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## Submitter Information

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## General Comment

See attached file(s)

## Attachments

07-13-2020 WCS VLLW Comments


July 13, 2020

Office of Administration
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ATTN: Program Management, Announcements and Editing Staff

**Subject: WCS Comments on VLLW Interpretive Rulemaking (Docket ID NRC-2020-0065)**

Waste Control Specialists (WCS) is providing these comments on the Nuclear Regulatory Commission (NRC) staff's proposed interpretive rule regarding the Transfer of Very Low-Level Waste to Exempt Persons for Disposal (Proposed Interpretative Rule or proposal). The staff's proposal was published in the Federal Register on March 6, 2020.[1]

WCS is opposed to the finalization and implementation of the Proposed Interpretive Rule set forth in the Federal Register. Use of an "interpretive rule" is neither legally permissible nor appropriate, given; (1) the conflict with the plain language and longstanding interpretations of the Commission's regulations; (2) the magnitude of the proposed change to the long-standing national policy for near surface disposal of low-level radioactive waste; and (3) the apparent absence of any concurrent review of the environmental, social, or economic consequences of a proposal of this breadth.

We regret to find ourselves in such definitive opposition to an NRC staff proposal—we are not accustomed to being in this position. We have only the highest regard for the professionalism and dedication of the NRC staff. But in this specific instance and as detailed below, we believe the staff's proposal reflects an impermissible re-writing of agency regulations, and a dramatic, unjustified, and ultimately unsupportable change of well-settled national policy for disposal of low-level radioactive wastes.

[1] Transfer of Very Low-Level Waste to Exempt Persons for Disposal, 85 Fed. Reg. 13,076 (proposed Mar. 6, 2020) (interpretive rule).

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The current, carefully crafted regulatory scheme unambiguously requires that an entity be "specifically licensed to receive waste" for disposal or disposal-related actions.[2] Securing such a license, and operating pursuant to its restrictions, requires and ensures numerous public health and safety and procedural safeguards. The new process contemplated by the Proposed Interpretative Rule would effectively eliminate both that licensing requirement and those safeguards. Had the Commission intended for disposal of low-level radioactive waste by any other category of "authorized recipients," [3] such as general licensees[4], it could have used that language. Rather, the Commission clearly articulated its determination that persons receiving waste containing licensed material must be subject to the additional regulatory scrutiny associated with being "specifically licensed." [5] Further, the Commission contemplated an alternative exemption process for rare exceptions, requiring analogous case-by-case determination in 10 C.F.R. § 20.2002. The Proposed Interpretive Rule significantly changes the Commission's scheme by creating what amounts to a general license for those recipients who satisfy disposal criteria not reviewed by the Commission – a generic exception that reverses the Commission's clear determination that case-by-case evaluation was necessary. While this proposal may relieve the staff of the burden of case-by-case reviews of specific alternatives, it runs directly contrary to the Commission's mandate that low-level radioactive waste be disposed of in facilities that have been subjected to both the technical scrutiny and process protections required by specific licensing by either the NRC or its Agreement States.

Moreover, even if the proposed interpretive rule were not in direct conflict with the Commission's regulations and NRC's own well-reasoned and long-standing interpretations of them, the Proposed Interpretive Rule is unwarranted for numerous additional reasons. A change with the obvious potential to substantially revise the national policy established by Congress and the Commission for disposal of low-level radioactive wastes requires some consideration of the impacts of those changes. [6] The FRN proposal does not address the consequences of this interpretation. Direct and indirect impacts upon the paths for disposal of domestic radioactive wastes have not been reviewed. Nor can the Proposed Interpretive Rule be justified upon the basis of any stakeholder need. The proposed reinterpretation cites neither Congressional

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[2] *See* 10 C.F.R. § 20.2001(b).
[3] *See, e.g.*, *id.* § 20.2001(a)(1).
[4] *See, e.g.*, *id.* §§ 30.31, 40.20, 70.18.
[5] 10 C.F.R. § 20.2001(b).
[6] *See* 42 U.S.C. § 4332(2)(C); *See also* 40 C.F.R. § 1508.18(b)(1):

> (b) Federal actions tend to fall within one of the following categories:
> (1) Adoption of official policy, such as rules, regulations, **and interpretations** adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.;* treaties and international conventions or agreements; **formal documents establishing an agency's policies which will result in or substantially alter agency programs**.(Emphasis supplied.)

or Commission mandate, nor purported health and safety benefit. Rather, the proposal reverses decades of reasoned, long-settled agency practice, upon which stakeholders and regulated parties have long relied. The proposal and its implementation do not take into account the agency's own Principles of Good Regulation, and do not appear to acknowledge or recognize Congressional direction reversing similar agency efforts.

