ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1240

United States Court of Appeals for the District of Columbia Circuit

NUCLEAR ENERGY INSTITUTE,

Petitioner,

v.

U.S. NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Action of the United States Nuclear Regulatory Commission

PETITIONER NUCLEAR ENERGY INSTITUTE'S REPLY BRIEF

Ellen C. Ginsberg
Jonathan M. Rund
Jerry Bonanno
Martin J. O'Neill
Nuclear Energy Institute
1201 F Street, NW
Suite 1100
Washington, DC 20004-1218
(202) 739-8000

Steven P. Croley
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
steven.croley@lw.com

Counsel for Petitioner

February 8, 2021

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

STATUTES AND REGULATIONS

Page(s)

OTHER AUTHORITIES

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

1986 Information Notice	NRC, Information Notice No. 86-90, Requests to Dispose of Very Low-Level Radioactive Waste Pursuant to 10 CFR 20.302 (Nov. 3, 1986)
2012 Letter	March 13, 2012 letter from NRC to Agreement States
2016 Issue Summary	Regulatory Issue Summary 2016-11
2019 Letter	September 16, 2019 letter from NRC to petitioner Nuclear Energy Institute
AEA	Atomic Energy Act
APA	Administrative Procedure Act
EPA	Environmental Protection Agency
Legal Opinion	NRC, Jurisdiction Over Low Level Waste Management at Reactor Sites in Agreement States (Sept. 13, 1985)
NEI	Nuclear Energy Institute
NRC	Nuclear Regulatory Commission

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 274 of the Atomic Energy Act ("AEA") allows the Nuclear Regulatory Commission ("NRC") to transfer authority to regulate certain nuclear materials, including the disposal of those materials, to "Agreement States." *See* 42 U.S.C. § 2021(b). NRC may not enter into agreements for the "disposal" of nuclear materials if it has determined "by regulation or order" that public health and safety require it to retain authority over such disposal. *Id.* § 2021(c)(4). Likewise, where it has entered into such agreements and transferred its regulatory authority to an Agreement State, NRC may reassert that authority only upon finding that Agreement State authority is inconsistent with public health and safety, or that the Agreement State failed to comply with the AEA. *See id.* § 2021(j). There is no dispute that NRC has not issued a regulation, order, or otherwise made such a finding with respect to disposal of the materials at issue in this case.

NRC has long permitted Agreement States to approve a reactor licensee's alternative disposal procedures for very low-level waste, instead of requiring licensees to obtain approval from NRC. *See* Office of Inspection Enforcement, NRC, Information Notice No. 86-90, Requests to Dispose of Very Low-Level Radioactive Waste Pursuant to 10 CFR 20.302 (Nov. 3, 1986) ("1986 Information Notice") (JA__). Indeed, NRC had consistently taken the position that it was "not at liberty to vary the clear meaning" of its regulations *in the absence of* a regulation

or order reasserting the authority it transferred to Agreement States. NRC, Jurisdiction Over Low Level Waste Management at Reactor Sites in Agreement States 2 (Sept. 13, 1985) (JA__). Because NRC decided against issuing such a regulation or order, 61 Fed. Reg. 26,852 (May 29, 1996), NRC licensees continued to seek, and routinely obtained, Agreement State approvals, not NRC approvals.

Notwithstanding the AEA's clarity, NRC's prior position, and longstanding industry practice, in a September 16, 2019 letter to the Nuclear Energy Institute ("NEI") ("2019 Letter") (JA__), NRC declared that reactor licensees "must" obtain its approval for alternative waste disposal procedures, effectively nullifying valid Agreement State approvals. In doing so, NRC disregarded the AEA requirement for a regulation or order, upended the regulated community's longstanding reliance on NRC's prior determinations, and imposed new obligations on reactor licensees.

Yet NRC now claims that the 2019 Letter does not create *new* regulatory burdens and enforcement risks because this expansion of its regulatory authority was telegraphed in a 2012 letter addressed to Agreement States ("2012 Letter") (JA__), and in the 2016 Regulatory Issue Summary ("2016 Issue Summary") (JA__). Not so. The 2012 Letter dealt with a completely different issue, and was not published in the *Federal Register* or provided to NRC licensees. Likewise, the 2016 Issue Summary could not reasonably have been understood by licensees to unwind previous Agreement State approvals. Neither document provided reasonable notice

to licensees that NRC had reversed a decades-old legal position and that licensees with valid Agreement State disposal approvals would be subject to future NRC enforcement action.

Only in the 2019 Letter did NRC claim—for the first time—that it must retain authority over reactor licensee disposal procedures for very low-level waste, even when the licensee has an Agreement State approval. Again, however, NRC concedes it has not issued any "regulation or order," as required by AEA Section 274(c)(4), to reassert authority to regulate very low-level waste disposal in Agreement States.

