Contact: Robert L. Fonner, ELD
(301) 492-8692

Attachment: List of Recently Issued IE Information Notices

Attachment 1
IN 86-90
November 3, 1986

LIST OF RECENTLY ISSUED
IE INFORMATION NOTICES

Information Notice No.	Subject	Date of Issue	Issued to
86-89	Uncontrolled Rod Withdrawal Because Of A Single Failure	10/16/86	All BWR facilities holding an OL or CP
86-05 Sup. 1	Main Steam Safety Valve Test Failures And Ring Setting Adjustments	10/16/86	All power reactor facilities holding an OL or CP
86-25 Sup. 1	Traceability And Material Control of Material And Equipment, Particularly Fasteners	10/15/86	All power reactor facilities holding an OL or CP
86-88	Compensatory Measures For Prolonged Periods Of Security System Failures	10/15/86	All power reactor facilities holding an OL or CP; fuel fabrication and processing facilities
86-87	Loss Of Offsite Power Upon An Automatic Bus Transfer	10/10/86	All power reactor facilities holding an OL or CP
86-86	Clarification Of Requirements For Fabrication And Export Of Certain Previously Approved Type B Packages	10/10/86	All registered users of NRC certified packages
86-85	Enforcement Actions Against Medical Licensees For Willfull Failure To Report Misadministrations	10/3/86	All NRC medical licensees
86-84	Rupture Of A Nominal 40-Millicurie Iodine-125 Brachytherapy Seed Causing Significant Spread Of Radioactive Contamination	9/30/86	All NRC medical institution licensees
86-83	Underground Pathways Into Protected Areas, Vital Areas, Material Access Areas, And Controlled Access Areas	9/19/86	All power reactor facilities holding an OL or CP; fuel fabrication and processing facilities

OL = Operating License
CP = Construction Permit

EXHIBIT D



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

October 31, 2018

Mr. G. T. Powell
President and CEO/CNO
STP Nuclear Operating Company
South Texas Project
P.O. Box 289
Wadsworth, TX 77483

EA-18-137

SUBJECT: SOUTH TEXAS PROJECT, UNITS 1 AND 2 - RESPONSE TO THE
AUGUST 14, 2018, LETTER ON THE DISPOSAL OF VERY LOW-LEVEL
RADIOACTIVE MATERIAL AND EXERCISE OF ENFORCEMENT DISCRETION
(EPID L-2018-LRO-0032)

Dear Mr. Powell:

I am responding to your letter to Mr. Brian Holian, Acting Director, Office of Nuclear Reactor Regulation, dated August 14, 2018 (Agencywide Documents Access and Management System Accession No. ML18226A352), on the disposal of very low-level radioactive waste from the South Texas Project, Units 1 and 2 (STP). In the letter, STP Nuclear Operating Company (STPNOC, the licensee) requested that the U.S. Nuclear Regulatory Commission (NRC) acknowledge the existing agreement between STPNOC and the State of Texas for the disposal of certain waste streams.

The NRC staff evaluated your request and determined that, by law, STPNOC must dispose of licensed material in accordance with Title 10 of the *Code of Federal Regulations* (10 CFR) Section 20.2001, "General requirements," unless it selects a different method, as is permitted under 10 CFR 20.2002. STPNOC chose to dispose of licensed material using a different method. In particular, STPNOC sent very low-level waste for disposal in an exempt waste facility in the State of Texas. The NRC acknowledges the existing exemption between the State of Texas¹ and unlicensed disposal facilities; however, NRC authorization for STPNOC to use these sites for disposal of this material is also required, as discussed below.

As discussed in the guidance set forth in Regulatory Issue Summary (RIS) 2016-11, "Requests to Dispose of Very Low Level radioactive Wastes Pursuant to 10 CFR 20.2002," an Agreement State does not have the authority to grant permission to a nuclear power plant licensee for proposed procedures to dispose of low-level waste. Rather, a licensee must receive approval of proposed procedures not otherwise authorized in the regulations to dispose of licensed material under 10 CFR 20.2002, "Method for obtaining approval of proposed disposal procedures." This

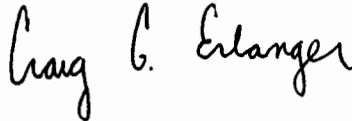
¹ Letter dated March 7, 2008, from Dr. Hans Weger, Texas Commission on Environmental Quality (TCEQ), to Mr. R.A. Gangluff, STPNOC. STPNOC included a copy of this letter as Attachment 2 to its letter dated August 14, 2018. This TCEQ letter concluded that the specified STPNOC waste streams are exempt under the relevant provisions of the Texas regulations and could be disposed of in a Texas Class 1 or 2 industrial landfill.

approval must come from the regulatory authority that issued the license for use of the radioactive material; in this case, that is the NRC. Thus, the NRC is the regulatory authority to grant approvals for disposal procedures under 10 CFR 20.2002 for STP.