For these and the additional reasons described below, WCS urges the NRC to withdraw the Proposed Interpretive Rule and focus its limited agency resources on higher priority issues.

### *A. The Current Scheme and Regulations: Disposal in Licensed Facilities.*

The Proposed Interpretive Rule fails to acknowledge and squarely address the clear structure established by the Commission. Specifically, Section 20.2001(a) requires licensed users of radioactive material to transfer only to persons authorized to dispose; it does not address the authority for the recipient to dispose of such material by burial.[7] The Commission clearly set that out in Section 20.2001(b), which requires persons or entities who receive waste for disposal or various disposal-related purposes must be "specifically licensed to receive waste."[8] (WCS holds such a license.) The Commission also foresaw the rare exception in which a user may need to consider alternative disposal alternatives. For that, it established Section 20.2002, providing for case-by-case review.[9] The NRC established, articulated, and enforced this position long before the 1991 rewrite of Part 20.[10] The NRC and Agreement State licensing process ensures important protections, procedures, and processes embodied in the Atomic Energy Act (AEA)[11], and clear standards in 10 C.F.R. Part 61 regarding specifications on dose and concentration limits.

There are no exceptions or permitted exemptions under the regulations or current practice—the Proposed Interpretive Rule so admits, stating that the "NRC's guidance on §20.2001 states that the transfer of material to exempt persons is not an

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[7] *See* 10 C.F.R. § 20.2001(a).
[8] *See id.* § 20.2001(b).
[9] *See id.* § 20.2002.
[10] *See* Memorandum from L. J. Cunningham, Chief, Operating Reactor Programs Branch, to M. Shanbaky *et. al*, Disposal of Exempt Quantities of Byproduct Material (Feb. 12, 1987) (forwarding Office of General Counsel concurrence with enforcement action based on "long-standing NRC staff position that 10 CFR Section 20.301 [now 20.2001], 30.14, 30.18 and 40.13(a) do not authorize disposal by transfer to persons who do not hold a specific license authorizing them to receive it".) (emphasis supplied) (ML103470253), https://www.nrc.gov/about-nrc/radiation/protects-you/hppos/hppos190.html. Indeed, the staff's proposed interpretation appears patterned closely on one specifically rejected by the agency as far back as 1983. *See* Memorandum from Jay M. Gutierrez, Regional Counsel, to James H. Joyner, Disposal of Exempt Quantities of Radioactive Material (April 13, 1983) ("Gurierrez")(ML103430092).
[11] *See* 42 U.S.C. § 2239(a)(1)(A).

authorized method of disposal," citing NUREG-1736.[12] Subsection (a)(1) of Section 20.2001 deals not with recipients of waste for purposes of land disposal, but, rather, with "licensees" (users) who possess radioactive waste and seek to transfer it to another licensee for disposal, *i.e.*, regulated users such as utilities, hospitals, and industrial users. Such licensees may "transfer" waste to "an authorized recipient as provided in § 20.2006 or in the regulations in parts 30, 40, 60, 61, 63, 70, and 72 of this chapter." Parts 30, 40, and 70, as the Proposed Interpretive Rule notes, contain provisions contemplating exemptions—an "authorized recipient" can be a licensee or a party with a duly granted exemption. Section 20.2002 similarly provides that a "licensee" (the user) may apply for disposal of waste not otherwise authorized, pursuant to identified criteria and specific review, and on a case-by-case basis. It is this Commission-established review process that the Proposed Interpretive Rule effectively eliminates by creating through interpretive guidance a general license the Commission did not provide.[13]

### *B. The New Proposed Scheme—Elimination of the Licensing Requirement*

Stated simply, the new proposed scheme would allow unlicensed facilities across the country to receive and dispose of radioactive waste in the same way that a Part 61 or Agreement State analog licensed facility does today, without the assurance of the procedural safeguards of the specific licensing process or substantive limits of those licenses. It substitutes a 25 mrem limit – more than five times the agency's current standard and industry norm for wastes subject to the alternative disposal under Section 20.2002. That represents a dramatic, abrupt, and fundamental change to the regulation of disposal of radioactive waste in the United States. It simply cannot be accomplished via an "interpretive rule." Such action violates the Administrative Procedure Act (APA) and other applicable statutes.[14]

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[12] Transfer of Very Low-Level Waste to Exempt Persons for Disposal, 85 Fed. Reg. at 13,076. *See* also NUREG-1736, Consolidated Guidance: 10 CFR Part 20 – Standards for Protection Against Radiation: Final Report at 3-152 (Oct. 2001) (ML013330106 and ML013330154). Subpart K – Waste Disposal, Section 3.20.2001 (General Requirements) of NUREG-1736 states:

> An authorized recipient is a person or an organization licensed to possess the material being transferred in the form and in the quantity being transferred. The licensee is responsible for ensuring that the recipient is authorized to receive the material being transferred. This may be done by reviewing the recipient's license or, if that leaves doubt, by contacting the NRC Regional Office or applicable Agreement State Office that issued the recipient's license. Other approved methods of verifying licensure are covered in 10 CFR 30.41, 40.51, 70.42, and 76.83.

