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Transfer of Very Low-Level Waste to Exempt Persons for Disposal

Comment On: NRC-2020-0065-0001

Transfer of Very Low-Level Waste to Exempt Persons for Disposal

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General Comment

See attached file(s)

Attachments

Comment on (NRC) Proposed Rule- Transfer of Very Low-Level Waste to Exempt Persons for Disposal

Anonymous
Member of the Public
New York, NY

April 22, 2020

Nuclear Regulatory Commission
Patricia K. Holahan,
Director, Division of Decommissioning, Uranium Recovery, and Waste Programs Office of
Nuclear Material Safety and Safeguards.

Re: Comment on Proposed Rule (Docket Number: [NRC-2020-0065](#)), *Transfer of Very Low-Level Waste to Exempt Persons for Disposal; Extension of Comment Period*

Director Holahan,

I am writing as a member of the public about the insufficient extension of the comment period for the transfer of very low-level waste (VLLW) to exempt persons for disposal. On March 6, 2020, the U.S. Nuclear Regulatory Commission (NRC) solicited comments on a proposed interpretation of its low-level radioactive waste disposal regulations that would permit licensees to dispose of waste by transfer to persons who hold specific exemptions for the purpose of disposal.¹ The public comment period was originally scheduled to close on April 20, 2020. In response to the current COVID-19 pandemic, the NRC extended the public comment period until July 20, 2020 to allow more time for members of the public to develop and submit their comments.²

I write this comment because the NRC's proposed rule may, if implemented, endanger the public and the environment. However, the current extension of the comment period is insufficient for allowing adequate preparation and submission of comments and should at least be extended until after the COVID-19 pandemic ends. Without sufficient time for members of the public to prepare and submit comments on the proposed rule's impact on their communities and environment, the NRC's implementation of its proposed rule would be based on an insufficient record under the Administrative Procedure Act (APA) and *Citizens to Preserve Overton Park*.³ Moreover, if implemented before the end of the pandemic, the implementation of the proposed rule would be arbitrary and capricious. In sum, the NRC must provide an adequate opportunity for members of the public, detrimentally impacted by the COVID-19 pandemic, to comment on its proposed rule with a reasonable extension of the comment until after the end of the pandemic.

Background

Currently, the nuclear waste in question is typically disposed of at licensed waste disposal facilities, which have adequate training and equipment to protect public health.⁴ The proposed rule would grant some exceptions to this regulation for waste with a cumulative radiation dose level of up to 25 millirem.⁵ Thus, the NRC requests comments from a broad range of stakeholders,

¹ 85 FR 13076.

² 85 FR 19907.

³ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

⁴ 10 CFR § 61.23.

⁵ 85 FR 13078.

including professional organizations, licensees, Agreement States, and members of the public, related to the proposed rule. In particular, the NRC requests comments on 1) the criteria that the NRC should consider when it reviews request for exemption for the purpose of dispose; and 2) issues associated with transboundary transfer of VLLW that should be considered with this proposed rule.

At the same time, advocates raise serious concerns about the effects of the NRC's proposed rule. For example, Dan Hirsch, the former director of the University of California, Santa Cruz's Program on Environmental and Nuclear Policy, argues that the rule would "prop up a failing industry so that the cost of decommissioning these [nuclear] reactors is reduced so you don't have to send it to a place that is expensive because it's designed to safely handle it."⁶ Also, the Public Employees for Environmental Responsibility Pacific Director Jeff Ruch urged that the proposed rule could transform most municipal dumps into radioactive repositories, with essentially no safeguards for workers, nearby residents, or adjoining water tables.⁷ At the very least, there are serious concerns about the effects of this interpretative rule that merit more time and attention for review after the pandemic ends.

Analysis

Without a reasonable extension of the comment period until after the COVID-19 pandemic ends, the comment period is simply an empty promise that does not permit the public to adequately and comprehensively comment on the proposed rule. The tragic health and economic effects of the pandemic cripple stakeholders, like advocate non-profit organizations and community members, who normally would be in a position to prepare and submit a comment on the NRC's proposed rule. Thus, members of the public, including stakeholders, do not have an adequate opportunity to comment until the pandemic ends. Any implemented rule by the NRC without the extension of the comment period until after the pandemic ends would be based on an inadequate record. Moreover, the NRC's proposed rule is not an interpretative rule and requires a notice-and-comment period during which the public can prepare and submit comments on the proposed rule.

The detrimental effects of the COVID-19 pandemic prohibits the public from sufficiently preparing and submitting comments on the NRC's proposed rule. Now, 95% of Americans are subject to stay-at-home state or local executive orders.⁸ States are battling to "flatten the curve" as the number of hospitalizations and deaths continue at a high level.⁹ Because of mental and physical health effects, many employees may not be available to adequately perform their duties. At the same time, many institutions, including non-profit organizations are working with a

⁶ Rachel Franzin, *Advocates Raise Questions About Proposal to Allow Some Nuclear Waste to be Disposed in Landfills*, THE HILL (Apr. 3, 2020), <https://thehill.com/policy/energy-environment/490988-advocates-raise-questions-about-proposal-to-allow-some-nuclear>.

⁷ Jeff Ruch, *NRC Stages Swift Sweeping Rollback During Pandemic*, PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY (Apr. 2, 2020), <https://www.peer.org/nrc-stages-swift-sweeping-rollback-during-pandemic/>.