STPNOC has raised issues associated with the RIS and with prior guidance. The NRC is evaluating the issue generically to provide further clarity. In view of that effort, and in light of the low safety significance of the non-compliance with 10 CFR 20.2002, I have been authorized, after consultation with the Director, Office of Enforcement, to exercise enforcement discretion for past non-compliance associated with this issue in accordance with Section 3.5 of the Enforcement Policy. Going forward, the NRC staff will continue to exercise enforcement discretion for STPNOC's existing process for disposal of low-level waste while the NRC staff evaluates regulatory options to address this issue. Once a resolution path is determined, the NRC will contact STPNOC to provide additional information.

If you have any questions, please contact Lisa Regner at 301 415-1906 or via e-mail at Lisa.Regner@nrc.gov.

Sincerely,

A handwritten signature in black ink that reads "Craig G. Erlanger". The signature is written in a cursive, flowing style.

Craig G. Erlanger, Director
Division of Operating Reactor Licensing
Office of Nuclear Reactor Regulation

Docket Nos. 50-498 and 50-499

cc: Listserv

G. Powell

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SUBJECT: SOUTH TEXAS PROJECT, UNITS 1 AND 2 - RESPONSE TO THE
AUGUST 14, 2018, LETTER ON THE DISPOSAL OF VERY LOW-LEVEL
RADIOACTIVE MATERIAL AND EXERCISE OF ENFORCEMENT DISCRETION
(EPID L-2018-LRO-0032) DATED OCTOBER 31, 2018

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ADAMS Accession No: ML18260A250

***via e-mail**

OFFICE	NRR/DORL/LPL4/PM	NRR/DORL/LPL4/LA	NRR/DORL/LPL4-1/BC
NAME	LRegner	PBlechman	RPascarelli
DATE	10/30/2018	10/17/2018	10/30/2018
OFFICE	RIV/DRS/PB2/BC*	OGC/GCHEA/AGCMLE*	OGC/GCLR/RMR*
NAME	HGepford	MLemoncelli (NLO)	TCampbell / NLO
DATE	10/30/2018	10/30/2018	10/30/2018
OFFICE	NRR/DRA/D*	OE/D	NRR/DORL/D
NAME	MFranovich	ABoland	CErlanger
DATE	10/30/18	10/30/2018	10/31/2018

OFFICIAL RECORD COPY

EXHIBIT E

PUBLIC MEETING ANNOUNCEMENT

Title: Public meeting regarding comments on the NRC's Regulatory Issue Summary (RIS) 2016-11, "Requests to Dispose of Very Low-Level Radioactive Waste Pursuant to 10 CFR 20.2002."

Date(s) and Time(s): September 06, 2019, 10:00 AM to 12:00 PM

Location: NRC Two White Flint North, T6-D2
11545 Rockville Pike
Rockville, MD

Category: This is a Category 2 meeting. The public is invited to participate in this meeting by discussing regulatory issues with the Nuclear Regulatory Commission (NRC) at designated points identified on the agenda.

Purpose: To discuss the NRC's proposed path forward to address concerns regarding RIS 2016-11 with the Nuclear Energy Institute, EnergySolutions, LLC, Waste Control Specialists LLC, South Texas Project Nuclear Operating Company and Agreement States.

Contact: Stephen Dembek
301-415-2342
Stephen.Dembek@nrc.gov

Participants:

<u>NRC</u>	<u>External</u>
Office of Nuclear Material Safety and Safeguards	EnergySolutions
	Nuclear Energy Institute (NEI)
	Waste Control Specialists LLC
	Agreement State
	South Texas Project Nuclear Operating Company (STPNOC)

Comments: Interested members of the public can listen to the entire meeting and participate in this meeting at certain points via teleconference. Please call the Bridgeline at 1-888-989-0729 and use passcode 7955844.

PUBLIC MEETING AGENDA

Public meeting regarding comments on the NRC's Regulatory Issue Summary (RIS) 2016-11, "Requests to Dispose of Very Low-Level Radioactive Waste Pursuant to 10 CFR 20.2002."