Recognizing this failure, NRC attempts to justify its action after the fact, based on a reinterpretation of 10 C.F.R. § 20.2002, which allows NRC to approve alternative waste disposal procedures.[1] Despite Section 20.2002's explicit reference to procedures "to *dispose* of licensed material," (and its title, "Method for obtaining approval of proposed disposal procedures"), NRC now asserts that this regulation governs nuclear power plant "operation" and thus, it is prohibited from delegating to Agreement States the authority to issue reactor licensees these approvals.

[1] Section 20.2002 governs the approval process for disposal procedures that are "not otherwise authorized in the regulations in this chapter," such as disposal in hazardous or municipal solid-waste landfills that, while strictly regulated, are not licensed under the AEA. *See* NEI Br. 6; NRC Br. 7-8. These disposal methods are thus referred to as "alternative" disposal procedures.

But there is a fundamental distinction between nuclear waste "disposal" and reactor "operation" that is central to the resolution of this case. NRC's new understanding of Section 20.2002 ignores that provision's plain language, structure, and history—all of which show that it applies only to waste disposal, not reactor operation. The Court should thus reject NRC's attempt to bypass the issuance of an AEA-mandated "regulation or order" to reassert its authority over very low-level waste disposal in Agreement States.

By reinterpreting Section 20.2002 contrary to its unambiguous terms, NRC also created a *de facto* new regulation in violation of Administrative Procedure Act ("APA") notice-and-comment requirements. In further violation of the APA, NRC failed to give a reasoned explanation for this new position in the 2019 Letter, and now attempts to offer impermissible *post-hoc* rationalizations for its action. And by arbitrarily imposing that new interpretation on licensees without the necessary analysis or evaluation, NRC violated its Backfitting Rule, 10 C.F.R. § 50.109, which applies both to new regulations *and* new interpretations of existing requirements.

Accordingly, this Court should vacate NRC's action as articulated in the 2019 Letter, reinstate NRC's previous practice, and remand to the agency for further consideration.

ARGUMENT

I. NRC'S 2019 LETTER CONSTITUTES REVIEWABLE FINAL AGENCY ACTION

The 2019 Letter constitutes reviewable final agency action. An agency decision is final if it marks the consummation of the agency's decisionmaking process and has direct and appreciable legal consequences. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). NRC concedes (at 22) that its 2019 Letter satisfies the first requirement. Instead, it argues that the 2019 Letter does not have legal consequences because it merely repeats a position purportedly made clear previously in NRC's 2012 Letter and 2016 Issue Summary. As explained below, that is incorrect. The 2019 Letter articulates a new, final agency position with legal and practical consequences, creating *new* regulatory burdens and enforcement risks for licensees with valid state approvals.

A. The 2019 Letter Creates New Regulatory Burdens and Enforcement Risks for Licensees

As explained in NEI's opening brief (at 34-37), the new position taken in the 2019 Letter—that NRC alone has jurisdiction over reactor licensees' very low-level waste disposal procedures—has significant legal and practical consequences for NRC licensees in Agreement States. NRC's 2019 Letter imposes new requirements for disposal procedure approvals that licensees must follow, or risk enforcement action. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000)

(guidance document constituted final agency action because "[i]t commands, it requires, it orders, it dictates"). Under NRC's prior position, licensees in Agreement States needed to seek very low-level waste disposal approval *only* from their respective Agreement States. Now, post-2019 Letter, they must obtain NRC approval, even if they have an Agreement State approval. 2019 Letter 1 (JA__).

That the 2019 Letter was issued in response to NEI's letter requesting rescission of the 2016 Issue Summary "did not preclude the agency from expressing a final position in that document." *Ciba-Geigy Corp. v. U.S. EPA*, 801 F.2d 430, 436 n.8 (D.C. Cir. 1986). In response to NEI's letter, NRC could have reaffirmed that the Issue Summary was "informational" and called only for "strictly voluntary" action by licensees. Instead, NRC did something different. It said licensees "must" follow the Issue Summary and submit a Section 20.2002 application to NRC for approval of waste disposal procedures or risk enforcement action. *See* 2019 Letter 1 (JA__).

Importantly, the 2019 Letter also offered a new legal basis for NRC's approval requirement, stating that "this requirement *is based on the NRC's jurisdiction over the operation of nuclear power plants*, which cannot be delegated to an Agreement State." 2019 Letter 1 (JA__) (emphasis added). NRC concedes (at 26) that *before* the 2019 Letter it "did not expressly refer to the non-delegability of jurisdiction over nuclear power plants" as a rationale for its new interpretation.

The legal effect of this new requirement is evident from NRC's initial statement that it "will consider" exercising enforcement discretion for licensees that have relied on existing Agreement State approvals, but only "on a case-by-case basis." 2019 Letter 1 (JA__). Enforcement discretion is necessary only where the agency finds a legal violation in the first place. Significantly, this statement also implies there are cases in which enforcement discretion will *not* be exercised—a risk which has now become reality for some licensees. *See* Hedges Decl. ¶¶ 19-21 (ADD10-12).

