ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1240

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NUCLEAR ENERGY INSTITUTE
Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of Action by the
Nuclear Regulatory Commission

RESPONDENTS' MOTION TO DISMISS

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GLOSSARY

AEA	Atomic Energy Act
APA	Administrative Procedure Act
EPA	Environmental Protection Agency
NEI	Nuclear Energy Institute
NRC	Nuclear Regulatory Commission
RCRA	Resource Conservation and Recovery Act

INTRODUCTION

On September 16, 2019, the U.S. Nuclear Regulatory Commission (NRC) responded to an unsolicited letter from Petitioner, Nuclear Energy Institute (NEI), and informed NEI that the NRC would continue to adhere to a previously announced interpretation of 10 C.F.R. § 20.2002. The NRC's interpretation provides the agency's views as to whether the NRC or states are required to approve certain "alternate" methods of disposal of low-level nuclear waste. NEI's Petition for Review challenges the agency's issuance of this letter.

The NRC and the United States of America (together, Respondents) jointly move to dismiss NEI's Petition for lack of jurisdiction. The September 16, 2019, letter from the NRC to NEI (2019 Letter, attached as Exhibit 1) does not constitute final agency action. Nor can NEI use the 2019 Letter as a vehicle to challenge positions that the agency has held and communicated to the public since 2012.

Under the Atomic Energy Act, 42 U.S.C. § 2239(a), (b), and the Hobbs Act, 28 U.S.C. § 2342(4), the NRC must issue a "final order" before this Court may exercise jurisdiction over a petition challenging the result of an NRC "proceeding." Once a final order issues, a 60-day window opens for parties to file petitions for review. NEI filed its Petition within 60 days of the NRC issuing the 2019 Letter. But the 2019 Letter is a routine, informational document by the NRC responding to a request by NEI to *alter* the position that the NRC had expressed in both 2012 and

2016. In that sense, the 2019 Letter breaks no new ground and imposes no new binding legal requirements; it simply reaffirms the agency's previously announced position. Such a workaday communication does not constitute a reviewable final order. And NEI cannot use the 2019 Letter to revive a challenge to other NRC actions that could only have been timely brought years ago, if at all.

BACKGROUND

I. Federal and state regulation of nuclear waste disposal.

The Atomic Energy Act empowers the NRC to issue licenses for the construction and operation of nuclear power plants. *See* 42 U.S.C. §§ 2131-2133; 10 C.F.R. Pts. 50, 52. Reactor licensees are likewise responsible for the disposal of low-level waste—items that have become contaminated with radioactive material or have become radioactive through exposure to neutron radiation. *See* 10 C.F.R. § 20.1003 (definition of "waste"); *id*. Subpart K ("Waste Disposal").

States also have a role in the regulation of waste disposal. Under Section 274 of the Atomic Energy Act (AEA), "Agreement States" may enter into agreements with the NRC whereby the NRC may "discontinue" its regulatory authority over certain aspects of its jurisdiction, and states may assume this responsibility (though even in Agreement States, the AEA requires the NRC to maintain exclusive regulatory authority over nuclear power plants with respect to radiological hazards). 42 U.S.C. §§ 2021(b), (c)(1). Thus, in Agreement States

that have assumed regulatory responsibility for such subject matters, low-level waste disposal facilities are subject to the licenses and regulations issued under state law. *See id.* § 2021(b).

State authority over such facilities is generally circumscribed by the NRC's requirements. As a precondition to the discontinuance of its regulatory authority pursuant to Section 274 of the AEA, the NRC must certify that the state's program for regulation is adequate to protect the public health and safety and is compatible with the NRC's program. *Id.* § 2021(d)(2). In addition, the NRC conducts periodic reviews of each Agreement State program to ensure that actions taken by the state are consistent with the AEA. *Id.* § 2021(j)(1).

NRC-approved methods for disposal of waste includes transfer to an authorized recipient, 10 C.F.R. § 20.2001(a)(1); decay in storage, *id.* § 20.2001(a)(2); or, under certain carefully prescribed limits, release in effluents, *id*. § 20.1301, release into sanitary sewers, *id*. § 20.2003, and incineration, *id*. § 20.2004. Should an NRC licensee wish to dispose of waste using a method not specified in Subpart K, NRC's regulations provide an avenue for seeking approval of alternative methods—namely, 10 C.F.R. § 20.2002. This provision allows NRC licensees to apply to the NRC for approval of an alternative method for disposal of waste not already contemplated by Subpart K.

II. The NRC's interpretation of 10 C.F.R. § 20.2002 and communication of its interpretation to the public.

NEI seeks to challenge the NRC's interpretation of its regulation allowing approval of alternative methods of waste disposal, 10 C.F.R. § 20.2002, and NEI contends that the NRC's articulation of its interpretation in its 2019 Letter constitutes reviewable agency action. To provide context for the 2019 Letter, this section summarizes: (1) the NRC's interpretation of § 20.2002; and (2) the NRC's communications about its interpretation of § 20.2002.

A. The NRC interprets § 20.2002 to require approval by the jurisdiction that authorized the use of the radioactive material.