September 06, 2019, 10:00 AM to 12:00 PM

NRC Two White Flint North, T6-D2
11545 Rockville Pike
Rockville, MD

Welcome (NMSS Director) (10:00 am)

NRC Presentation (DUWP Director) (10:05 am)

- Short history of 2012 AS Letter, 2016 RIS, STP enforcement issue
- History of stakeholders' input:
 - NEI letter
 - Energy *Solutions* letter
 - WCS letter

NRC's Path forward (LLWPB Chief) (10:15 am)

- 20.2002 Case-by-case Procedural Review
 - Compliance
 - Review process
 - Update RIS 2016-11
- 20.2001 Approval
 - Potential change in interpretation
 - VLLW Scoping Study

Open discussion (NRC, NEI, WCS, Energy *Solutions*, Agreement States) (10:30 am)

Public Comments (11:15 am)

Conclusion (DUWP Director) (12:00 pm)

The time of the meeting is local to the jurisdiction where the meeting is being held.

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If reasonable accommodation is needed to participate in this meeting, or if a meeting notice, transcript, or other information from this meeting is needed in another format (e.g., Braille, large print), please notify the NRC meeting contact. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

ADAMS Accession Number: ML19247B399

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Link to meeting details: <https://www.nrc.gov/pmns/mtg?do=details&Code=20190883>

EXHIBIT F

ELLEN C. GINSBERG

Vice President, General Counsel & Secretary

1201 F Street, NW, Suite 1100

Washington, DC 20004

P: 202.739.8140

ecg@nei.org

nei.org



February 28, 2019

Mr. Ho Nieh
Director, Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Mr. Scott Moore
Acting Director, Office of Nuclear Material
Safety and Safeguards
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Subject: Comments on Regulatory Issue Summary 2016-11, "Requests to Dispose of Very Low-Level Radioactive Waste Pursuant to 10 CFR 20.2002"

Dear Mr. Nieh and Mr. Moore:

The Nuclear Energy Institute (NEI)¹ writes to express our concerns with Regulatory Issue Summary (RIS) 2016-11, "Requests to Dispose of Very Low-Level Radioactive Waste Pursuant to 10 CFR 20.2002" (Nov. 13, 2016), and the recent U.S. Nuclear Regulatory Commission (NRC) staff action to give RIS 2016-11 the force and effect of law in the agency's enforcement process. Reversing decades of agency guidance and practice, RIS 2016-11 (at page 2) declared that "any licensee's request for approval to dispose of licensed material under 10 CFR 20.2002, or the equivalent Agreement State regulations, must be submitted to the regulatory authority that issued the license for use of the radioactive material." Prior to this change in policy, the NRC had long held that the licensing and regulatory authority over the *disposal* of low-level waste (LLW) generated by a reactor facility located within an Agreement State resided with the Agreement State in which the waste was generated (although the NRC maintained authority over the *handling* and *storage* of LLW at all reactor facilities).²

Without acknowledging the well-reasoned legal underpinnings of the NRC's prior interpretation of section 274 of the Atomic Energy Act of 1954, as amended (AEA) and 10 CFR § 150.15, RIS 2016-11 and subsequent enforcement actions simply reverse course. To remedy these clear violations of the AEA, the Administrative Procedure Act (APA), and Commission regulations, NEI requests that the NRC, in accordance with 10 CFR § 2.804(f), treat this letter as a post-promulgation comment on the agency's new interpretation, and publish a statement in the *Federal Register* rescinding RIS 2016-11 and reinstating the NRC's prior longstanding position in IN 86-90 and the referenced OELD Opinion.

¹ NEI is responsible for establishing unified policy relating to matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect and engineering firms, fuel cycle facilities, nuclear materials licensees, and other organizations involved in the nuclear energy industry.

² See Office of Executive Legal Director (OELD) Opinion, Jurisdiction Over Low Level Waste Management at Reactor Sites in Agreement States (Sept. 13, 1985) (ML103430218); Information Notice (IN) No. 86-90, Requests to Dispose of Very Low-Level Radioactive Waste Pursuant to 10 CFR 20.302 (Nov. 3, 1986) (ML031250358).

NEI Comments on RIS 2016-11

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A. The AEA and NRC Regulations Allow Agreement States to Assume Jurisdiction Over the Disposal of LLW Generated at Reactor Facilities.