Despite the new legal consequences that flow from its 2019 Letter, NRC attempts (at 21) to avoid judicial review by arguing that its new interpretation would be "susceptible to challenge, if need be, in the event that enforcement action is taken against a licensee." But where, as here, an "agency publicly articulates an unequivocal position . . . and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review." *Ciba-Geigy*, 801 F.2d at 436. A licensee's "only alternative to obtaining judicial review now is to violate [NRC's] directives," refuse to seek the newly-required NRC approval, "and then defend an enforcement proceeding on the grounds [NEI] raises here." *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 49 (D.C. Cir. 2000). This choice between "costly compliance," and the risk of "serious civil and criminal penalties" underscores the

2019 Letter's legal consequences and provides no basis to delay judicial review. *Ciba-Geigy*, 810 F.2d at 438-39.[2]

In short, the 2019 Letter put forth a new regulatory regime with new legal consequences for NRC licensees, and NRC's arguments to the contrary lack merit.

B. The 2019 Letter Does Not Simply Restate a Prior NRC Position

Before the 2019 Letter, no reasonable observer would have perceived a "very substantial risk" that NRC would interpret its 2012 Letter and 2016 Issue Summary in the manner it now advances. *See Dominion Res., Inc. v. FERC*, 286 F.3d 586, 589 (D.C. Cir. 2002). Neither document reflected the position that NRC articulated in the 2019 Letter.

1. The 2012 Agreement State Letter Did Not Alter the 1986 Information Notice

NRC claims (at 27) that "its conclusion that NRC licensees must apply to the NRC under Section 20.2002 to use an alternative method of disposal" can be traced back to the 2012 Letter. But as discussed below and in NEI's brief opposing the

[2] Obtaining review of an enforcement action is not as easy as NRC suggests. NRC regulations do not provide for an opportunity for hearing to challenge a notice of violation. *Compare* 10 C.F.R. § 2.201(b), *with id.* §§ 2.202(a)(3)(i), 2.205(d). In fact, for minor violations (like those at issue here), NRC typically does not issue a formal notice of violation or document its findings. *NRC Enforcement Policy* 12, 82 (Jan. 15, 2020), https://www.nrc.gov/docs/ML1935/ML19352E921.pdf. Nonetheless, under its enforcement policy, NRC views a failure to correct a minor violation within a reasonable time as a potential willful violation, which could then raise the potential for civil and criminal penalties. *Id.* at 11; *see also* 42 U.S.C. § 2273(a), (c) (AEA civil and criminal penalties).

Government's motion to dismiss (Opp. to Mot. to Dismiss 14-15 (Mar. 11, 2020)), the 2012 Letter did not effect the regulatory change that NRC claims.

The 2012 Letter does not purport to reverse the agency policy articulated in the 1986 Information Notice. Indeed, it does not reference the Information Notice at all. The 2012 Letter, which NRC styled as a "clarification," is simply not germane to the issues before the Court.

Directed to Agreement States, not NRC licensees, the 2012 Letter's stated purpose is to clarify how Section 20.2002 and similar Agreement State processes work when the waste disposal facility "is located in another State" than the waste generator. 2012 Letter 1 (JA__). The 2012 Letter's summary paragraph reinforces its focus on these interstate situations, noting that "the operator of an unlicensed [disposal] 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." *Id.* at 3 (JA__)

(emphasis added). The letter also did not reference AEA Section 274(c)(1), or distinguish between reactor "operation" and "disposal."[3]

Finally, NRC does not explain how NRC licensees could have been on notice of the 2012 Letter's supposed policy change given that it was neither directed to licensees nor published in the *Federal Register*. The 2012 Letter acknowledges as much, stating that "[i]n 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*" and "*will be shared* with the Agreement States once it has been finalized." 2012 Letter 3 (JA__) (emphasis added). This guidance, as NRC points out (at 53), was not issued until 2020. This Court has long held that "[p]otential petitioners cannot be expected to squirrel through the Commission's public document room in search of papers that might reflect final agency action." *Public Citizen v. NRC*, 901 F.2d 147, 153 (D.C. Cir. 1990). NRC's failure to direct the 2012 Letter to NRC licensees further belies its claim that this document effected

[3] NRC disputes (at 10-11 & n.4) that it consistently maintained the agency policy announced in the 1986 Information Notice. But the examples cited by NRC hardly constitute a reversal of agency policy. One example suggests there was confusion over whether federal approval was needed given it "does not authorize [the disposal facility] to accept any material it is not otherwise licensed to receive under Texas licensing authority." 70 Fed. Reg. 24,124, 24,126 (May 6, 2005). In any event, that NEI's members received Agreement State approvals after the 2012 Letter underscores that Agreement States and industry did not understand the 2012 Letter to alter agency policy or requirements. *See* Weber Decl. ¶ 17 (ADD43).

a policy change of which licensees should have been aware, let alone the change NRC now attributes to it.