At issue in this case is NRC's interpretation of § 20.2002, particularly when NRC reactor licensees request approval to dispose of very low-level radioactive waste at offsite facilities that are not licensed by the NRC, for example, a municipal landfill or a Resource Conservation and Recovery Act (RCRA) disposal facility.[1] As reflected in the communications issued by the NRC and described below, the NRC interprets the approval process for such offsite disposal requests to entail two separate regulatory actions—first, the approval for the *generator* of the

[1] RCRA provides a framework for the regulation of solid waste disposal. *See* 42 U.S.C. § 6901 *et seq*. In the context of 10 C.F.R § 20.2002 requests, "RCRA disposal facilities" are typically those regulated under Subtitle C of RCRA—meaning that they are authorized by the Environmental Protection Agency (EPA), or the implementing State agency, to dispose of hazardous waste (but not radioactive material). *See* 40 C.F.R. Pts. 260-270.

waste to use this method of disposal under 10 C.F.R. § 20.2002; and, second, approval for the *recipient* of the waste to receive the material and dispose of it, typically through an exemption from otherwise applicable regulatory requirements (either from an Agreement State or from the NRC).

The NRC has determined that for reactor licensees, the 10 C.F.R. § 20.2002 approval must be by the NRC (and not Agreement States). The NRC interprets § 20.2002 to require reactor licensees to obtain approval from the NRC because the AEA confers *exclusive* authority on the NRC over regulation of nuclear power plant operations. *See* 42 U.S.C. § 2021(c)(1). If the generator of the waste is a nuclear power plant licensee, it must receive approval from the NRC under 10 C.F.R. § 20.2002 to avail itself of an alternative disposal method. NEI disputes the NRC's interpretation, asserting that the § 20.2002 approval for a reactor licensee can be made by Agreement States, even if the NRC originally licensed the use of the material or facility at issue, and even if the NRC's regulatory authority to regulate such material or facility is exclusively reserved to the NRC under the AEA.

B. NRC communications to the public regarding its interpretation of § 20.2002.

The NRC has communicated its interpretation of § 20.2002 in several public documents. As relevant here, the first interpretation was expressed in 1986, at a time when reactor licensees primarily saw § 20.2002 as a means to dispose of low-

level waste by onsite land burial. The NRC issued an "Information Notice" (Exhibit 2) that advised nuclear power facilities that Agreement States had jurisdiction to approve disposal of very low-level radioactive waste by NRC licensees under the equivalent of what today is § 20.2002.

Over time, licensees increasingly began to use § 20.2002 as a means of securing approval for offsite (rather than onsite) disposal, prompting the NRC to reassess its understanding of the provision in light of jurisdictional issues that this practice had created (and, specifically, the possibility that Agreement States were authorizing disposal of wastes at out-of-state unlicensed facilities). The NRC addressed these concerns in a March 2012 letter to Agreement States (the 2012 Letter, attached as Exhibit 3). In the 2012 Letter, the NRC clarified that the NRC's or Agreement State's approval for an unlicensed disposal facility to *receive* very low-level radioactive waste does not by itself permit the generator to send the waste to that unlicensed facility for disposal. *See id.* at 1-3. Rather, where the generator obtained its license from the NRC (as is necessarily the case for reactor licensees), the generator must obtain the NRC's approval to dispose of licensed material at a disposal facility in a manner not otherwise authorized by 10 C.F.R. Subpart K. *Id.*[2]

[2] The 2012 Letter provided guidance reflecting the allocation of authority in several different jurisdictional scenarios. Of particular note here, it examined a scenario

The 2012 Letter communicated the NRC's interpretation of the relevant regulations, but it did not purport to create any legally binding obligations not otherwise contained in 10 C.F.R. § 20.2002. Nor did the agency seek comments from the public before issuing it. The 2012 Letter also advised recipients that "specific guidance regarding the review process for the evaluation of requests under 20.2002 is under development. This information will be shared with the Agreement States once it has been finalized." *Id.* at 3.

In November 2016, the NRC issued Regulatory Issue Summary 2016-11, "Requests to Dispose of Very Low-Level Radioactive Waste Pursuant to 10 C.F.R. § 20.2002" (Exhibit 4), in which it reiterated the interpretation of § 20.2002 announced in the 2012 Letter.[3] The agency did not provide an opportunity for public comment, explaining that the summary was "informational and pertains to [an NRC] staff position that does not represent a departure from current regulatory requirements and practice." Exhibit 4 at 3.

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where "[a]n NRC licensee requests authorization under 20.2002 to dispose of material at an unlicensed facility in an Agreement State." It explained that "the NRC would need to approve the disposal of the material under 20.2002" *and* that "[t]he unlicensed facility would then need to obtain a license or an exemption from the Agreement State's regulations prior to accepting the material for disposal." Exhibit 3 at 2 (scenario 4).

[3] Regulatory Issue Summaries are one means that the NRC uses to communicate with stakeholders concerning issues affecting nuclear licensees and the nuclear industry. *See* https://www.nrc.gov/reading-rm/doc-collections/gen-comm/reg-issues/ (last visited Feb. 10, 2020).

Consistent with the 2012 Letter, the 2016 Regulatory Issue Summary provided the agency's view that a "licensee's request to dispose of licensed material under § 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." *Id.* at 2. The 2016 Regulatory Issue Summary confirmed that for licensees under 10 C.F.R. Part 50 or 10 C.F.R. Part 52 (that is, operators of nuclear power plants who are subject to exclusive NRC authority), the licensee's request "should be made to the NRC." *Id.*

III. Events following the NRC's announcement of its interpretation of § 20.2002.

NEI's Petition for Review references recent events that, it believes, provide a basis for judicial review of the agency's interpretation of § 20.2002 at this time.