⁸ Holly Secon & Aylin Woodward, *About 95% of Americans Have Been Ordered to Stay at Home. This Map Shows Which Cities and States are Under Lockdown*, BUSINESS INSIDER Apr. 7, 2020, <https://www.businessinsider.com/us-map-stay-at-home-orders-lockdowns-2020-3?op=1>.

⁹ See Centers for Disease Control and Prevention, *Key Updates for Week 14, ending April 4, 2020*, (April 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html>.

decreasing budget and workforce.¹⁰ During this period, donations from individuals and institutions will likely decrease for nonprofit organizations that need to work with decreasing operational capacity and funds as they try to meet their organizational missions and cope with the current pandemic. For example, the Environmental Defense Fund (EDF) receives 68% and 23% of its support and revenue from contributions and memberships and foundations and other institutional giving.¹¹ Moreover, many non-profit organizations, including EDF, do not qualify for financial assistance from the recently approved congressional stimulus package, which does not apply to organizations with more than 500 employees.¹² Thus, large advocate organizations like LDF that would normally be in a position to prepare and submit comments are crippled in their ability to respond to the NRC.

The NRC must provide the public with the opportunity to comment and develop an adequate record to implement a rule. Under §553(c) of the APA, an agency must:

“provide interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.”

Courts are also instructed to set aside agency action that is “arbitrary and capricious, or an abuse of discretion” under §706(2)(A) of the APA. Furthermore, *Citizens to Preserve Overton Park* clarified that the agency must take into account all relevant factors and develop a “whole record.”¹³ Here, under the current pandemic, many “interested persons” are not able to “participate in rulemaking” and submit comments on the NRC’s proposed rule. As stated earlier, the health and economic effects of the pandemic cripple members of the public and diminish their ability to prepare and submit comments. Thus, it is likely that if the NRC does not extend its comment period until after the pandemic ends, its new rule will be based on an inadequate record through which it could not consider all relevant factors for its rulemaking. Without a “whole record,” the NRC’s new rule will likely be arbitrary and capricious because the NRC cannot consider all relevant factors when implementing that rule.

Moreover, the NRC’s proposed rule is not an interpretative rule and therefore the NRC is not exempt from providing a notice-and-comment period and developing a “whole record.” According to *American Hospital Association*, an interpretative rule is a statement that clarifies and explains but does not alter existing legal requirements.¹⁴ Here, the NRC’s proposed rule is not an

¹⁰ See, e.g., Ivan Pereira, *Nonprofit Organizations ask for stimulus money as resources dry up in coronavirus pandemic: Nearly 12.5 million Americans work in the nonprofit sector*, ABC News (Apr. 2, 2020), <https://abcnews.go.com/Health/nonprofit-organizations-stimulus-money-resources-dry-pandemic/story?id=69925503>.

¹¹ Environmental Defense Fund, *Our Finance* 2019, <https://www.edf.org/finances>.

¹² See Tony Ritti, *Congress Reaches Agreement on a Coronavirus Relief Package: Tax Aspects of the CARES Act*, FORBES (Mar. 25, 2020), <https://www.forbes.com/sites/anthonymitti/2020/03/25/congress-reaches-agreement-on-a-coronavirus-relief-package-tax-aspects-of-the-cares-act/#30d20e9e5f99>.

¹³ See 401 U.S. 402, 410–12, 19–20 (1971).

¹⁴ *Am. Hosp. Asso. v. Bowen*, F.2d 1037, 1045 (1987). See also *Sentara-Hampton Gen. Hosp. v. Sullivan*, F.2d 749, 759 (1992) (“an agency may not, under the interpretative rule exception, ‘constructively rewrite [a] regulation’ or ‘effect a totally different result.’”) (footnotes omitted).

interpretive rule that clarifies and explains existing legal requirements; instead, the proposed rule likely results in completely different results from those of the current guidance.

The NRC's guidance on § 20.2001 of 10 CFR 20, Subpart K, states that the transfer of material to exempt persons is not an authorized method of disposal. This guidance explains that an “authorized recipient is a person, or an organization licensed to possess the material being transferred.” With respect to exemptions, the guidance explains that:

“[e]xemption of certain types, quantities, or concentrations of materials from the licensing requirements applies to the initial decision of whether or not the material should be licensed. However, once licensed, no quantity of that material, however small, is exempt from the applicable regulations in this section.”

According to the NRC, the proposed rule would in effect only provide for the transfer of VLLW to persons who hold specific exemptions for disposal of VLLW by land burial. However, this rule risks exposing the communities and the environment to harmful wastes, albeit VLLWs, that otherwise would not occur. For example, it may be possible that VLLW would be disposed at local trash disposal sites, which is currently prohibited.¹⁵ Therefore, the NRC's proposed can have different results from that of the current guidance.

Conclusion

The NRC must extend its comment period until after the end of the pandemic to allow all interested persons to adequately prepare and submit comments on its proposed rule. Otherwise, the NRC will not be able to consider all relevant factors when deciding to implement its proposed rule, which itself may detrimentally impact the public and environment.

Best,

Victor Flores

¹⁵ See News Editor, *Low-level Radioactive Waste Could Go to Local Landfills*, ENVIRONMENTAL NEWS SERVICE (Apr. 8, 2020), <https://ens-newswire.com/2020/04/08/low-level-radioactive-waste-could-go-to-local-landfills/>.