[13] This interpretive rule comes close on the heels of a challenge to the agency's similarly dramatic departure from decades of precedent in its reinterpretation of the requirements of 10 C.F.R. § 20.2002. *See Nuclear Energy Inst. v. Nuclear Regulatory Comm'n,* D.C. Cir. No. 19-1240 (pending).

[14] The FRN does not adequately address whether NEPA review is required for this action. Further, Staff does not indicate whether it intends to submit this proposed interpretive rule for review under the Congressional Review Act, 5 U.S.C. § 801, before giving it substantive effect. As noted below, it

The Proposed Interpretive Rule does not address or "interpret", much less reconcile the plain reading of Sections 20.2001(b) and 20.2002. This proposed interpretation suffers from the same flaw explained to a Part 30 licensee in 1983: "A general rule of statutory construction is that where two regulations are in apparent contradiction, the specific governs over the general."[15] The staff indicates it is revisiting its NUREG guidance, but does so without recalling that the guidance merely implements the Commission's rule. Although Parts 30, 40, and 70 contain authority to transfer for disposal, Part 20 establishes the requirement for licensed disposal, subject *only* to the alternative of specific case-by-case review under Section 20.2002. Contrary to the suggestion in the Proposed Interpretive Rule, the "exemptions" contemplated create an entirely new scheme, inconsistent with the text of the current regulation.

### *C. Conflict with Existing Regulations and Practices.*

1. *The Proposed Interpretive Rule is not an "interpretation" of Section 20.2001.* As explained above, only a facility with a "specific license" to dispose of radioactive waste may receive such waste for disposal under Section 20.2001(b).[16] The Proposed Interpretive Rule creates a new process that circumvents the Commission's requirement. Such is not an "interpretation;" that is a repeal. Such action is not permissible even by the Commission except via compliance with the Congressionally mandated administrative processes. It is plainly a reversal without basis of longstanding interpretation consistent with the black letter of the regulation and without consideration of impacts other than the agency's administrative convenience.

Similarly, the new rule upends without even comment on the national policy and requirements established by Congress in the AEA and in the Low Level Radioactive Waste Policy Amendments Act of 1985, as amended (LLRWPAA). In the LLRWPAA, Congress articulated the national policy for disposal of low-level radioactive waste in the United States, establishing responsibility for states and enabling Compacts to accept waste for disposal in licensed facilities authorized by host states.

In Section 274 of the AEA, Congress established the process by which NRC could relinquish to the states its responsibility for some classes of radioactive materials. Through this process, and in reliance on the powers, limitations, duties and responsibilities articulated by the Congress, the States made decisions with long reaching economic, political and environmental consequences. The proposed reinterpretation potentially would allow disposal of significant volumes of low-level radioactive wastes in unspecified radionuclide concentrations in unlicensed facilities whether or not they are Agreement States.

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appears the staff may already be acting inconsistent with its regulations to implement this new interpretation.

[15] Gutierrez, *supra* note 10.

[16] NUREG-1736 at 3-152.

The proposal does not square this action with Congressional policy. Even, *arguendo*, if the proposal included a rationale that it was favorable as a national policy (which it is not for the reasons discussed below, and the proposal does not so argue), the staff lacks the authority to rewrite the statutes and regulations by its own interpretation. That is a power reserved to Congress and to the Commission, respectively.

2. *Exemptions are a special tool for exceptions to the general rule, not a tool for informal rulemaking.* The NRC, in adjudicatory proceedings in 2013, confirmed the sensible proposition that "exemptions" should be just that—"extraordinary" and "sparing"

> Although our regulations thus authorize exemptions, we consider an exemption to be an "extraordinary" equitable remedy to be used only "sparingly". The reason for this high standard is simple. Every NRC regulation has gone through the rulemaking process, including public notice-and-comment, and its underlying rationale has been explained in our Statements of Consideration. Although our authority under the Atomic Energy Act of 1954, as amended (AEA), and other statutes to adopt rules of general application "entails a concomitant authority to provide exemption procedures in order to allow for special circumstances," our rules presumably apply until an exemption requester has met the high burden we place upon such requests.[17]

WCS recognizes that the exemption process provides an important and necessary tool for the regulator and its licensees. Exemptions from the Commission's rules, appropriately, are subject to a very high standard. In this case, the proposed interpretive rule goes far in the opposite direction. It takes the Commissions' judgment in 20.2002 that alternative disposal options be considered on a case-by-case basis, and sweeps it into a one-time categorical determination subject to unknown and unfixed standards. This proposed application falls far outside the important and legitimate uses the exemption process.