As NEI recounts, during a 2018 inspection, an NRC inspector discovered that the licensee operating South Texas Project, a nuclear reactor in Texas, had been disposing of very-low level radioactive waste at landfills in Texas without receiving NRC approval to use this alternative method of disposal under 10 C.F.R. § 20.2002. In an October 2018 letter (Exhibit 5), the NRC acknowledged that the State of Texas (an Agreement State) had issued an exemption permitting disposal at unlicensed storage facilities, but the NRC informed the licensee that, because it was licensed by the NRC, it needed to obtain NRC authorization under 10 C.F.R. § 20.2002 before disposing of licensed material at unlicensed sites. The agency

also explained that, as an exercise of its enforcement discretion, it would excuse the licensee's past non-compliance with that provision and that "[g]oing forward," it would "continue to exercise enforcement discretion for [the licensee's] existing process for disposal of low-level waste while the NRC evaluates regulatory options to address this issue." Exhibit 5 at 2.

In February 2019, NEI, an industry group that represents a large number of NRC licensees, sent a letter to NRC (Exhibit 6) requesting that the NRC rescind the 2016 Regulatory Issue Summary. NEI raised a series of legal arguments related to the position that NRC had adopted and requested that the agency, "in accordance with 10 [C.F.R.] § 2.804(f), treat [its] letter as a post-promulgation comment on the agency's new interpretation in [the 2016 Regulatory Issue Summary], and publish a statement in the *Federal Register* rescinding [the Summary] and reinstating" what it understood to be the position that NRC had adopted in 1986. Exhibit 6 at 10. NEI's letter also prompted other stakeholders to submit letters (Exhibits 7, 8) to the NRC about § 20.2002. On September 6, 2019, the NRC held a public meeting with interested stakeholders to discuss these issues. *See* Exhibit 9. Shortly thereafter, the NRC issued the 2019 Letter responding to NEI's letter.

In the 2019 Letter, the Director of the NRC's Office of Nuclear Material Safety and Safeguards rejected NEI's request that the NRC rescind the 2016

Regulatory Issue Summary. The 2019 Letter noted that the Summary "correctly stated that any licensee's request for approval to dispose of licensed material under [10 C.F.R. §] 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." Exhibit 1 at 1. The NRC also noted that for reactor licensees that have sought approval from Agreement States rather than the NRC, "the NRC staff will consider enforcement discretion on a case-by-case basis, as appropriate." *Id.*

ARGUMENT

This Petition for Review is an attempt to obtain review of the NRC's interpretation of its regulation by challenging the 2019 Letter. To secure this Court's review, NEI advances two alternative theories for treating the 2019 Letter as a final order. Neither theory holds true.

First, NEI contends that the NRC's 2019 Letter "substantively alter[ed]" the 2016 Regulatory Issue Summary so that the 2019 Letter is a *new* NRC position subject to challenge. Petition for Review at 1, Document No. 1816696 (Nov. 15, 2019). Second, NEI asserts in the alternative that the 2019 Letter constitutes "renewed adherence" to the 2016 Regulatory Issue Summary, presumably so that NEI can now challenge the NRC position set forth in the Summary. *Id.*; *see also* Petitioner's Non-Binding Statement of Issues at 1, Document No. 1825011 (Jan.

21, 2020). We address these two theories, and the reasons that neither supports jurisdiction under the Hobbs Act, in the two Sections below.

I. The NRC's 2019 Letter is not a final order subject to judicial review.

To the extent that NEI challenges the 2019 Letter as a new agency position, it cannot be reviewed under the Hobbs Act because it is not a "final order."

Finality under the Hobbs Act is "narrowly construed." *Blue Ridge Environmental Defense League v. NRC*, 668 F.3d 747, 753 (D.C. Cir. 2012) (quotation marks and citation omitted). A Hobbs Act "final order" is one that "imposes an obligation, denies a right, or fixes some legal relationship, usually at the consummation of an administrative process." *Honicker v. NRC*, 590 F.2d 1207, 1209 (D.C. Cir. 1978). In determining the finality of an agency's actions under the Hobbs Act, courts have looked to the familiar framework established by the Supreme Court in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).[4] For an agency order to be final under *Bennett*, the action (1) "must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature"; and (2) "must be one by which rights or

[4] The two-prong test in *Bennett v. Spear* was formulated to determine whether an agency decision constitutes "final agency action" under the Administrative Procedure Act (APA). Although the Hobbs Act and the APA use different terminology—"final order" versus "final agency action"—this Court has stated that although the terms were not "equivalent in all respects," they were "equivalent for the purposes of finality." *Weaver v. Federal Motor Carrier Safety Administration*, 744 F.3d 142, 146 (D.C. Cir. 2014).

obligations have been determined, or from which legal consequences will flow." 520 U.S. at 177-78 (internal citations and quotation marks omitted).

Courts have long-recognized that routine, informational letters from agencies reiterating agency policies and legal interpretations are not final agency actions subject to judicial review. For example, in *Independent Equipment Dealers Association v. EPA*, this Court held that it lacked jurisdiction to review an EPA letter responding to an industry trade association's letter, in which the agency stated that it did not concur in the trade association's proposed interpretation of certain emissions regulations. 372 F.3d 420, 421 (D.C. Cir. 2004). This Court held that the EPA letter failed to satisfy the second prong of *Bennett* and therefore was not a final agency action. *Id*. at 425-29. This Court reasoned that the EPA letter "merely restated in an abstract setting—for the umpteenth time—EPA's longstanding interpretation of the [relevant emissions] regulations." *Id*. at 427. Thus, the EPA letter was "the type of workaday advice letter that agencies prepare countless times per year in dealing with the regulated community." *Id*. (internal quotation marks omitted)

The reasoning in *Independent Equipment Dealers* applies with full force to the 2019 Letter and precludes a finding of finality under prong two of *Bennett*. Barely exceeding one page, the 2019 Letter merely restates what the NRC already made clear in both the 2012 Letter and the 2016 Regulatory Issue Summary—that