In support of its overbroad reading of the 2012 Letter, NRC points (at 13, 42) to "Scenario 4" of that letter, in which an NRC licensee applies for authorization to dispose of material at an unlicensed facility in an Agreement State. *See* 2012 Letter 2 (JA__). NRC claims that this scenario makes clear NRC licensees in Agreement States must seek approval from NRC to dispose of the waste. But it is unclear from the referenced scenario whether the hypothetical NRC licensee is even located in an Agreement State—which would have been a crucial fact to include if NRC actually intended to reverse its prior position. *Id.* Moreover, if NRC intended to use this "scenario" to reassert jurisdiction over the disposal procedures of NRC licensees in Agreement States, it could have said so. It did not. NRC thus inaccurately characterizes the 2012 Letter when it claims that that document communicated the regulatory change articulated in the 2019 Letter.

2. The 2016 Issue Summary Did Not Create Legal Consequences

NRC's claim that the 2019 Letter merely restates a position articulated in the 2016 Issue Summary is similarly unavailing. As discussed in NEI's opening brief (at 32-34), the Issue Summary suggested that NRC's position with respect to very low-level waste disposal was changing insofar as the Issue Summary supersedes the agency position articulated in the 1986 Information Notice. Nevertheless, the Issue

Summary plainly stated that "no action or written response" was required from NRC licensees, and that it did "not represent a departure from current regulatory requirements and practice." 2016 Issue Summary 3 (JA__). Notably, when NRC issued the Issue Summary, it knew that multiple NRC licensees had valid Agreement State approvals. *See* Hedges Decl. ¶ 18 (ADD9-10). The Backfitting Rule would have been triggered if the 2016 Issue Summary had required licensees to change their procedures. 10 C.F.R. § 50.109(a)(1). But the Issue Summary did not say state approvals were no longer valid—it said there was "not a backfit" and any action taken by licensees was "strictly voluntary." 2016 Issue Summary 3 (JA__).

NRC attempts (at 28-30) to reframe the Issue Summary's backfit discussion by essentially arguing that the 2012 Letter to Agreement States already imposed a backfit on NRC licensees. NRC thus contends that the 2016 Issue Summary's statement (at 3 (JA__)) that it "does not represent a departure from current regulatory requirements and practice" was a reference to "requirements and practice" imposed on licensees in 2012. This argument falls flat. As discussed above, the 2012 Letter did not alter the position articulated in the Information Notice, did not require changes from licensees, and did not include a backfitting analysis. Moreover, no licensee reasonably would have perceived a "very substantial risk" that NRC might, several years later, construe the 2016 Issue Summary, or its reference to "current requirements and practice," to mean what NRC eventually posited in 2019. *See*

Dominion Res., 286 F.3d at 589. Rather, licensees reasonably would have read the 2016 Issue Summary to mean what it says: NRC was not imposing a backfit on licensees and required "no action or written response." 2016 Issue Summary 3 (JA__).

NRC also claims (at 25-26) that its newfound understanding that waste disposal procedures are part of nuclear power plant "operation" and that their approval cannot be delegated to Agreement States, 2019 Letter 1 (JA__), has a basis in the 2016 Issue Summary. But as NRC concedes (at 26), the Issue Summary contains no discussion of reactor "operations" or this non-delegation theory. The Issue Summary's reference to the "regulatory authority that issued the license" is *not* equivalent to NRC's exclusive, non-delegable jurisdiction over reactor operations. On its face, the Issue Summary applies to "[a]ll NRC licensees"—not just reactor licensees covered by AEA Section 274(c)(1). It applies, for example, to other NRC licensees in Agreement States, like Veteran Affairs hospitals, nuclear fuel-fabrication facilities, and federal agencies—none of which is subject to AEA Section 274(c)(1). NRC's 2019 Letter thus adopted a rationale for its action that is nowhere to be found in the 2016 Issue Summary.

In short, between issuance of the 2016 Issue Summary and the 2019 Letter, NRC revised the legal effect and basis of that Issue Summary, disclaiming its 2016

representation to industry that it was not departing from current regulatory requirements and practice.

3. *Independent Equipment Dealers* Is Inapposite

This case stands in sharp contrast to *Independent Equipment Dealers Association v. EPA*, 372 F.3d 420 (D.C. Cir. 2004), on which NRC relies. In that case, a trade association wrote to the Environmental Protection Agency ("EPA") requesting it confirm the association's interpretation of certain EPA regulations. *Id.* at 424-25. EPA disagreed with the association's interpretation, citing longstanding policy, and the trade association petitioned for review of that decision. This Court found that EPA's letter was the "'type of workaday advice letter that agencies prepare countless times per year in dealing with the regulated community,'" and which did not effect regulatory change. *Id.* at 427 (citation omitted). Because the EPA letter neither "announced a new interpretation of the regulations nor effected a change in the regulations themselves," it did not constitute final agency action. *Id.* The fact that the agency might later enforce the legal interpretation repeated in the letter was insufficient to make the letter itself final agency action.