Section 274 of the AEA authorizes the NRC to transfer regulatory and licensing authority over specific categories of nuclear materials within a state to the state government.³ Under that provision, Congress allows the NRC to “enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the [NRC]” and the assumption of the authority by the state.⁴ Before doing so, the NRC must find that the regulatory regime of the proposed “Agreement State” is “compatible with the [NRC’s] program” and that the state’s program is “adequate to protect the public health and safety.”⁵

In accordance with section 274, many Agreement States have been transferred regulatory and licensing authority over LLW disposal, including states with reactor and fuel-cycle facilities. Section 274(c), however, provides that such agreements for NRC discontinuance of authority may not cover the regulation of waste disposal falling under two enumerated categories: (i) “disposal into the ocean or sea of byproduct, source, or special nuclear waste materials as defined in regulations or orders of the Commission;” and (ii) “disposal of such other byproduct, source, or special nuclear material as the Commission determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.”⁶

The clear implication of this language is that Agreement States can assume regulatory authority over LLW disposal that does *not* fall within either of these two categories. Importantly, the issues addressed in RIS 2016-11 do not involve either the disposal of nuclear materials (i) in the ocean or sea, or (ii) that the Commission has determined “by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.” To the contrary, the Commission allows Agreement States to regulate LLW disposal. In particular, using 10 CFR § 20.2002 or compatible Agreement State processes, the Commission has long allowed the disposal of so-called “Very LLW” in Resource Conservation and Recovery Act (RCRA) permitted facilities that are neither licensed by the NRC nor Agreement State programs.⁷

Nothing in section 274 directs the NRC to treat the disposal of LLW from reactor facilities (or any other production or utilization facility) any differently than LLW from other sources. Section 274(c) does provide that agreements for NRC discontinuance of authority may not cover the regulation of “the

³ 42 U.S.C. § 2021.

⁴ 42 U.S.C. § 2021(b).

⁵ 42 U.S.C. § 2021(d)(2).

⁶ 42 U.S.C. § 2021(c)(3), (4).

⁷ “Very LLW” refers to waste that contains residual radioactivity falling well below the Class A LLW limits found in 10 CFR Part 61. Very LLW can be safely disposed in landfill facilities that are regulated under RCRA.

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construction and operation of any production or utilization facility or any uranium enrichment facility.”⁸ But notably, Congress included only the *construction* and *operation* of production and utilization facilities—not the *disposal* of waste from production and utilization facilities within this prohibition. Congress made this choice even though—and likely because—it imposed different, risk-based limitations on the discontinuance of authority over disposal of nuclear material in other subparagraphs in section 274(c).

Had Congress intended to impose a blanket limitation on the ability of Agreement States to regulate the disposal of wastes from production and utilization facilities it could have done so. Instead, Congress provided the Commission with the authority—by regulation or order—to determine which wastes presented sufficient hazards such that only the Commission could remain the regulatory and licensing authority. But the Commission has neither by regulation nor by order determined that it must retain authority over LLW generated by production and utilization facilities. To the contrary, LLW from production and utilization facilities is regularly disposed of in Agreement State facilities and, in the case of Very LLW, RCRA-permitted facilities.

The NRC’s regulations implementing and interpreting section 274(c) in 10 CFR Part 150 further demonstrate the jurisdictional lines over LLW. Restating the requirement of section 274(c), 10 CFR § 150.15(a)(1) provides that persons in Agreement States “are not exempt from the Commission’s licensing and regulatory requirements with respect to . . . [t]he construction and operation of any production or utilization facility.” That regulation further provides that “operation of a facility,” as that term is used in that subparagraph, “includes, but is not limited to (i) the *storage* and *handling* of radioactive wastes *at the facility site* by the person licensed to operate the facility, and (ii) the discharge of radioactive effluents from the facility site.”⁹ Had the Commission intended to retain jurisdiction over the *disposal* of LLW generated at a production or utilization facility site, it would have said so.

The Statement of Considerations for Part 150 conclusively demonstrates that the Commission deliberately omitted disposal of LLW generated at a reactor facility site from 10 CFR § 150.15(a)(1). After receiving comments from “some fifty organizations and individuals,” the Atomic Energy Commission (AEC) explained that many “comments received were concerned in the main with the question of whether the Commission should continue control in agreement States of the commercial land burial of byproduct, source, or special nuclear wastes”¹⁰ After considering the various comments, the Commission “decided against blanket reservations of control over land burial of waste”¹¹ It further explained: “Control over the *handling and storage* of waste at the site of a reactor, including

⁸ 42 U.S.C. § 2021(c)(1).

⁹ 10 CFR § 150.15(a)(1) (emphasis added).

¹⁰ Atomic Energy Commission, Part 150—Exemptions and Continued Regulatory Authority in Agreement States Under Section 274, 27 Fed. Reg. 1351, 1351 (Feb. 14, 1962).