"any licensee's request for approval to dispose of licensed material under [10 C.F.R. § 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." Exhibit 1 at 1. In the 2019 Letter, the NRC reiterated that the interpretation in the 2016 Regulatory Issue Summary was correct, quoted the Summary's language and rationale nearly verbatim, and declined NEI's invitation to rescind it. Thus, like the EPA letter in *Independent Equipment Dealers*, the NRC's 2019 Letter covered "no new ground"; rather, it "left the world just as it found it, and thus cannot be fairly described as implementing, interpreting, or prescribing law or policy." 372 F.3d at 428; *see also Clayton County, v. FAA*, 887 F.3d 1262, 1267-68 (11th Cir. 2018) (FAA letter that "merely restate[d]" the agency's regulatory interpretation that had been established two years earlier in a policy clarification was not reviewable agency action); *General Motors Corporation v. EPA*, 363 F.3d 442, 449 (D.C. Cir. 2004) (EPA letters did not constitute reviewable agency action where, "[i]n response to industry inquiries," the agency "repeated its regulatory interpretation" from a prior policy document issued years earlier). Because the 2019 Letter imposed no new legal consequences, it is not a final order under the Hobbs Act. *See California Communities Against Toxics v. EPA*, 934 F.3d 627, 637-38 (D.C. Cir. 2019). Absent a final order, this Court lacks jurisdiction.

This result is not only legally correct, but it reflects sensible agency practice. The NRC wrote the 2019 Letter in response to an unsolicited, informal inquiry from NEI—an organization that represents companies that the NRC regulates. Seeking to be responsive to NEI's request, the NRC summarized its preexisting views about the regulatory requirements in § 20.2002. Subjecting agencies such as the NRC to judicial review when they merely restate a regulatory interpretation in response to inquiries from the regulated community would chill future interactions. As this Court observed in *Independent Equipment Dealers*, "it is silly to permit parties to challenge an established regulatory interpretation each time it is repeated." 372 F.3d at 428. "Such a regime would quickly muzzle any informal communications between agencies and their regulated communities—communications that are vital to the smooth operation of both government and business." *Id*. This Court should not allow NEI to convert the NRC's routine, informal communication into a final agency action.

II. NEI cannot belatedly challenge the 2016 Regulatory Issue Summary.

In addition to challenging the 2019 Letter directly, NEI also uses it as a vehicle to attempt to launch a procedural and substantive challenge to the 2016 Regulatory Issue Summary. But its arguments are little more than an attempt to

evade the Hobbs Act's jurisdictional 60-day window, and this Court has repeatedly rejected similar attempts by petitioners.[5]

NEI's primary procedural challenge is that the NRC violated 10 C.F.R. § 2.804(e)(2) in issuing the 2016 Regulatory Issue Summary without notice and comment and that its February 2019 letter to the NRC should be treated as a "post-promulgation comment" to the Summary. Presumably, NEI's argument is that the NRC's actions in responding to this comment in its 2019 Letter restarted the Hobbs Act's 60-day jurisdictional clock in relation to the Summary. Exhibit 6 at 8-9, 10; Petitioner's Non-Binding Statement of Issues at 3, Document No. 1825011 (Jan. 21, 2020).[6] But this theory, as well as NEI's other procedural challenges (including its challenge based on the NRC's backfit rule), is foreclosed by this

[5] NEI's argument also appears to be founded on the incorrect assumption that the 2016 Regulatory Issue Summary itself is reviewable agency action. Granted, the position articulated in the Summary—that NRC licensees must apply to the NRC for approval of alternative disposal method under 10 C.F.R. § 20.2002—satisfies the first prong of *Bennett* in that this position is not "tentative or interlocutory in nature." *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016). But the Summary fails to satisfy the second prong of *Bennett* because it has no independent legal effect. *See Valero Energy Corporation v. EPA*, 927 F.3d 532, 536 (D.C. Cir. 2019) ("Absent some identifiable effect on the regulated community, an agency works no legal effect merely by expressing its view of the law." (quotation marks and citation omitted)).

[6] NEI also asserts that the NRC's issuance of the 2016 Regulatory Information Summary diverges from the NRC's "backfit" rule, as set forth at 10 C.F.R. § 50.109 (providing guidelines for the agency's application of new requirements to previously licensed activities). *See* Exhibit 6 at 9; Petitioner's Non-Binding Statement of Issues, Document No. 1825011 (Jan. 21, 2020), at 3.

Court's decision in *Natural Resources Defense Council v. NRC*, 666 F.2d 595, 602 (D.C. Cir. 1981) (*NRDC*).

In *NRDC*, the petitioner asserted that the NRC had amended its regulations without notice and comment. *Id.* at 600-01. Instead of directly challenging the amendments, however, the petitioner appealed the NRC's denial of its petition for rulemaking calling for the NRC to repeal the amendments on the grounds that the NRC unlawfully promulgated them without notice and comment. *Id.* This Court dismissed the petitioner's challenge for lack of jurisdiction. *Id.* at 603. In so holding, this Court reasoned that the finality purposes underlying the Hobbs Act's 60-day window "would be frustrated if untimely procedural challenges could be revived by simply filing a petition for rulemaking requesting rescission of the regulations and then seeking direct review of the petition's denial." *Id.* at 602. Indeed, this Court noted that the petitioner's position "would permit procedural challenges to be brought twenty, thirty, or even forty years after the regulations were promulgated. No greater disregard for the principle of finality could be imagined." *Id.*

