ORAL ARGUMENT NOT YET SCHEDULED
No. 19-1240

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NUCLEAR ENERGY INSTITUTE
Petitioner,

v.

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

On Petition for Review of Action by the
Nuclear Regulatory Commission

RESPONDENTS' REPLY TO PETITIONER'S OPPOSITION TO MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Judicial Decisions

Statutes and Regulations

INTRODUCTION

Petitioner Nuclear Energy Institute (NEI) has responded to our motion to dismiss ("Motion") by asserting that the NRC's September 16, 2019, letter (2019 Letter) constitutes final agency action from which direct and appreciable legal consequences flow. Specifically, it asserts that the 2019 Letter (1) "does not restate a prior NRC position"; and (2) "imposes new obligations on NRC licensees." NEI's Opposition to Respondents' Motion to Dismiss 11, 13, Document #1833123 (Mar. 11, 2020) ("Opposition"). NEI is wrong on both counts.

The 2019 Letter barely spans one page. It states that the 2016 Regulatory Issue Summary—which NEI had by previous letter requested that the agency rescind—"correctly" concluded that requests to use an alternative method of disposal of radioactive material must be submitted to the authority that licensed use of the material in the first instance. And, rather than imposing a requirement of its own, the 2019 Letter states that the agency will "consider enforcement discretion" for licensees who are not in compliance with the agency's regulations.

Simply stated, the 2019 Letter broke no new ground and did nothing to change the legal landscape or its licensees' obligations. Rather, it responded to an unsolicited letter and informed NEI that the agency would adhere to its existing interpretation of its own regulation. Deeming an informal communication of this

type to be judicially reviewable agency action would chill agency efforts to engage in good governance by responding to stakeholders' concerns, and the Court should decline NEI's invitation that it do so.

ARGUMENT

I. The 2019 letter cannot reasonably be read as a change to the 2016 regulatory issue summary.

NEI asserts that "[u]ntil the 2019 Letter, NRC's policy related to [very low-level waste] disposal had not settled, and therefore the legal effect challenged here did not exist before the 2019 Letter fully and clearly communicated the agency's position to the regulated industry." Opposition 14. But as we explained, Motion 12-14 (citing *Independent Equipment Dealers Association v. EPA*, 372 F.3d 420 (D.C. Cir. 2004)), the 2019 Letter cannot reasonably be read as a change from the position articulated in the 2016 Regulatory Issue Summary; by its terms, it is a "respon[se]" to NEI's "request[]" that the NRC "rescind" the Issue Summary, and a decision not to do so. Motion Exhibit 1, 2019 Letter at 1.

NEI ignores the workaday nature of the 2019 Letter and nonetheless asserts that, embedded within its one paragraph (two sentence) explanation of its conclusion is a "brand new legal theory." Opposition 2. Presumably, it is referring to the statement in the Letter that, "In the case of 10 CFR Part 50 or 52 licensees, th[e] requirement [to seek NRC approval for alternate methods of disposal] is based on the NRC's jurisdiction over the operation of nuclear power plants, which

cannot be delegated to an Agreement State." Motion Exhibit 1, 2019 Letter at 1; *see* Opposition 17-18 (characterizing the sentence as "a dramatic change in NRC's interpretation of the [Atomic Energy Act] and its delegation authority"). But the NRC made the same point in the 2016 Regulatory Issue Summary—that with respect to nuclear power plants (i.e., Part 50 and 52 licensees), "this request should be made to the NRC" because the NRC is the "regulatory authority that issued the license for use of the radioactive material." Motion Exhibit 4, 2016 Regulatory Issue Summary at 2.