Here, rather than restating "information" already included in the Issue Summary (or the irrelevant 2012 Letter), the 2019 Letter conveyed a new agency position that directly conflicts with the Issue Summary. *See supra* at 11. The 2016 Issue Summary said it imposed no backfit, required no action, and merely provided

information—it thus had no legal consequences for NRC licensees. The 2019 Letter rescinded that prophylactic language and created new legal consequences for NRC licensees, including the potential for enforcement action.

The 2019 Letter also followed months of agency flip-flopping about the legal implications of the Issue Summary and NRC's statement that it "is evaluating the issue generically to provide further clarity." Oct. 31, 2018 NRC Letter to STP Nuclear Operating Company 2 (JA__). Unlike the letter at issue in *Independent Equipment Dealers*, NRC's 2019 Letter wrought regulatory change by imposing new legal obligations on licensees that were not articulated in the Issue Summary.

This case is therefore more like *Appalachian Power Co.* and *Barrick Goldstrike Mines*, in which the courts found informal communications or guidance documents that imposed legal obligations or altered the agency's policy position could constitute final agency action. *See Barrick Goldstrike*, 215 F.3d at 50; *Appalachian Power*, 208 F.3d at 1023; *see also Ciba-Geigy*, 801 F.2d at 436-38 & nn.8-9 (challenge to EPA position taken in letter to petitioner was ripe, because it represented EPA's final position on the matter and had legal consequences). Because the 2019 Letter altered the regulatory regime and imposed new requirements on NRC licensees, it satisfies the "legal consequences" prong of the *Bennett* test.

II. NRC'S NEW REGULATORY INTERPRETATION IS UNLAWFUL

NRC's 2019 Letter states that reactor licensees must seek approval to dispose of very low-level waste from NRC—not Agreement States—"based on the NRC's jurisdiction over the operation of nuclear power plants, which cannot be delegated to an Agreement State." 2019 Letter 1 (JA__). NRC previously acknowledged, however, that it would need to amend 10 C.F.R. Part 150 in order to take this authority back, and it concedes (at 42) that it has not done so. *See* Office of Executive Legal Director, NRC, Jurisdiction Over Low Level Waste Management at Reactor Sites in Agreement States 2 (Sept. 13, 1985) ("Legal Opinion") (JA__); 61 Fed. Reg. 26,852, 26,852-53 (May 29, 1996). NRC now says it has *reinterpreted* a *different* regulation—10 C.F.R. § 20.2002—to do functionally the same thing. NRC thus seeks to circumvent the AEA-required regulation or order by contending that Section 20.2002 authorizes it to regulate alternative disposal procedures for very low-level radioactive waste in Agreement States. It does so notwithstanding that NRC previously transferred such authority to Agreement States and decided against issuing a regulation or order taking that authority back.

At most, Section 20.2002 can be read as establishing a method for NRC licensees to obtain approval of proposed disposal procedures in situations not relevant here. There is no dispute that licensees located in *non-Agreement States* may use Section 20.2002 to obtain NRC approval of alternative disposal procedures

for very low-level radioactive waste. But Section 20.2002 is *not* triggered with respect to such activities in Agreement States precisely because NRC long ago ceded disposal authority to Agreement States. And NRC's new interpretation of Section 20.2002 does not satisfy the AEA's requirement of a regulation to reclaim jurisdiction from Agreement States.

A. Section 20.2002 Addresses Waste "Disposal," Not Reactor Operations

To avoid dual regulation, when an Agreement State assumes NRC's delegated authority for low-level waste disposal, anyone in the state subject to NRC jurisdiction "is exempt . . . from regulations of the Commission applicable to licensees." 10 C.F.R. § 150.10. NRC, however, must retain exclusive authority over the "operation" of reactor facilities, among other things. 42 U.S.C. § 2021(c)(1); 10 C.F.R. § 150.15(a)(1). NRC long interpreted these provisions to allow Agreement States to approve an NRC licensee's alternative disposal procedures for very low-level waste because such disposal is not part of reactor operations. In other words, Section 150.10 exempted NRC licensees from the requirement in Section 20.2002 to seek NRC's approvals of alternative disposal procedures; licensees would instead need to secure Agreement State approvals.

Whether Section 150.10 makes Section 20.2002 inapplicable to NRC licensees in Agreement States turns on whether the latter regulates reactor "operations" or "disposal." NRC argues (at 45) that it is "compelled" to conclude

that Section 20.2002 regulates "operations," such that Section 150.15(a)(1) and AEA Section 274(c)(1) prohibit Agreement States from assuming the regulatory authority to approve an NRC licensee's alternative disposal procedures.