So too here. Like the petitioner in *NRDC*, NEI seeks to revive challenges to the manner in which the 2016 Regulatory Issue Summary was issued more than three years after the fact, by asserting those challenges within a challenge to the 2019 Letter. But the 60-day window for seeking judicial review would mean little

if, as the theory underlying NEI's Petition suggests, a party could restart the limitations period simply by sending a letter challenging the manner by which a decision was reached and characterizing the agency's response as a new form of final agency action. Moreover, the 2016 Regulatory Issue Summary explicitly stated that the NRC was not providing an opportunity for public comment because it "[was] informational and pertain[ed] to a staff position that d[id] not represent a departure from current regulatory requirements and practice." Exhibit 4 at 3. It further stated that no "backfit" analysis was required. *Id.* If NEI now contends that the NRC erred in issuing the 2016 Regulatory Issue Summary without notice and comment or without a backfit analysis, it had ample opportunity to timely raise such challenges to its adoption (as well as any others) when the Summary was issued. NEI cannot circumvent the jurisdictional 60-day window for review under the Hobbs Act by using the 2019 Letter to bring a "back door" procedural challenge to the 2016 Regulatory Issue Summary more than three years too late. *See JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994) (procedural challenges to agency regulations "will not be entertained outside the 60-day period provided" in the Hobbs Act).

NEI's attempt to use the 2019 Letter as a basis for substantive challenges to the 2016 Regulatory Issue Summary is likewise time-barred by the Hobbs Act. To be sure, there are circumstances under the "reopening" doctrine when an agency's

renewed promulgation of a position can "create[] the opportunity for renewed comment and objection." *Ohio v. EPA,* 838 F.2d 1325, 1328 (D.C. Cir. 1988); *United Transportation Union-Illinois Legislative Board. v. Surface Transportation Board*, 132 F.3d 71, 75-76 (D.C. Cir. 1998). But the doctrine "only applies . . . where the entire context demonstrates that the agency has undertaken a serious, substantive reconsideration of the existing rule." *Alliance for Safe, Efficient & Competitive Truck Transportation v. Federal Motor Carrier Safety Administration*, 755 F.3d 946, 954 (D.C. Cir. 2014) (internal quotation marks and citation omitted); *see also CTIA-Wireless Association v. FCC*, 466 F.3d 105, 110 (D.C. Cir. 2006) (concluding that "an agency does not reopen a rulemaking or policy determination merely [by] respond[ing] to an unsolicited comment by reaffirming its prior position" (internal quotation marks and citation omitted)); *National Association of Reversionary Property Owners v. Surface Transportation Board*, 158 F.3d 135, 145 (D.C. Cir. 1998) ("The mere act of repeating old reasons for an old policy in response to unsolicited comments is not the equivalent of reconsidering, and therefore reopening, the old issue.").

Those circumstances are not present here. The NRC did not initiate a dialogue with stakeholders on the question of which regulatory authority—the NRC or Agreement State—should review § 20.2002 requests from reactors; it simply responded to the points set forth in NEI's letter (and considered the views

of others in the industry, after the issue had been raised by NEI). The NRC did not republish the 2016 Regulatory Issue Summary, did not propose any changes to 10 C.F.R. § 20.2002, and did not make a "sustained attempt to reiterate the reasons" for issuing it. *American Iron & Steel Institute v. EPA*, 886 F.2d 390, 398 (D.C. Cir. 1989) (reopening doctrine did not apply where the agency "reaffirmed its previous position and at most briefly reiterated its prior reasoning" (internal quotation marks omitted)); *see also Massachusetts v. ICC*, 893 F.2d 1368, 1372 (D.C. Cir. 1990) (reopening doctrine not applicable where "[t]he agency did not hold out the unchanged calculation of value as a proposed regulation; it did not explain the unchanged procedure; it did not solicit comment on the substance of the value calculation; and it responded to Massachusetts' comments only to deny them as inconsistent with long established practice and policy and summarily to find them antithetical to established goals").

Undoubtedly, NEI disagrees with the position articulated in the 2016 Regulatory Issue Summary. This Court has made clear, however, that "[t]he 'reopening' rule of *Ohio v. EPA* is not a license for bootstrap procedures by which petitioners can comment on matters other than those actually at issue, goad an agency into a reply, and then sue on the grounds that the agency had re-opened the issue." *American Iron & Steel Institute,* 886 F.2d at 398. Moreover, to permit NEI to manufacture a challenge to the 2016 Regulatory Issue Summary, over three

years after its issuance, based on the NRC's plain restatement of its position in response to a wholly unprompted call for the NRC to reverse course, would not only chill communications between agencies and the regulated communities (including the type the NRC engaged in here) but would undermine the finality principles embodied in the Hobbs Act's strict time limitations. *See Clayton County*, 887 F.3d at 1269 ("If a court intervened now, it might mean that regulated parties could bring lawsuits whenever an agency advises a party of its already-existing obligations. Such a result would discourage agencies from offering advisory guidance which in turn would harm regulated parties who appreciate and rely on such guidance.").