3. *The Proposed Interpretive Rule violates NRC's stated principles of good regulation.* The changes embodied in the Proposed Interpretive Rule does not live up to the Commission's stated and published Principles of Good Regulation.[18]

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[17] *Honeywell Int'l, Inc*. (Metropolis Work Uranium Conversion Facility) CLI-13-1, 77 NRC 1, at 9 (2013).

[18] COMKR-90-1 Principles of Good Regulation (Apr. 6. 1990) (ML15083A026), https://www.nrc.gov/docs/ML1508/ML15083A026.pdf, reaffirmed and the basis for agency-wide training on regulatory actions. *See also* NRC, Values (Apr. 19, 2019), https://www.nrc.gov/about-nrc/values.html#principles (discussing the Principles of Good Regulation).

For example, the action fails to meet the test of the Principle of Independence[19] in that there was never an open discussion of this proposal with licensees and others prior to the release of the Proposed Interpretive Rule. The fact that the proposal was a surprise to us and other licensees demonstrates falling short on the Principle of Openness.[20] It fails the Principle of Clarity as it solves no health and safety problem, and is not connected to a current agency position in regulation.[21] It fails the Principle of Reliability as it would destabilize the regulatory framework for the disposal of low-level radioactive waste.[22]

If the NRC's Principles of Good Regulation articulate the values by which the agency operates and trains its employees, they must be respected here as well. Anything less undermines the agency's credibility with the public, its own employees, the Congress, the States, its licensees, and other stakeholders. We would respectfully suggest that the Proposed Interpretive Rule is inconsistent with the NRC's tradition of effective oversight.

### *D. Significant Factors and Impacts Not Considered.*

Before implementing such a fundamental change to the disposal scheme for radioactive waste in the United States, it is incumbent upon the staff to thoroughly consider the relevant factors. The Proposed Interpretive Rule does not.

1. *The new interpretation does not address any stakeholder, public, or other need.* The Proposed Interpretive Rule does not address any pressing issue regarding storage capacity for radioactive waste, costs of disposal, public health and safety, or other problem. No orphaned waste stream finds its new licensed home. It provides no increase to safety of waste disposal. Quite the opposite, the Proposed Interpretive

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[19] Regarding independence, the NRC's Principles of Good Regulation state:

> Nothing but the highest possible standards of ethical performance and professionalism should influence regulation. However, independence does not imply isolation. All available facts and opinions must be sought openly from licensees and other interested members of the public. The many and possibly conflicting public interests involved must be considered. Final decisions must be based on objective, unbiased assessments of all information, and must be documented with reasons explicitly stated. COMKR-90-1 at 2

[20] Regarding openness, the NRC's Principles of Good Regulation state:

> Nuclear regulation is the public's business, and it must be transacted publicly and candidly. The public must be informed about and have the opportunity to participate in the regulatory processes as required by law. Open channels of communication must be maintained with Congress, other government agencies, licensees, and the public, as well as with the international nuclear community. *Id.*

[21] *Id.* at 3.

[22] *Id.*

Rule threatens disruption of the certainty of existing safe and established disposal paths.[23]

2. *The radiation and dose impacts of the new proposal have not been adequately considered.* A very real result of the Proposed Interpretive Rule process could be an unintended *increase* in concentrations and doses of radioactive material at unlicensed disposal sites all across the country. At a minimum, it was incumbent upon staff to fully assess such issues, and it has not done so.

The proposal would allow for disposal of material in an unlicensed exempted landfill—hazardous or municipal—at levels up to 25 mrem per year. That 25 mrem limit set by this Proposed Interpretive Rule is the same as for Part 61 licensed disposal facilities. At a 25 mrem per year cumulative dose all classes of LLW disposals could be safely disposed in a robust *licensed* facility and meet this criterion. For example, the peak dose at the WCS facility which is licensed for Class, A, Class B, and Class C LLRW under 10 C.F.R. Part 61 will be about 0.5 mrem at 170,000 years.

Currently, the criteria for exemptions under Section 20.2002 is a "few millirem," which the NRC has interpreted as five mrem or less.[24] Accordingly, for non-licensed facilities, implementation of the Proposed Interpretive Rule could mean higher doses and more radioactive waste than would be allowed under current Section 20.2002 guidance.