NRC is wrong. Nothing in the AEA or NRC regulations hints, much less compels, NRC to construe Section 20.2002 as applying to reactor *operations* rather than *waste disposal*. "[B]ecause 'deference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that interpretation is compelled by Congress,' [the Court] may not defer to the [NRC's] reading if it is but one of several permissible interpretations of the statutory language." *Am. Lung Ass'n v. EPA*, No. 19-1140, 2021 WL 162579, at *15 (D.C. Cir. Jan. 19, 2021) (citations omitted). For NRC "to prevail, its reading must be required by the statutory text." *Id.* at *16. NRC's attempted reinterpretation fails for at least three reasons.

First, the term reactor "operation" in AEA Section 274(c)(1) cannot reasonably be read to include nuclear waste "disposal." NRC concedes (at 51) that these are "discrete activities." Disposal is clearly, and separately, addressed in AEA Section 274(c)(3)-(4), not (c)(1). *See* NEI Br. 48-49. Thus, Section 274(c)(1), on which NRC relies, cannot be read to compel NRC's conclusion that the AEA precludes Agreement State approval of a reactor licensee's waste disposal procedures.

Second, by its plain terms and indeed its very title, Section 20.2002 deals with "disposal." *See* NEI Br. 50-51. NRC has broad discretion to regulate reactor "operation," and defined that term to include the "storage and handling" of radioactive waste before its ultimate disposal—but, critically, not disposal itself. *See* 10 C.F.R. § 150.15(a)(1). The requirements in Section 20.2002 are directed at the risks and conditions at the waste disposal facility—not the risks and conditions at the reactor site prior to waste disposal. *See id.* § 20.2002.

NRC nonetheless attempts (at 52-54) to draw an artificial distinction between waste disposal procedures and the act of disposal itself—even though disposal procedures deal with the act of disposal, not the pre-disposal storage and handling of waste referenced by NRC. Despite NRC's suggestion that a Section 20.2002 review allows it to regulate operational activities related to waste handling and transportation, such activities are clearly addressed in other regulations, not Section 20.2002. *See, e.g.*, 10 C.F.R. § 20.1904 (labeling requirements for safe handling of waste containers); *id.* § 20.2006 (requirements for transfer and manifesting waste shipments); *id.* § 20.2108 (recordkeeping requirements for waste disposal); *id.* § 71.5 (transportation requirements). These other regulations are consistent with NRC's ability to maintain exclusive regulatory authority over a reactor licensee's handling of waste pre-disposal and underscore the unreasonably expansive nature of NRC's new reading of Section 20.2002.

Third, consistent with its plain language, NRC historically classified Section 20.2002 as a disposal regulation rather than one addressing reactor operations. In a 1985 Legal Opinion, NRC determined that it could not reassert authority over low-level waste disposal "without a rulemaking proceeding, or by issuance of appropriate orders." Legal Opinion 2 (JA__). Based on this understanding, NRC proposed, and later withdrew, a 1988 rule that would have reasserted NRC jurisdiction over reactor licensee waste disposal procedures. *See* 61 Fed. Reg. at 26,852-53. Under its current flawed logic, NRC would have the Court believe that all these prior interpretations were wrong, and that NRC violated Section 20.2002 and AEA Section 274(c)(1) for decades.

In summary, nothing in the AEA or NRC regulations supports NRC's conclusion that Section 20.2002 concerns nuclear reactor operations, and AEA Section 274(c) belies NRC's conclusion. NRC's conclusion that the AEA mandates its new position is erroneous and entitled to no deference. *See Am. Lung Ass'n*, 2021 WL 162579, at *15. And because Section 20.2002 unambiguously applies to waste disposal (not reactor operations), the Court need not afford *Auer* deference to NRC's reinterpretation of that provision. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). The Court should thus reject NRC's claim that Section 20.2002 applies to reactor operations.

B. NRC's Reading of Section 20.2002 Is Inconsistent with Other NRC Regulations

To bolster its new regulatory interpretation, NRC points (at 49) to the language in Section 20.2002 stating that NRC licensees "may apply to the Commission" for approval of alternative disposal procedures. 10 C.F.R. § 20.2002. But NRC, in doing so, ignores Section 150.10. As explained above, Section 150.10 exempts licensees that would otherwise be subject to Section 20.2002 from its applicability. *See supra* at 17.

Applying NRC's flawed logic also leads to absurd results. If Part 20 were read in isolation, ignoring Section 150.10 as NRC suggests, no transfer to an Agreement State-licensed disposal facility could, as a practical matter, occur. As NRC observes (at 5, 12), 10 C.F.R. § 20.2001(a)(1) authorizes transfers to an "authorized recipient," such as low-level waste disposal facilities licensed under 10 C.F.R. Part 61. Significantly, none of the nation's low-level waste disposal facilities is licensed by NRC under Part 61—they are all licensed by Agreement States via their own NRC-compatible and adequate regulations. *See* 42 U.S.C. § 2021(d)(2).