¹¹ *Id.*

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effluent discharge, will be retained by the Commission as a part of the control of reactor operation. *The states will have control over land burial of low level wastes.*¹² Thus, the Commission clearly and intentionally distinguished between the “storage and handling” of LLW (authority over which the NRC must always maintain), and the disposal of LLW (authority over which may be transferred to Agreement States).

B. NRC’s Longstanding Position Is That an Agreement State Has Authority over the Disposal of LLW Generated by a Reactor Facility within the Agreement State.

For decades, the NRC affirmed the AEC’s interpretation of section 274 and 10 CFR § 150.15 discussed in the previous section that the Agreement State—not the Commission—was the proper authority to review and approve the disposal of Very LLW generated by a reactor facility under the state’s equivalent of 10 CFR 20.2002. The NRC’s Office of Executive Legal Director (OELD) specifically addressed NRC versus Agreement State jurisdiction over LLW at reactor sites in a memorandum entitled, “Jurisdiction over Low Level Waste Management at Reactor Sites in Agreement States” (Sept. 13, 1985). The OELD Opinion looked to the plain language and structure of section 274 and 10 CFR § 150.15 to draw a distinction between the need for the NRC to maintain authority to license and regulate the *handling* and *storage* of LLW *at the reactor facility site*, and the ability of the Agreement States to maintain authority to license and regulate the *disposal* of LLW *outside the reactor facility site*. After concluding that in Agreement States, the NRC continues to maintain authority to license and regulate the handling and storage of low-level waste in the exclusion area (*i.e.*, part of the reactor facility site), the OELD Opinion explained:

The conclusion differs, however, regarding the disposal of low level radioactive waste generated by the operation of the nuclear reactor. The omission of low level waste disposal in 10 CFR 150.15 as a function reserved to the Federal Government implies that it has been relinquished to the Agreement States. The Statement of Considerations accompanying Part 150 when it was promulgated clearly demonstrates that the Atomic Energy Commission considered the question of Agreement State authority over the disposal of reactor low level waste and decided to relinquish the function, while retaining handling and storage.¹³

The OELD Opinion supported this conclusion by quoting the Part 150 Statement of Considerations, which declared that: (1) “[t]he Commission has decided against blanket reservations of control over land burial of waste . . .”; (2) “[c]ontrol over the handling and storage of waste at the site of a reactor,

¹² *Id.* (emphasis added).

¹³ OELD Opinion at 2.

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including effluent discharge, will be retained by the Commission as a part of the control of reactor operation”; and (3) “[t]he states will have control over land burial of low level wastes.”¹⁴

Importantly, the OELD Opinion went on to note that because the AEA requires that the agency identify, by regulation or order, the regulatory authority over which, if any, forms of LLW disposal cannot be transferred to Agreement States, “the NRC is not at liberty to vary the clear meaning given to this regulation by the Atomic Energy Commission without a rulemaking proceeding, or by issuance of appropriate orders, pursuant to Section 274c. of the Atomic Energy Act, as amended.”¹⁵

This conclusion was incorporated into Generic Letter 85-14, Commercial Storage at Power Reactor Sites of Low-level Radioactive Waste Not Generated by the Utility (Aug. 1, 1985), which states: “[I]nterim storage of LLW within the exclusion area of a reactor site, as defined in 10 CFR 100.3(a), will be subject to NRC jurisdiction regardless of whether or not the reactor is located in an Agreement State, pursuant to the regulatory policy expressed in 10 CFR 150.15(a)(1). *Within Agreement States, for locations outside the exclusion areas, the licensing authority is in the Agreement State.*”¹⁶

The OELD interpretation of section 274 and 10 CFR § 150.15 was also incorporated into Information Notice (IN) No. 86-90, Requests to Dispose of Very Low-Level Radioactive Waste Pursuant to 10 CFR 20.302 (Nov. 3, 1986). IN 86-90 states:

This notice is to inform nuclear reactor licensees of the authority of Agreement States in reviewing and approving disposals of waste that in the past might have been reviewed by the NRC pursuant to 10 CFR § 20.302(a). In those cases where the reactor facility was in an Agreement State, the NRC did not have a legal basis for performing the reviews and granting approvals.¹⁷

IN 86-90 further states that 10 CFR § 20.302(a) (which has since been re-designated as 10 CFR § 20.2002(a)) does not address “NRC versus Agreement State jurisdiction,” but that “in a recent legal opinion regarding regulatory jurisdiction, the NRC’s Executive Legal Director made it clear that in Agreement States NRC approval is not necessary for within or outside of the exclusion area of low-level waste from a reactor facility. Such approval is within the jurisdiction of the Agreement State. For

¹⁴ *Id.* (quoting 27 Fed. Reg. at 1351) (emphasis added by OELD Opinion).