The Proposed Interpretive Rule does not propose concentration limits for VLLW, only the 25 mrem dose limit and reference to "the lowest portion of Class A waste". WCS' experience is that the lowest 10% of Class A LLRW by radionuclide concentration accounts for more than 90% of LLRW by volume. This percentage is based on WCS' real-world experience including Humboldt Bay and Vermont Yankee decommissioning projects as well as based on Decommissioning Cost Estimates for planned future nuclear power plant decommissioning projects. Therefore, if we

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[23] This reversal of longstanding agency position risks the perception that the Proposed Interpretive Rule reflects an effort by the agency to address a litigation position. *Nuclear Energy Inst. v. Nuclear Regulatory Comm'n,* D.C. Cir. No. 19-1240 (pending).

[24] NRC, Guidance for the Reviews of Proposed Disposal Procedures and Transfers of Radioactive Material Under 10 CFR 20.2002 and 10 CFR 40.13(A) at 14 (April 2020) (ML18296A068)., Section 8.1.1 On-Site Disposals (20.2002 requests only) provides:

> Section 15.12.2.1, "Current Practice of a Few Millirem Per Year," of NUREG-1757, states that the "few millirem" per year criterion encompasses a 0–0.05 millisieverts (mSv) per year, or 0-5 millirem (mrem) per year, total effective dose equivalent.

For discussion of staff's historical application of the "few millirem" standard to 10 C.F.R. § 20.2002 requests, *see* SECY-07-0060, Basis and Justification for Approval Process for 10 CFR 20.2002 Authorizations and Options for Change at 5 (March 27, 2007) ("The staff recommends [the] Status Quo."). (ML070220045, https://www.nrc.gov/reading-rm/doc-collections/commission/secys/2007/secy2007-0060/2007-0060scy.pdf.

assume that "the lowest portion of Class A waste" is the lowest 10% by concentration, NRC could be allowing 90% or more of all LLRW waste generated to be disposed of in unlicensed facilities. Even were that result not the staff's intent today, if the guidance can change this radically without Commission action, nothing is to stop future escalation of concentration and dose limits.

Clearly, such a fundamental change to the program for radioactive waste disposal in the United States requires public input and thorough and careful study, neither of which has not been done. Such a dramatic change in the waste disposal scheme cannot be implemented by an "interpretive rule."[25]

3. *The probable impacts and disruptions to the settled radioactive waste disposal policy in the United States have not been adequately considered or addressed.*
The changes arising from implementation of the Proposed Interpretive Rule certainly will reverberate throughout the waste disposal and domestic nuclear industries at large, fundamentally altering economic and regulatory relationships. Yet, the NRC has performed no assessment of such structural changes and realignments. Nor is there evidence to suggest that NRC consulted with the LLW Compact Commissions or Agreement States prior to issuing the Proposed Interpretative Rule.[26]

A likely result of the new Proposed Interpretive Rule scheme would be a "race to the bottom" by entities vying to secure revenue from disposal of radioactive waste, with the resulting elimination of safe disposal options for many types of waste. In other words, unlicensed facilities will compete to accept higher activity wastes that will be diverted from licensed facilities to unlicensed facilities. Some non-agreement state facilities will receive NRC exemptions, and some Agreement States will grant exemptions to undercut others' standards for disposal. This will have a significant impact on States, Compacts, Agreement States, and their licensees, including WCS, and could threaten the underlying economic viability of licensed facilities that can safely and compliantly dispose of all classes of LLRW. It is a foreseeable result of the interpretive rule that Class B and C wastes could no longer have an authorized disposal site, and would remain in their current locations across the country indefinitely. Yet, the NRC has not assessed any of this, nor considered the direct threat to the carefully laid out current framework for low-level radioactive waste disposal.

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[25] Public commenters have compared the current Proposed Interpretive Rule to efforts in the early 1990's to terminate regulation of waste concentrations deemed to be "below regulatory concern." In the Energy Policy Act of 1992, Congress directed NRC reverse course, and the staff withdrew its policy statements and guidance. Congressional direction should at least be considered here. *See* Press Release, NRC Withdraws Below Regulatory Concern Policy Statements (Aug. 18, 1993) (ML003702922), https://www.nrc.gov/docs/ML0037/ML003702922.pdf

[26] See Section 274 g. of the AEA "The Commission is authorized **and directed** to cooperate with the States in the formation of standards for the protection of hazards of radiation to assure that State and Commission programs for protection against hazards of radiation will be coordinated **and compatible**." 42 U.S.C. 2021.g. Emphasis supplied.