It is true that, in the Issue Summary, the agency did not expressly refer to the non-delegability of jurisdiction over nuclear power plants. But this limitation has existed since the Agreement State program was adopted in 1959. *See* 42 U.S.C. § 2021(c)(1) ("No agreement entered into pursuant to subsection (b) shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of–(1) the construction and operation of any production or utilization facility or any uranium enrichment facility. . . ."). And the Issue Summary's directions concerning the appropriate regulatory authority to issue 10 C.F.R. § 20.2002 approvals are premised on precisely this statutory limitation. Pursuant to these directions, Part 50 and Part 52 licensees (i.e., operators of nuclear power plants) seeking an alternate method of waste disposal must obtain approval from the NRC, but persons authorized to possess

source, byproduct, or certain special nuclear material (authority over which *can* be discontinued pursuant to an agreement under 42 U.S.C. § 2021(b)), should obtain such approval either from the NRC (in non-Agreement States) or from Agreement States, as applicable. Motion Exhibit 4, 2016 Regulatory Issue Summary at 2. Thus, the 2019 Letter does not articulate a new legal theory; it simply refers to the underlying and widely-known justification for the conclusion that the agency expressed three years earlier. NEI's suggestion that the 2019 Letter breaks new legal ground therefore fails.

II. The 2019 Letter's bare, single-sentence mention of the potential for case-by-case enforcement discretion does not convert the 2019 Letter into final agency action.

NEI's second argument—that the 2019 Letter imposes new legal obligations—hinges on the claim that the 2019 Letter made the 2016 Regulatory Issue Summary apply "retroactively" and raised the specter of NRC enforcement action. Opposition 7-8, 12-13. On this point, it bears emphasizing that the NRC has taken *no* enforcement action against *any* NRC licensee for such a violation of 10 C.F.R. § 20.2002. The only instance where even the *possibility* of enforcement action was raised involved the South Texas Project. But the NRC decided against taking enforcement action in that instance. The NRC's innocuous acknowledgement in the 2019 Letter that it would consider the exercise of enforcement discretion for violations of § 20.2002 on a case-by-case basis reflects

the unremarkable fact that, as an agency responsible for enforcing legally binding requirements such as 10 C.F.R. § 20.2002, it will have to grapple with how to address what it believes to be instances of noncompliance by its licensees. The agency's statement that some party, somewhere, may be subject to enforcement action based on some hypothetical scenario (including, for example, a licensee that obtained an approval from an Agreement State after the NRC issued the 2016 Regulatory Issue Summary) is not an action from which legal obligations flow. *See AT&T Co. v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001) (injury sufficiently concrete for purposes of finality inquiry "typically is not caused when an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party"); *see also Center for Auto Safety v. National Highway Traffic Safety Administration*, 452 F.3d 798, 812 (D.C. Cir. 2006) (Randolph, J., concurring) ("Agency action is not final when it 'does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action.'" (quoting *DRG Funding Corp. v. HUD*, 76 F.3d 1212, 1215 (D.C. Cir. 1996)).[1]

[1] NEI asserts that the agency is necessarily foreclosed from requiring licensees to comply with approvals obtained prior to publication of the 2016 Regulatory Issue Summary because a retroactive application of the NRC's interpretation would constitute a "backfit," and that even the mere contemplation of enforcement action in these circumstances constitutes a change in the legal regime. *See* Opposition 16. Its sweeping assertion is unfounded. The agency has promulgated extensive

In fact, in responding to NEI and mentioning enforcement discretion, the NRC was doing little more than acting responsively to the concerns raised by NEI on behalf of its members. In direct contrast to cases where courts have found final agency action in informal agency documents that threaten, coerce, or direct significant civil or criminal penalties against the regulated community, the singular sentence in the 2019 Letter referring to the possibility of case-by-case enforcement discretion in hypothetical cases reflects that the agency was looking to work with licensees to bring them into compliance and, using the agency's words, to "streamline" the process for any licensees who might have obtained Agreement State approvals on the basis of prior guidance. It hardly suggests, as NEI claims, the specter of "significant legal and practical consequences," including "AEA civil and criminal penalties." Opposition 13; *cf. U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (noting that persons who defied Corps of Engineers' jurisdictional determination without a permit, under belief that they were free from regulation, would run risk of significant civil penalties).

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regulations concerning whether the retroactive application of an interpretation of a requirement requires a backfit analysis. *See* 10 C.F.R. § 50.109 (providing, for example, that adoption of interpretations that are necessary to bring a licensee into compliance with the Commission's regulations or to maintain adequate protection of public health and safety do not require such an evaluation). The agency's recognition in the 2019 Letter that enforcement action could conceivably be appropriate in some cases is perfectly consistent with the case-by-case analysis that its backfiting regulations contemplate.