Finally, while NEI concedes that the 2016 Regulatory Issue Summary "had no legal consequence at the time it was issued," it seems to suggest that the Summary ripened into reviewable agency action when the NRC allegedly "started using the [Summary] as justification for enforcement action." Petition at 3 n.1. In making this argument, NEI likely is referring to the NRC's October 2018 Letter to the South Texas Project licensee. However, NRC issued this letter in the context of a *response* to the licensee's written inquiry. And, as stated in its October 2018 letter, the NRC did *not* take enforcement action against the South Texas Project licensee. *See* Exhibit 5 at 2. Moreover, any potential enforcement action that the agency considered was not based on that licensee's noncompliance with the 2016

Regulatory Issue Summary, but, rather, on its noncompliance with 10 C.F.R. § 20.2002 itself. Exhibit 5 at 2 (reasoning that enforcement discretion was appropriate given the low safety significance of the South Texas Project licensee's "non-compliance with 10 CFR 20.2002"). And the NRC informed the licensee that it was continuing to "evaluate regulatory options to address [the] issue." *Id.* Notwithstanding NEI's characterizations, the NRC has not taken enforcement action, has not suggested that enforcement action is imminent, and has not claimed that the 2016 Regulatory Issue Summary itself has the force of law.

And even accepting NEI's apparent argument that the NRC relied on the 2016 Regulatory Issue Summary as the basis for the potential violation instead of the regulation itself, the NRC's actions would still not constitute reviewable final agency action. As this Court stated in *Independent Equipment Dealers*, "the threat of having to defend itself in an administrative hearing should the agency actually decide to pursue enforcement, [is] insufficient to bring an agency's conduct under [this Court's] purview." 372 F.3d at 428 (internal quotation marks and citation omitted). In the event that enforcement action were taken against a licensee based on a failure to comply with § 20.2002, the NRC would need to assert its interpretation of the regulation in that proceeding, and the licensee would have the opportunity to challenge that interpretation in a hearing before the agency (and to seek judicial review if it disagreed with the NRC's final decision). But the

agency's re-articulation of its position, long after any window to challenge has closed, is not subject to judicial review at this time.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court dismiss the Petition for Review for lack of jurisdiction.

Respectfully submitted,

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DJ Number 90-13-3-15901
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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 27(D)

I certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this filing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5,191 words, excluding the parts of the filing exempted under Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/ Andrew P. Averbach
ANDREW P. AVERBACH

Counsel for Respondent United States Nuclear Regulatory Commission

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

The petitioner is the Nuclear Energy Institute. The respondents are the United States and the United States Nuclear Regulatory Commission.

(B) Ruling Under Review

The ruling under review is a letter sent by the Nuclear Regulatory Commission to the Nuclear Energy Institute on September 16, 2019. It is attached to this motion as Exhibit 1.

(C) Related Cases

There are no related cases.

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.

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

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

SSINS No.: 6835
IN 86-90

UNITED 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 20.302

Addressees:

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.

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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

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

(FSME-12-025, March, Other, 10 CFR 20.2002)

March 13, 2012

ALL AGREEMENT STATES

CLARIFICATION OF THE AUTHORIZATION FOR ALTERNATE DISPOSAL OF MATERIAL ISSUED UNDER 10 CFR 20.2002 AND EXEMPTION PROVISIONS IN 10 CFR (FSME-12-025)

Purpose: To clarify the use of 10 CFR 20.2002 and similar Agreement State processes for the disposal of radioactive materials in RCRA disposal facilities or other unlicensed facilities (unlicensed facilities), when the unlicensed facility is located in another State.

Background: The Nuclear Regulatory Commission (NRC) and the Agreement States can authorize waste generators to dispose of radioactive materials in facilities other than 10 CFR Part 61 (or Agreement State equivalent) disposal facilities in accordance with 10 CFR Part 20 Subpart K (or equivalent Agreement State regulations). If the Agreement State has not adopted regulations equivalent to 10 CFR 20.2002, the State may accomplish the same regulatory authorization through application of its specific exemption authority, which would grant the disposal request.

When a licensee obtains 20.2002 approval to send material to a disposal facility that is not licensed by the NRC or an Agreement State, the disposal facility operator must obtain either an NRC or Agreement State license or an exemption from the NRC or Agreement State licensing requirements. The NRC, for example, can grant exemptions from its licensing requirements under 10 CFR 30.11, 40.14, or 70.17.

In some cases, it is necessary for the NRC and an Agreement State or multiple Agreement States to become involved in the disposal process. For example, if a licensee in Agreement State A wants to send material for disposal at an unlicensed facility in Agreement State B, then the licensee would need to receive approval under Agreement State A's 20.2002 provisions, and the unlicensed facility would need to receive an exemption or license from Agreement State B.

Discussion: There are several situations where the NRC and an Agreement State or multiple Agreement States would be involved in the disposal of material at an unlicensed facility:

1. An Agreement State licensee requests authorization under the State's 20.2002-equivalent regulation to dispose of material at an unlicensed facility in that Agreement State. In this situation, only one Agreement State is involved, and that Agreement State would evaluate both the 20.2002-equivalent request and would license or exempt the unlicensed facility.

2. An Agreement State licensee requests authorization under the State's 20.2002-equivalent regulation to dispose of material at an unlicensed facility in another Agreement State. In this situation, both Agreement States would need to become involved. The Agreement State that regulates the licensee seeking to dispose of

material at an unlicensed facility in another Agreement State would need to approve disposal under the Agreement State's 20.2002-equivalent regulation. The unlicensed facility would then need to obtain a license or an exemption from its Agreement State prior to accepting the material for disposal.

3. An Agreement State licensee requests authorization under the State's 20.2002-equivalent regulation to dispose of material at an unlicensed facility in a non-Agreement State (a state under NRC jurisdiction). In this situation, both the Agreement State and the NRC would need to become involved. The Agreement State that regulates the license seeking to dispose of the material at an unlicensed facility in another state would need to approve disposal under the Agreement State's 20.2002-equivalent regulation. The unlicensed facility would then need to obtain a license or an exemption from the NRC prior to accepting the material for disposal.