¹⁵ *Id.*

¹⁶ Generic Letter 85-14, Commercial Storage at Power Reactor Sites of Low-level Radioactive Waste Not Generated by the Utility (Aug. 1, 1985) (ML031150709) (emphasis added). The OELD Opinion was itself also included in NUREG/CR-5569, Rev. 1, Health Physics Positions (HPPOS) Data Base at 173 (Feb. 1994) (ML093220108) as HPPOS-097 PDR-9111210206.

¹⁷ IN 86-90 at 1.

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disposal of very low-level radioactive waste in States that are not Agreement States, only NRC approval is required.”¹⁸

C. The NRC’s Change in Position in RIS 2016-11 Violates the AEA, APA, and NRC Regulations.

For decades, licensees relied on the position set forth in IN 86-90, Generic Letter 85-14, and the OELD Opinion. Despite the longstanding, well-reasoned interpretation of section 274, 10 CFR § 150.15, and 10 CFR § 20.2002, the NRC issued RIS 2016-11 on November 13, 2016 without first soliciting input from industry, the Agreement States, or any other stakeholders. RIS 2016-11 simply declared that:

IN 1986-90 incorrectly stated that in cases where a nuclear reactor facility is located in an Agreement State, the NRC does not have the legal basis for performing the reviews and granting approvals. The NRC performed a regulatory review of the 10 CFR 20.2002 process and determined that IN 1986-90 did not provide the correct information regarding regulatory approval to dispose of very low-level waste.¹⁹

According to RIS 2016-11, the NRC was making a “clarification that any licensee’s request for approval to dispose of licensed material under 10 CFR 20.2002, or the equivalent Agreement State regulations, must be submitted to the regulatory authority that issued the license for use of the radioactive material.”²⁰ In the case of licensees for production and utilization facilities, therefore, the request would now need to be made to the NRC. But RIS 2016-11 provided no discussion of the jurisdictional issues discussed in the OELD Opinion and offered no alternative interpretations of section 274 and 10 CFR § 150.15. It did not, for example, point to any “regulation or order” in which the Commission determined that it—not the Agreement States—must retain licensing and regulatory authority over the disposal of low-level waste as required by section 274 and Part 150. As discussed below, RIS 2016-11 and its subsequent invocation in enforcement actions violate the AEA, APA, and NRC regulations.

1. RIS 2016-11 relies on an interpretation not in accordance with Section 274 and Part 150.

The OELD Opinion and IN 86-90 conclusions that the NRC has no authority over the disposal of LLW from a reactor facility located in an Agreement State was based on the plain language and structure of

¹⁸ *Id.*

¹⁹ RIS 2016-11 at 1. It is unclear which “regulatory review” is referenced here, but in 2012, the NRC issued “Clarification of the Authorization for Alternate Disposal of Material Issued Under 10 CFR 20.2002 and Exemption Provisions in 10 CFR (FSME-12-025)” (Mar. 13, 2012) (ML12065A038). While this letter to Agreement States suggests that “both the NRC and the Agreement State would need to become involved” when “[a]n NRC licensee requests authorization under 20.2002 to dispose of material at an unlicensed facility in an Agreement State,” it never explains why 10 CFR § 20.2002 is universally applicable in such scenarios. *Id.* at 2.

²⁰ RIS 2016-11 at 2.

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section 274(c), and subsequent determinations in the Part 150 rulemaking. Section 274(c)(4) grants the NRC the ability to withhold from Agreement States the authority over any nuclear material the Commission has determined “by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.” In the Part 150 rulemaking, the Commission “decided against blanket reservations of control over land burial of waste . . .” and instead determined that Agreement States will have authority over the disposal by land burial of LLW.²¹

And while section 274(c)(1) precludes the transfer to Agreement States of authority over the “construction and operation” of reactor facilities, “disposal” of waste—whether from reactor facilities or otherwise—is dealt with in other subparagraphs in section 274(c). Because disposal is clearly addressed in other subparagraphs in section 274(c)—and not in section 274(c)(1)—the clear conclusion to be drawn is that section 274(c)(1) does not preclude the transfer to Agreement States of authority over the disposal of LLW waste from reactor facilities. For this reason, 10 CFR § 150.15 necessarily draws a distinction between the need for the NRC to maintain authority to license and regulate the *handling* and *storage* of LLW *at the reactor facility site*, and the ability of the Agreement States to maintain authority to license and regulate the *disposal* of LLW *outside the reactor facility site*. By taking the opposite view in RIS 2016-11—and doing so without conducting a notice and comment rulemaking—the NRC abused its discretion and took action not in accordance with section 274 and 10 CFR § 150.15.²²

