

**IN THE 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.

Case No. 19-1240

PETITIONER’S NON-BINDING STATEMENT OF ISSUES

In accordance with the Court’s Order dated December 17, 2019, the Nuclear Energy Institute (“NEI”) submits the following non-binding statement of issues to be raised in this Court’s review of the Nuclear Regulatory Commission’s (“NRC”) adherence to and substantive and material alteration of Regulatory Issue Summary 2016-11 (“RIS 2016-11”) without notice, as expressed in a letter to NEI from John Lubinski, the Director of the Office of Nuclear Material Safety and Safeguards at NRC, dated September 16, 2019 (“Lubinski Letter”):

1. The Atomic Energy Act allows NRC to transfer to the States via agreement the authority to regulate the disposal of low-level radioactive waste unless NRC determines by “regulation or order” an NRC license is required for such waste disposal. NRC determined by regulation that States may regulate low-level waste

disposal and has transferred regulatory authority to “Agreement States.” In the challenged action, NRC reversed its decades-old position that approval of low-level waste disposal procedures should be issued by the Agreement States (not NRC), and has only now notified the industry of this material change through the Lubinski Letter. Did NRC abuse its discretion and act not in accordance with the Atomic Energy Act when—through issuance of RIS 2016-11 and the Lubinski Letter—it required that approval of procedures to dispose of very low-level waste generated at nuclear power plants come from NRC (not Agreement States)?

2. The Lubinski Letter reaffirmed the statement in RIS 2016-11 that NRC’s decades-old interpretation of the Atomic Energy Act and NRC regulations was incorrect, and indicated that NRC would now rely on RIS 2016-11 as a basis for enforcement. But neither the Lubinski Letter nor RIS 2016-11 provided an explanation of the basis for NRC’s changed interpretation. Are RIS 2016-11 and the Lubinski Letter arbitrary and capricious, an abuse of discretion, or otherwise contrary to law under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, because they deviate from NRC’s prior interpretation of the Atomic Energy Act and NRC regulations: (a) without identifying statutory and regulatory provisions that address this issue; (b) without engaging with or addressing the original rationales for NRC’s prior, contrary interpretation; and (c) without providing any

factual findings that support the new interpretation or address the industry's reliance on NRC's prior interpretation?

3. NRC's "Backfitting Rule" requires the agency to conduct an analysis or evaluation before imposing certain new or amended regulations, or new or different interpretations of unchanged regulations, on certain classes of licensees. RIS 2016-11 stated it "require[d] no action or written response" and was "strictly voluntary." Without addressing the Backfitting Rule, the Lubinski Letter stated licensees "must" follow RIS 2016-11 or risk enforcement action. Was NRC's failure to perform a backfitting analysis or evaluation arbitrary and capricious, an abuse of discretion, or otherwise a violation of law under the APA?

4. The Lubinski Letter indicates that RIS 2016-11 will have the force and effect of law in NRC enforcement actions, but NRC did not provide notice or an opportunity for public comment prior to issuance of either RIS 2016-11 or the Lubinski Letter. Did NRC violate the APA, by failing to provide notice and an opportunity to comment before issuing RIS 2016-11 and/or the Lubinski Letter?

5. In the alternative, NRC regulations require a 30-day post-promulgation comment period for any "interpretive rule." Even assuming the Lubinski Letter and RIS 2016-11 do not have the force and effect of law and are instead interpretative rules, was NRC's decision not to offer a post-promulgation comment opportunity arbitrary and capricious, an abuse of discretion, or otherwise a violation of law?

Dated: January 21, 2020

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 SERVICE

I, Steven P. Croley, hereby certify that on January 21, 2020, the foregoing has been electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Steven P. Croley

Steven P. Croley