To avoid the preposterous conclusion that Section 20.2001(a)(1) does not permit an NRC licensee to transfer waste to an Agreement State-licensed facility, NRC adds (at 5, 8) the phrase "or Agreement State-equivalent regulations" into Section 20.2001(a)(1). Again, it does so even though that regulation references only NRC-licensed disposal facilities (of which there are none). *See* 10 C.F.R.

§ 20.2001(a)(1). But NRC refuses to read "or Agreement State-equivalent regulations" into Section 20.2001(a)(4), which also authorizes NRC licensees to dispose of waste under Section 20.2002. *See id.* § 20.2001(a)(4).

There is no way to reconcile NRC's inconsistent reading of Section 20.2001(a)—which inserts "or Agreement State-equivalent regulations" into some provisions but refuses to read it into the one that references Section 20.2002. The Court need not adopt this inconsistent interpretation and should instead read Sections 20.2001, 20.2002, and 150.10 together, as NRC did for decades.

There are other logical inconsistencies with NRC's position. Despite NRC's nebulous reference (at 8) to a "potential safety concern," NRC has no concern with an Agreement State regulating the *recipient* of the waste (*i.e.*, the entity ultimately responsible for disposal). Yet NRC suggests it must approve the *generator's* disposal procedures even though the technical considerations are no different than those considered by the Agreement State. NRC likewise has no concern with Agreement States regulating disposal of low-level waste generally, but believes states cannot approve disposal procedures for very low-level waste, the material with the lowest safety risk. This makes no sense. And critically, nothing in the record suggests that Agreement State regulation of very low-level waste disposal poses a

safety issue or that NRC lacks tools to oversee Agreement State programs. *See* NEI Br. 43-44.

III. NRC FAILED TO OFFER A SUFFICIENT EXPLANATION FOR ITS NEW INTERPRETATION OF SECTION 20.2002

In its 2019 Letter, NRC violated the APA requirement for reasoned decisionmaking because it provided no legal or factual analysis to support its contention that low-level waste disposal procedures are part of nuclear reactor "operation." According to NRC (at 44), NEI "ignores the events of the last eight years" because the 2019 Letter merely restates the position communicated in the 2012 Letter and 2016 Issue Summary. Not so. As discussed above, the 2019 Letter changed NRC's position concerning both the legal effect of the Issue Summary and the legal basis for the agency's new approval requirement. *See supra* at 5. In doing so, NRC abandoned its prior position without citing the relevant statutory and regulatory provisions, addressing the original rationales for NRC's longstanding contrary interpretation, providing any factual support for the new interpretation, or considering industry's reliance on NRC's prior position.

Even considering its 2012 and 2016 statements, NRC has not satisfied its obligation to explain its changed position. NRC offers (at 45) *post-hoc* rationales found nowhere in 2019 Letter (or prior documents), claiming that its new position is "compelled" by the AEA and NRC regulations, and necessary for it to retain jurisdiction over waste prior to disposal. But NRC's justification for its new position

is limited to reasons stated in its decision document and may not be upheld based on these "impermissible *post hoc* rationalizations." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020).

Moreover, while "an agency may justify its policy choice by explaining why that policy 'is more consistent with statutory language' than alternative policies," it violates the APA's requirement for reasoned decisionmaking when it does "not analyze or explain why the statute should be interpreted" as the agency suggests. *Encino Motorcars., LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007)). That is precisely what has happened here.

Notably, the 2012 Letter makes no reference to the 1986 Information Notice, AEA Section 274(c)(1), or the distinction between reactor "operation" and "disposal." Indeed, the 2012 Letter did not purport to change anything—it was labelled as a mere "clarification" and not even sent to licensees. 2012 Letter 1 (JA__). The 2016 Issue Summary stated that it supersedes the 1986 Information Notice because the position in that document was incorrect. 2016 Issue Summary 1 (JA__). But the Issue Summary provided no explanation or supporting rationale for that conclusion (much less one based on the notion that Section 20.2002 governs reactor operations). *Id.* NRC simply failed to offer any meaningful explanation of

its new position. The agency's new interpretation was thus arbitrary and capricious, and at odds with the APA requirement for reasoned decisionmaking.

IV. NRC FAILED TO COMPLY WITH NOTICE-AND-COMMENT PROCEDURES BEFORE *DE FACTO* AMENDING SECTION 20.2002

In response to NEI's argument that the 2019 Letter gave the 2016 Issue Summary the force and effect of law in enforcement actions, NRC again claims (at 41) that the 2019 Letter simply restated its 2012 and 2016 position. But the 2019 Letter did far more than reiterate a prior NRC position; it changed the legal effect of the Issue Summary *and* the legal basis for NRC's new approval requirement, altering the regulatory landscape for reactor licensees. *See supra* at 5.