Although NEI attempts to compare the instant case to the circumstances in *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45 (D.C. Cir. 2000), and *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000), those cases are inapposite. In *Barrick*, this Court found that an enforcement letter, issued in concert with a guidance document, constituted agency action from which legal consequences flowed. 215 F.3d at 48-49. Here, however, the NRC has not commenced enforcement action against anyone. *See Community Financial Services Association of America v. FDIC*, 132 F. Supp. 3d 98, 121 (D.D.C. 2015) ("In this case however, none of the Defendants have issued any enforcement letters and *Barrick* is not relevant."); *see also Reliable Automatic Sprinkler Co. v. Consumer Products Safety Commission*, 324 F.3d 726, 731-32 (D.C. Cir. 2003) (agency's letter was not final agency action where it "has not yet made any determination or issued any order imposing any obligation on [the petitioner], denying any right of [petitioner], or fixing any legal relationship" and where any enforcement action would require the agency to initiate a formal adjudication). Further, the NRC concedes that it would not, and indeed *could* not, rely on the 2016 Regulatory Issue Summary, and certainly not the 2019 Letter, as a basis for enforcement action because neither of those documents has the force and effect of law. Unlike *Barrick*, any enforcement action would be taken based on a violation of the regulation itself (which requires application "to the Commission" for

approval of alternate methods of disposal "of licensed material generated in the licensee's activities"). 10 C.F.R. § 20.2002; *compare Barrick*, 215 F.3d at 49 ("[I]f Barrick refuses to abide by the 1999 Guidance, the company will be subject to an enforcement action.").

Similarly, in *Appalachian Power v. EPA*, this Court, in holding that a nineteen-page EPA guidance document was judicially reviewable, noted that the guidance "reads like an ukase" and that "State authorities, with EPA's Guidance in hand, are insisting on [additional monitoring]." 208 F.3d at 1023. Unlike the guidance at issue in *Appalachian Power*, however, the 2019 Letter does not "command[]," does not "require[]," does not "order[]," and does not "dictate[]." *Id.*; *see also Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 227-28 (D.C. Cir. 2007) (identifying factors that distinguished *Appalachian Power*, including that EPA "does not treat the [agency guidance document] as binding"); *General Motors Corp. v. EPA*, 363 F.3d 442, 451 (D.C. Cir. 2004) (holding that agency letters that "did no more than state the obligations set forth in [prior guidance]" did not comprise final agency action). Rather, the 2019 Letter reflects the NRC's willingness to work with licensees to address the need to comply with the binding regulatory requirements in 10 C.F.R. § 20.2002.

The 2019 Letter is simply not a coercive tool, and it is difficult to imagine a more innocuous response declining NEI's invitation to rescind the 2016

Regulatory Issue Summary. If a one-sentence mention of enforcement discretion in hypothetical, future cases, renders the 2019 Letter final agency action, then all future agency communication would be chilled as the agency would have little incentive to explain or clarify its views. This is precisely the situation this Court has warned against in refusing to find similar informational, workaday agency letters to be judicially reviewable. *See, e.g., Valero Energy Corp. v. EPA*, 927 F.3d 532, 538 (D.C. Cir. 2019)*; Independent Equipment Dealers Association*, 372 F.3d at 428; *see also Clayton County, v. FAA*, 887 F.3d 1262, 1269 (11th Cir. 2018).

Finally, we stress that, in the event that the agency actually takes enforcement action against a licensee, that licensee will have a full and fair opportunity to present its arguments concerning the validity of the agency's interpretation of 10 C.F.R. § 20.2002. But there is no reason to dislodge well-settled principles of finality, or to create or extend an exception to the Hobbs Act's 60-day window for challenging final orders, based solely upon the agency's decision to informally communicate its adherence to an interpretation of a regulation—a position that it announced more than three years ago.

CONCLUSION

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

Respectfully submitted,

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DJ 90-13-3-15901
Dated: April 2, 2020

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