4. *There is no disposal cost imperative for the Proposed Interpretive Rule proposal.* In 2012, the Electric Power Research Institute (EPRI) published a report titled "Basis for National and International Low Activity and Very Low-Level Waste Disposal Classifications."[27] While not cited in the Proposed Interpretive Rule, the NRC has cited this report in its "Regulatory Analysis for Issuing a Guidance Document for the Review of Proposed Disposal Procedures and Transfers of Radioactive Material under 10 CFR 20.2002 and 10 CFR 40.13(a)," issued in April 2020.[28] To the extent that the NRC would attempt to rely upon the EPRI report or similar assessments in connection with the Proposed Interpretive Rule, such reliance would be misplaced.

Chapter 10 of the EPRI report, "Potential Cost Savings with VLLW Classification," provides an analysis that projects a savings of $6.2 billion for the US nuclear power industry by implementing VLLW disposal in unlicensed Resource Conservation and Recovery Act (RCRA) landfills.[29] Unfortunately, the financial analysis in this document is dated and significantly flawed. The report assumed that the cost for disposal of demolition debris from nuclear power plant deactivation and decommissioning would be $100 per cubic foot for disposal. This price was stated to be based on "Industry Experience." The report set the price for RCRA disposal at a tenth of this price.

Contrary to EPRI's assumptions, pricing for disposal of demolition debris from nuclear power plants is highly competitive, and, depending on the waste type, can be an order of magnitude lower than the prices cited by EPRI. One published set of data points are the Department of Energy's (DOE) Indefinite Delivery/Indefinite Quantity contracts administered by the DOE Environmental Management Consolidated Business Office. These contracts include disposal rates for radioactive soils and debris as low as $8 per cubic foot.[30] Competitive pricing for a large volume project can be lower still.

In addition, diversion of waste from existing LLW disposal facilities will tend to increase costs for operating nuclear power plants. Operating nuclear power plants rarely generate low cost demolition waste. Much of their waste is higher concentration radioactive waste that could not be disposed at proposed VLLW facilities. Since existing LLW disposal facilities could receive less revenue from low activity waste, in order to remain in operation more of their fixed costs would need to be shifted to the higher concentration waste from these operating nuclear power

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[27] Elec. Power Research Inst., Basis for National and International Low Activity and Very Low Level Waste Disposal Classifications (2012).

[28] Nuclear Regulatory Comm'n, Regulatory Analysis for Issuing a Guidance Document for the Review of Proposed Disposal Procedures and Transfers of Radioactive Material under 10 CFR 20.2002 and 10 CFR 40.13(a) at 23 (2020) (ML20072L323).

[29] Elec. Power Research Inst., *supra* note 27, at 10-2.

[30] *See, e.g.,* Envt'l Mgmt. Consolidated Bus. Office , Dept' of Energy, Contract # 89303318DEM000005 with Energy*Solutions*, LLC, Low-Level Waste & Mixed Low-Level Waste Disposal (awarded Apr. 12, 2018), https://www.emcbc.doe.gov/Content/Office/89303318DEM000005.pdf.

plants. The end result is that there might be more disposal options for decommissioning waste (without significant savings), but operating plants would bear the higher costs of existing LLW disposal facilities. In any event, the NRC should have thoroughly assessed all of these potential impacts in connection with the Proposed Interpretive Rule, and it did not do so.

5. *The Proposed Interpretive Rule fails to consider or account for information gathered in prior VLLW scoping studies and efforts.* In 2018, the staff undertook a VLLW Scoping Study. The study was to be completed and significant results reported to the Commission.[31] That study appears neither to have been completed, nor conclusions or results provided to the Commission.[32] None were published or shared with Compacts, Agreements States, licensees, or other stakeholders who responded to the request for comments. In fact, these new ideas were never publicly introduced or discussed prior to publication of the proposal. This Proposed Interpretive Rule represents a significant departure from what the NRC described as the scope of its considerations in 2018.

The never-completed 2018 scoping study effort received comments from the Compacts, Agreement States, licensees, and others that were not publicly addressed and appear not to have been considered at all in development of the novel Proposed Interpretive Rule.

For example, the Northwest Compact commented:

- "The actual total activity any RCRA (or state equivalent) permitted or specifically licensed VLLW disposal facility accepts should be limited, or capped, based on a site-specific dose assessment to ensure that the projected dose remains within the NRC's goal of "a few millirem per year".
- The Compact assumed in its comment #3 that new disposal facilities accepting VLLW would be licensed.
- In item #5 of its comments, the Compact spoke to the impacts that affect regional compacts in terms of additional responsibilities or resources.[33]

The Texas Compact Commission stated that "… (as) the only facility for the disposal of B and C waste for generators in 36 states, the Compact Facility is critical for generators across the country. Because of the importance of this facility, the TLLRWDCC sincerely hopes that the NRC does not take steps that, in any way, compromise the facility's viability through any action it takes as a result of the VLLW