2. RIS 2016-11 contains no reasoned explanation for the NRC’s new interpretation.

“The APA’s requirement of reasoned decision-making ordinarily demands that an agency acknowledge and explain the reasons for a changed interpretation.”²³ “An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”²⁴ When switching interpretations, an agency must always “show that there are good reasons for the new policy.”²⁵ And in certain circumstances—like those here—more is required. The Supreme Court has held that “the APA requires an agency to provide more substantial justification when ‘its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.’”²⁶ “[I]t is not that further justification is demanded by the mere fact of policy change[,] but that a reasoned explanation is needed for

²¹ 27 Fed. Reg. at 1351

²² As the OELD Opinion recognized, section 274(c)(4) allows the NRC to “determine by regulation or order” that authority over certain nuclear material should not be transferred to an Agreement State because of its “hazards or potential hazards.” The NRC has made no such determination with regard to LLW by regulation or order.

²³ *Verizon Communications Inc. v. FCC*, 740 F.3d 623, 636 (D.C. Cir. 2014).

²⁴ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

²⁵ *Id.*

²⁶ *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1209 (2015).

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disregarding facts and circumstances that underlay or were engendered by the prior policy.”²⁷ Put another way, “[i]t would be arbitrary and capricious to ignore such matters.”²⁸

RIS 2016-11 fails to satisfy the basic requirements of reasoned decision-making demanded of an agency when changing an interpretation. Other than a conclusory statement that “IN 1986-90 incorrectly stated that in cases where a nuclear reactor facility is located in an Agreement State, the NRC does not have the legal basis for performing the reviews and granting approvals,” RIS 2016-11 fails to identify any reason—let alone a good reason—to alter the prior policy. Nor does RIS 2016-11 meet the heightened standard involved here given the longstanding industry reliance on IN 86-90 (as well as Generic Letter 85-14 and HPPOS-097 PDR-9111210206). Indeed, RIS 2016-11 makes no mention of the OELD Opinion referenced in IN 86-90. Nor does it provide any analysis of the plain language and structure of section 274 and 10 CFR § 150.15, or the regulatory history of Part 150 even though they all provide the underpinning for the position established in IN 86-90. Accordingly, the NRC’s issuance of RIS 2016-11 was arbitrary and capricious and violates the APA.

Not only was this departure from NRC’s longstanding position insufficiently explained, it is unclear why such a change would be needed because the NRC has ample tools to evaluate Agreement State regulation of LLW. Under the Integrated Materials Performance Evaluation Program (IMPEP), the NRC already provides comprehensive oversight of Agreement State programs, including LLW disposal programs. IMPEP reviews ensure that public health and safety are adequately protected from the potential hazards associated with the use of radioactive materials and that Agreement State programs are compatible with NRC’s program. To be sure, there has been no suggestion that the approval of the disposal of Very LLW pursuant to Agreement State equivalents of 10 CFR § 20.2002 has somehow created a radiological safety issue. Nor has there been any suggestion of incompatibility with the NRC’s program. But if there were such concerns, the IMPEP is the proper tool to identify and remedy any such findings. Accordingly, there is no need for NRC-licensed facilities within Agreement States to seek an exemption from NRC to dispose of LLW in a non-Part 61 LLW disposal facility or for the NRC to review 10 CFR § 20.2002 requests for the offsite disposal of Very LLW generated by such licensees.

3. The NRC violated its own procedures and regulations when it promulgated RIS 2016-11.

Equally problematic is the NRC’s failure to follow its own processes and regulations when issuing RIS 2016-11. Under 10 CFR § 2.804(e)(2), the NRC “shall provide for a 30-day post-promulgation comment period for . . . [a]ny interpretative rule.” In accordance with 10 CFR § 2.804(f), “[f]or any post-promulgation comments received under paragraph (e) of this section, the Commission shall publish a statement in the *Federal Register* containing an evaluation of the significant comments and any revisions of the rule or policy statement made as a result of the comments and their evaluation.”

²⁷ *Fox*, 556 U.S. at 515-16.

²⁸ *Id.* at 515.