Nothing in Section 20.2002's plain language, structure, or history suggests that provision concerns reactor operations. NRC's attempt to reinterpret Section 20.2002 in a manner inconsistent with its plain language thus constitutes a *de facto* amendment to that rule. This NRC "cannot legally do without complying with [notice-and-comment] rulemaking procedures." *Appalachian Power*, 208 F.3d at 1028; *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) ("To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."). Because its 2019 Letter substantively altered agency policy and requirements without following notice-and-comment procedures, NRC violated the APA.

V. NRC'S 2019 LETTER IMPOSED A NEW INTERPRETATION AS A BACKFIT WITHOUT INVOKING ANY EXCEPTION EXCUSING THE REQUIRED ANALYSIS

NRC failed to comply with its "Backfitting Rule" before imposing new disposal requirements on reactor licensees. As explained above, the 2019 Letter imposed a backfit because it did far more than restate a prior NRC position. *See supra* at 8-14.

NRC's claim (at 48) that its prior position "has been known to the regulated community since at least 2012" is baseless. The 2012 Letter was not sent to licensees or published in the *Federal Register*. It also did not purport to reverse agency policy. As explained above, NRC characterized the 2012 Letter as a "clarification" rather than a new NRC policy position or interpretation of agency regulations. In fact, the 2012 Letter's plainly stated purpose was to clarify how Section 20.2002 and similar Agreement State processes work in multistate situations. 2012 Letter 1 (JA__); *see also supra* at 9.

Significantly, the 2016 Issue Summary states that there is "not a backfit" and it contains no "backfitting" analysis or evaluation (which would have been required if NRC had sought to impose new or different interpretations of its regulations). 2016 Issue Summary 3 (JA__). Thus, when the 2019 Letter reversed course and said licensees "must" follow the Issue Summary and submit a Section 20.2002 application for approval of very low-level waste disposal procedures (or risk

enforcement action), NRC violated its Backfitting Rule by failing to perform the required analysis.

NRC belatedly attempts (at 48-49) to invoke an exception to the Backfitting Rule's requirement that it prepare "a systematic and documented analysis" to determine whether imposing the prospective new rule or interpretation is justified considering its benefits and costs. 10 C.F.R. § 50.109(a)(2). The Backfitting Rule allows NRC to prepare a documented evaluation that explains why the agency is invoking a listed exception to the otherwise required systematic analysis. *Id.* § 50.109(a)(2)-(4). But NRC's reference to the so-called "compliance" exception in Section 50.109(a)(4)(i) is misplaced in two major respects.

First, the Issue Summary said there is "not a backfit" for which an exception might be necessary and did not otherwise purport to invoke the compliance (or any other) exception. Issue Summary 3 (JA__). The Issue Summary's passing reference to compliance—in the middle of a sentence saying there is no backfit—hardly meets NRC's own requirement for a documented evaluation justifying an agency exception to performing a more detailed systematic analysis. *See* 10 C.F.R. § 50.109(a)(4) (allowing exception when NRC "finds and declares, with appropriated documented evaluation for its finding" that the relevant standard is satisfied). Having failed to make the necessary finding or declaration of the compliance exception's

applicability in the Issue Summary, and then failing again to do so in the 2019 Letter, NRC may not do so now. *See Regents*, 140 S. Ct. at 1909.

Second, even had it invoked the compliance exception as the basis for its decision, that exception is inapplicable here. The Commission has made clear "that new or modified interpretations of what constitutes compliance would not fall within the exception." 50 Fed. Reg. 38,097, 38,103 (Sept. 20, 1985). In this case, the requirements in Section 20.2002 have not changed; only NRC's interpretation of what constitutes compliance has changed, rendering the exception inapplicable. A contrary finding would allow the compliance exception to swallow the Backfitting Rule, which applies to both changes to regulations and new or different regulatory interpretations.

CONCLUSION

NRC's 2019 Letter constitutes final agency action that created *new* regulatory burdens and enforcement risks for licensees with existing state approvals. This new NRC position could not reasonably have been anticipated by licensees reviewing the 2012 Letter or 2016 Issue Summary. NRC's new *post-hoc* interpretation is inconsistent with the AEA and NRC regulations, and amounts to a *de facto* amendment undertaken without reasoned explanation, public comment, or compliance with the Backfitting Rule. NEI respectfully requests that this Court vacate NRC's determination that compliance with the agency's new very low-level

waste disposal requirement is mandatory for NRC licensees, reinstate NRC's prior position, *see CropLife America v. EPA*, 329 F.3d 876, 884 (D.C. Cir. 2003), and remand to NRC for further consideration.

Dated: February 8, 2021

Respectfully submitted,

/s/ Steven P. Croley

Steven P. Croley
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004-1304
(202) 637-2200
steven.croley@lw.com

Counsel for Petitioner

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1), this document contains 6,448 words, as determined by the word-count function of Microsoft Word 2016.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman Font.

/s/ Steven P. Croley
Steven P. Croley