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[31] NRC, Very Low-Level Waste (Apr. 30, 2020), https://www.nrc.gov/waste/llw-disposal/very-llw.html.
[32] *Id.* ("The NRC staff is currently reviewing stakeholder feedback on the VLLW scoping study.").
[33] Letter from Earl Fordham, Exec. Dir, Northwest Interstate Compact, to May Ma, Office of Admin, NRC, Request for Comments on the Very Low-Level Radioactive Waste Scoping Study as Published at 83 Federal Register p. 6,619 (Docket ID NRC-2018-0026) at 1-2 (May 15, 2018) (ML18144A768).

scoping study."[34] The issues raised by Texas and in the Northwest Compact's letter were neither identified nor addressed by the staff in its responses then,[35] nor have they been considered now.

6. *The steps NRC has already taken in the direction of the Proposed Interpretive Rule illustrate these concerns.* Despite the fact that the public comment period for the *Proposed Interpretive Rule* extends until July 20,[36] the NRC has already taken steps—which WCS opposes—to prematurely implement the new rule. For example, the NRC finalized certain guidance in April for NRC staff use when processing requests from licensees and applicants for alternative disposal requests for licensed material, and which may be used by Agreement State staff in similar reviews, as appropriate.[37]

Another example is an application by a private party to the Utah Division of Waste Management and Radiation Control, dated April 10, 2020.[38] The premise of the application is that Utah should allow disposal of what the applicant terms, "Potentially Clean Waste (PCW)." The application specifically cites NRC's Proposed Interpretive Rule —*which is not yet final, as the public comment period remains open*— in support of the application; "NRC has further suggested that an upper dose limit of 25 mrem per year is an appropriate criteria for certified transfer of PCW and subsequent disposal in a solid waste landfill such as the Clean Transfer Facility."[39] The NRC's Office of Public Affairs has stated with respect to this application for a new unlicensed landfill for LLRW in Utah that "[i]t's essentially at background levels of radiation, low enough that it can be disposed of safely in a facility that does not meet the licensing requirements that the Clive facility currently meets," and "(i)t's really a way to make a process that is already happening a little more efficient for the licensees and us so we won't have to do a review every time."[40]

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[34] Letter from Brandon Hurley, Chair, Texas Low-Level Radioactive Waste Disposal Compact Comm'n, to May Ma, Office of Admin, NRC, regarding Docket ID NRC-2018-0026, at 2 (May 15, 2018) (ML18141A422).

[35] NRC, "Responses to Comments on the 'Guidance For the Reviews Of Proposed Disposal Procedures and Transfers of Radioactive Material Under 10 CFR 20.2002 AND 10 CFR 40.13(A),' issued on October 19, 2017" (Apr. 1, 2020)(ML19295F140).

[36] Numerous commenters who participated in the NRC's July 7, 2002 webinar on the proposed rule requested that the comment period be extended based on inadequacy of notice, scope of the proposal and the COVID-19 pandemic. WCS joins the commenters and requests the comment period be extended at least 90 days, unless the proposal is dropped prior.

[37] Issuance of a Revision to the Guidance Document for Alternative Disposal Requests, 85 Fed. Reg. 19,966 (Apr. 9, 2020) (revising Guidance for the Reviews of Proposed Disposal Procedures & Transfers of Radioactive Material Under 10 CFR 20.2002 & 10 CFR 40.13(A) (April 2020) (ML19295F109)).

[38] Letter from Vern Rogers, Dir. of Regulatory Affairs, Energy Solutions, to Ty Howard, Dir., Utah Div. of Waste Mgmt. & Radiation Control, Clean Transfer Cell Permit Application (Apr. 10, 2020) (Utah Dep't of Envt'l Quality Docket No. DRC-2020-006628).

[39] *Id.* at 2.

[40] Brian Maffly, *Debris from demolished nuke plants is coming to Utah, where EnergySolutions is proposing a new landfill*, Salt Lake Trib., June 23, 2020, https://www.sltrib.com/news/environment/2020/06/23/debris-demolished-nuke/.

It may be "a little more efficient" for the NRC and some non-licensee parties to do away with the substantive and procedural protections of a license issues subject to Part 61, but the current regulations require otherwise. The Staff appears to have predetermined the outcome this Proposed Interpretive Rule by premature application of the proposed rule to non-licensed facilities that would receive and dispose of radioactive waste in the same way that a licensed facility does today..

In sum, we believe this proposal should be withdrawn. NRC should initiate open and candid discussions about disposal of VLLW with the Congress, States, Compacts, licensees, and other interested stakeholders. If it plans to fundamentally alter the national policy, a national dialog is warranted, including regarding the appropriate administrative rulemaking procedures, to rewrite the law while honoring Congressional direction in the AEA and LLRWPA.