4. An NRC licensee requests authorization under 20.2002 to dispose of material at an unlicensed facility in an Agreement State. In this situation both the NRC and the Agreement State would need to become involved. The NRC would need to approve the disposal of the material under 20.2002. The unlicensed facility would then need to obtain a license or an exemption from the Agreement State's regulations prior to accepting the material for disposal.

5. An NRC licensee requests authorization under 20.2002 to dispose of material at an unlicensed facility in a non-Agreement State. In this situation the NRC will review both the 20.2002 request and the exemption or license request. No Agreement State involvement is required. This issue was first addressed for a specific facility in a letter dated December 16, 2004 to the State of Idaho (ADAMS ML043510144).

In some cases, scenarios 2, 3, and 4 may not require the involvement of the NRC or another Agreement State because some materials are already exempt from the NRC's licensing requirements (and those of the Agreement States). When this is the case, the unlicensed facility does not need a specific exemption or license to dispose of the material. For example, a source material licensee may transfer unimportant quantities of source material (10 CFR 40.13(a)) to persons exempt (10 CFR 40.51(b)(3) & (4)). This can be done without any specific licensing action by the NRC (or Agreement State).

As noted in the scenarios discussed above, an Agreement State cannot authorize disposal at an unlicensed facility outside of its jurisdiction. If an Agreement State licensee requests authorization to send material to another Agreement State or a non-Agreement State for disposal at an unlicensed facility, then the Agreement State should contact the other Agreement State or the NRC to ensure that the disposal facility has a license for receiving and disposal of the material or receives an exemption prior to disposal.

All licensing actions taken by the Agreement States are subject to review under the Technical Quality of Licensing indicator during their Integrated Materials Performance Evaluation Program review.

In summary, the operator of an unlicensed facility receiving NRC and Agreement State regulated waste for disposal must receive either an exemption or a license from the appropriate regulatory authority (either the NRC or an Agreement State depending on the location of the disposal site) prior to receiving or disposal of the material.

In order to inform NRC licensees and interested stakeholders, specific guidance regarding the review process for the evaluation of requests under 20.2002 is under development. This information will be shared with the Agreement States once it has been finalized.

If you have any questions regarding the correspondence, please contact me at 301-415-3340 or the individual named below.

POINT OF CONTACT: Stephen Poy
TELEPHONE: (301) 415-7135
INTERNET: stephen.poy@nrc.gov
FAX: (301) 415-5955

/RA/

Brian J. McDermott, Director
Division of Materials Safety
and State Agreements
Office of Federal and State Materials
and Environmental Management Programs

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 20.2002[1]). 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).

ML16007A488

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 quantities[2] 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
(301) 415-7135
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

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/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

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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

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 Texas[1] 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,

Craig G. Erlanger

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

Docket Nos. 50-498 and 50-499

cc: Listserv

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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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

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NUCLEAR ENERGY INSTITUTE

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.

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[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).

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

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[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.

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 deliberatively 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

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[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.*

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,

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12 *Id.* (emphasis added).

13 OELD Opinion at 2.

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)(l). *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

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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.

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

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[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.

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

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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 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).

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."

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[27] *Fox*, 556 U.S. at 515-16.

[28] *Id.* at 515.

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.

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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).

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

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33 *Guernsey*, 514 U.S. at 99.

34 EA-18-137 at 2.

ENERGYSOLUTIONS

April 8, 2019

Craig G. Erlanger, Director
Division of Operating Reactor Licensing
Office of Nuclear Reactor Regulation
United States Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Also sent via email: Craig.Erlanger@nrc.gov

SUBJECT: Energy*Solutions*' Support of Regulatory Issue Summary (RIS) 2016-11, "*Requests to Dispose of Very Low-Level Radioactive Waste Pursuant to 10 CFR 20.2002*"

Dear Mr. Erlanger,

Greetings. We are sending you this letter to support the views taken by the Nuclear Regulatory Commission (NRC) in your letter to Mr. G.T. Powell, President and CEO/CNO, STP Nuclear Operating Company dated October 31, 2018. Specifically, two points in your letter are noteworthy, the first is that a 10 CFR 20.2002 authorization for a Part 50 licensee must be granted by the NRC and secondly, there is a need for more clarification about this authorization process for the disposal of low-level radioactive waste.

In reviewing this issue, we have also carefully examined the Nuclear Energy Institute (NEI) letter dated February 28, 2019 which criticized the issuance and contents of RIS 2016-11. In our view, RIS 2016-11 is consistent with the NRC position set forth in the All Agreement States letter, "*Clarification of the Authorization for Alternate Disposal of Material Issued Under 10 CFR 20.2002 and Exemption Provisions in 10 CFR (FSME-12-025)*" dated March 13, 2012. In particular, Scenario 4 set forth in the 2012 All Agreement States letter aligns with the situation being addressed in your letter to Mr. G.T. Powell. Further, NEI states the view that issuance and reliance on the RIS violates the Administrative Procedures Act (APA) and Commission regulations. We fundamentally do not agree with this position as no enforcement action has been taken based upon the RIS. Specifically, in the case of STP, enforcement discretion was used and no violations were issued etc.

We have concerns about the need for potentially continuing to use enforcement discretion to address the 10 CFR 20.2002 authorization issue for Part 50 licensees and we certainly agree with the NRC that additional generic clarification is needed to make the 20.2002 authorization process more understandable and consistent for the nuclear industry. In view of our perspectives on this issue, we would like to meet with you and other appropriate NRC staff to share our views in more detail and to work with the NRC as it strives to provide more clarification on this important authorization to allow disposal of low-level radioactive waste.