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Although not defined in the APA, the Supreme Court has held that “the critical feature of interpretive rules is that they are ‘issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.’”²⁹ On its face, RIS 2016-11 is an interpretative rule as it advises the public of the NRC’s construction of 10 CFR § 20.2002 and, by RIS 2016-11’s repudiation of IN 86-90 (and the referenced OELD Opinion), 10 CFR § 150.15 and section 274 as well.

Despite the agency’s own requirements for interpretative rules, the NRC has still yet to provide the public with a post-promulgation comment period for RIS 2016-11. The NRC should thus treat this letter as a post-promulgation comment and should publish a statement in the *Federal Register* rescinding RIS 2016-11 and reinstating the longstanding position in IN 86-90 (and the referenced OELD Opinion).

4. RIS 2016-11 contains a seriously flawed backfit analysis.

RIS 2016-11 concedes that “the staff did not perform a backfit analysis” ostensibly because “[a]ny action that licensees take to implement changes or procedures in accordance with the information contained in this RIS ensures compliance with current regulations, is strictly voluntary, and, therefore, is not a backfit.”³⁰ That conclusion ignores the fact that in reliance on the NRC’s longstanding position, licensees have developed procedures, entered into contracts, and obtained approvals from Agreement States for the disposal of low-level waste in accordance with Agreement State regulations (including Agreement State regulations equivalent to 10 CFR § 20.2002).

Notwithstanding the incorrect disclaimer in RIS 2016-11 that licensees are required to take “no action”³¹ because it purportedly provides a mere “clarification,” the NRC has relied on RIS 2016-11 as the basis for enforcement action under the theory that “an Agreement State does not have the authority to grant permission to a nuclear plant licensee for proposed procedures to dispose of low-level waste.”³² The NRC made this determination despite the fact that the Agreement State had granted the licensee an authorization for the disposal of certain low-level waste streams in accordance with the state’s equivalent to 10 CFR 20.2002. Thus, the basis for the NRC’s summary dismissal of its obligation to perform a backfitting analysis is incorrect. That is, the changed interpretation provided in the RIS *requires* licensees that have obtained approval from an Agreement State for alternative disposal of LLW to obtain approval from the NRC prior to continuing such disposals or risk enforcement action.

²⁹ *Mortgage Bankers*, 135 S. Ct. at 1204 (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)).

³⁰ RIS 2016-11 at 3.

³¹ *Id.*

³² EA-18-137, South Texas Project, Units 1 & 2 - Response to the August 14, 2018, Letter on the Disposal of Very Low-Level Radioactive Material and Exercise of Enforcement Discretion (EPID L-2018-LRO-0032) at 1 (Oct. 31, 2018) (ML18260A250).

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5. The NRC is improperly relying on RIS 2016-11 to justify enforcement actions.

As noted in the previous section, the NRC has explicitly relied on RIS 2016-11 as the basis for enforcement action. Such agency action is troubling because interpretive rules (such as RIS 2016-11) “do not have the force and effect of law and are not accorded that weight in the adjudicatory process.”³³ Nonetheless, the enforcement action cited appears to entirely rely on RIS 2016-11 as the basis for the NRC’s decision and further notes that because the *licensee* has “raised issues associated with the RIS and with prior guidance,” the NRC is powerless to take action in this particular adjudication until the issue is addressed “generically to provide further clarity.”³⁴ But the problem here is not of the licensee’s making; it is that of the NRC’s based on the agency’s unreasonable decision to treat RIS 2016-11 as a binding substantive requirement.

* * * *

In summary, NEI requests that the NRC, in accordance with 10 CFR § 2.804(f), treat this letter as a post-promulgation comment on the agency’s new interpretation in RIS 2016-11, and publish a statement in the *Federal Register* rescinding RIS 2016-11 and reinstating the NRC’s prior position in IN 86-90 and the referenced OELD Opinion. Thank you for your consideration of NEI’s comments on behalf of the industry. If the NRC staff has questions or would like to discuss these or other issues, please do not hesitate to contact me (ecg@nei.org; 202.739.8140) or Jonathan Rund (jmr@nei.org; 202.739.8144).

Very truly yours,



Ellen C. Ginsberg

c: Ms. Mary Spencer, OGC/AGG/RMR
Mr. Bo Pham, NMSS/DUWP
Ms. Andrea Kock, NMSS/MSST
Mr. Micheal Franovich, NRR/DRA

³³ *Guernsey*, 514 U.S. at 99.

³⁴ EA-18-137 at 2.