**Specific Requests for Comment by the NRC**

1. **This interpretive rule would authorize the transfer of licensed material to persons who hold specific exemptions for disposal without a case-by-case review and approval of the transfers. Do you think that case-by-case review and approval of these transfers is necessary?**

As explained above, whether or not the staff concludes that case-by-case review is either necessary or burdensome, that is the blackletter law established by the Commission. WCS views this NRC initiative as a legally defective use of "interpretive" rulemaking. LLRW disposal is built upon the foundation of requirements that result in the issuance of licenses. The scheme (a *de facto* general license) contemplated by the Proposed Interpretive Rule would, in reality, create an entirely new regulatory path for disposal for LLRW outside of Part 61 requirements. To create a path for disposal of LLRW at up to 25 mrem to unlicensed facilities is contrary to the limits of the current regulations. It does not "clarify" or "interpret" the regulations. The commission already answered this question in the affirmative when it established that disposal facilities must have a "specific license" in Section 20.2001(b). It also provided a tool for alternative methods under Section 20.2002.

2. **Transboundary transfer of VLLW associated with the approved disposal actions is an important consideration. What issues associated with transboundary transfers of VLLW should be considered with this interpretive rule?**

Transboundary transfer of LLRW under this proposal will significantly impact existing licensed Part 61 facilities. There will be less use of licensed Part 61 facilities for LLRW disposal if an unlicensed facility can receive and dispose of LLRW of up to 25 mrem. The facilities that are the most protective of health and safety and licensed

under Part 61 will suffer under the competitive disadvantages occasioned by the federal government favoring those that are the least protective.

In addition to the practical impacts regarding disruption of the current national policy for disposal of low-level radioactive wastes, the Proposed Interpretive Rule certainly will result in additional unlicensed disposal facilities around nation and new routes for disposal of those wastes. The proposal fails to consider either environmental or economic impacts in affected communities. It is the agency's responsibility to consider them before taking action.

3. **10 CFR 20.2006 states that "[a]ny licensee shipping radioactive waste intended for ultimate disposal at a licensed land disposal facility must document the information required on NRC's Uniform Low-Level Radioactive Waste Manifest and transfer this recorded manifest information to the intended consignee in accordance with appendix G to 10 CFR Part 20." Should the exempt persons authorized to dispose of certain VLLW that would be considered §20.2001 "authorized recipients" under this proposed interpretive rule be required to use Uniform Waste Manifests (consistent with §20.2006) for waste transferred to the exempted, disposal facility?**

The question arises because of the flaw in this re-interpretation approach. The Commission imposed the waste manifest requirement on shipments to licensees because it intended all shipments to go to licensees. There can be no interpretation of the regulations that reads licensees out of the requirement. The use of manifests is already required for licensed facilities. Therefore, this question actually is asking, are manifests needed for waste going to unlicensed persons under this proposal? If the staff determines that they are not needed, it would further illustrate that what is really happening is a change to the regulation, not an "interpretation."

4. **Are there any other criteria that the NRC should consider when it reviews a request for a specific exemption for the purpose of disposal?**

Any request for an exemption should be specific to the regulations that govern a licensed facility. Disposal facilities must, appropriately, now be licensed. The criteria for licensing are well settled and established, and should be maintained. Allowing wholesale exemptions for unlicensed facilities should not be considered.

5. **The regulation in §20.2001 is currently identified as a compatibility C regulation for purposes of Agreement State compatibility. In light of this proposed interpretive rule, does the compatibility designation raise issues that the NRC should consider**?

The identification as compatibility C is consistent with Section 274 of the AEA and Section 276 Energy Policy Act Amendments of 1992.[41] Some states have chosen to be more protective of worker and public health and safety. It should remain.

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If you have any questions or comments regarding this matter, please contact me at dcarlson@wcstexas.com or 865-201-3191.

Sincerely,

David S Carlson

David S. Carlson
President & COO

[41] 42 U.S.C. 2023 (a) In General. No provision of this Act, or of the Low-Level Radioactive Waste Policy Act, may be construed to prohibit or otherwise restrict the authority of any State to regulate, on the basis of radiological hazard, the disposal or off-site incineration of low-level radioactive waste, if the Nuclear Regulatory Commission, after the date of the enactment of the Energy Policy Act of 1992 exempts such waste from regulation.
(b) "This section may not be construed to imply preemption of existing State authority. Except as expressly provided in subsection (a), this section may not be construed to confer on any State any additional authority to regulate activities **licensed** by the Nuclear Regulatory Commission. [Emphasis supplied.]