We look forward to communicating with your office to arrange this meeting and share with you some agenda topics to facilitate our discussion. Again, we support your views and are eager to work with the NRC to enhance clarification about use of the 10 CFR 20.2002 authorization.

Thank you.

Sincerely,

John Christian
President
Energy*Solutions*, LLC
Ph: 571-215-9066
Email: jchristian@energysolutions.com

WASTE CONTROL SPECIALISTS

July 17, 2019

Mr. John Lubinski, Director
Office of Nuclear Materials and Safeguards
U.S. Nuclear Regulatory Commission
Washington, D.C., 20555-0001

Also sent via e-mail: John.Lubinski@nrc.gov

SUBJECT: Waste Control Specialists' Concerns with Regulatory Issue Summary (RIS) 2016-11, "Requests to Dispose of Very Low-Level Radioactive Waste Pursuant to 10 CFR 20.2002"

Dear Mr. Lubinski,

I am writing to express Waste Control Specialists' (WCS) views on the Nuclear Regulatory Commission's (NRC) Regulatory Issue Summary (RIS) 2016-11 and resulting impacts on regulatory stability and efficiency in the area of disposal of very low-level radioactive waste (VLLW).

Please be aware that RIS 2016-11 and a subsequent 2018 NRC inspection of South Texas Project Nuclear Operating Company's (STPNOC) South Texas Project Units 1 and 2 and related NRC enforcement action (EA-18-137) have generated confusion among WCS utility customers. The RIS states that "any licensee's request for approval to dispose of licensed material under 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." Further, in an October 31, 2018 response to a STPNOC letter dated August 14, 2018, the NRC staff opined that "a licensee must receive approval of proposed procedures not otherwise authorized in the regulations to dispose of licensed material under 10 CFR 20.2002", and that "[t]his approval must come from the regulatory authority that issued the license for use of the radioactive material; in this case, that is the NRC."

The foregoing NRC statements are making some utility licensees reluctant to use WCS for VLLW disposal due to a misconception that those statements in RIS 2016-11 are applicable to the Texas Commission on Environmental Quality (TCEQ) regulatory process that governs the WCS VLLW disposal process. We remain confident that utility customers may continue to send Low-

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Level Radioactive Waste (LLRW) to WCS that, after being evaluated by WCS and ultimately determined to be exempt VLLW pursuant to TCEQ-approved criteria and procedures, can be disposed in WCS's RCRA cell in full compliance with federal and state laws and regulations.

Specifically,

- Federal law authorizes the State of Texas, as an NRC Agreement State, to license and regulate the disposal of Low-Level Radioactive Waste (LLRW) in Texas (AEA Section 274 Agreement – 1963, as amended in 1982).
- State law authorizes the TCEQ to license and regulate the receipt, processing, storage, and disposal of LLRW in Texas (THSC 401).
- The TCEQ has the legal authority to allow the disposal of exempt low activity radioactive waste at WCS' RCRA facility (30 TAC 336.5).
- The TCEQ has authorized WCS to dispose of exempted radioactive waste in its RCRA facility through WCS' Radioactive Material License (RML) R04100 (License Condition 192) and Hazardous Waste Permit HW-50358.
- The NRC regularly reviews Texas' Agreement State program under IMPEP and has determined that the Texas program is satisfactory.
- In the WCS VLLW process, transfer of LLRW from an NRC-licensed nuclear power reactor is shipped as licensed waste on NRC Forms 540/541, to an Agreement State radioactive materials licensee (RML) - WCS.
- Shipping and receipt of the licensed LLRW occurs before the waste is evaluated for exemption at WCS pursuant to TCEQ requirements. Therefore, the utility is not exempting waste itself or shipping exempt waste to WCS.
- The licensed LLRW is evaluated by WCS, and those wastes satisfying the TCEQ-approved exemption criteria under our RML (LC 192) are disposed as VLLW in the RCRA facility.

Additionally, states are not required under Agreement State Compatibility criteria to adopt a Section 20.2002 equivalent rule, and Texas has not done so. As a result, WCS must perform analytical measurements and/or radiation surveys to confirm that the waste meets the specific exemption criteria and standards in TCEQ RML 04100.

Therefore, it is our understanding and conclusion that RIS 2016-11 is not applicable to the exemption structure at the WCS facility, as any transfer of radioactive waste is accomplished before the waste is processed and evaluated for exemption. Thus, a utility need not obtain any NRC approval under 10 CFR 20.2002, because the exemption occurs separate from the transfer and acceptance of the waste for disposal. I respectfully request that the NRC confirm its agreement with this understanding of RIS 2016-11 in your response to this letter.

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We are always pleased to work with the NRC to enhance regulatory stability; promote efficiency for the licensees, Agreement States, and the NRC; and most importantly to ensure continued efficient disposal activities with a high degree of safety.

Sincerely,

David S Carlson

David Carlson
President & COO
Waste Control Specialists

Cc: Electronic Copy Only

Steven West, Deputy Executive Director for Materials, Waste, Research, State, Tribal, Compliance, Administration, and Human Capital Programs

Catherine Haney, Assistant for Operations, Office of the Executive Director for Operations

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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:	NRC	External
	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

OFFICIAL RECORD COPY

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

Commission's Policy Statement on "Enhancing Public Participation in NRC Meetings"
67 Federal Register 36920, May 28, 2002
The policy statement may be found on the NRC website
http://www.nrc.gov/reading-rm/doc-collections/commission/policy/67fr36920.html