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Attachments: 2020-7-20 FINAL NEI COMMENTS ON NRC VLLW DISPOSAL_ 10 CFR 20.2001 PROPOSED INTERPRETIVE RULE.pdf

ATTN: Program Management, Announcements and Editing Staff:

The Nuclear Energy Institute (NEI), on behalf of its members, hereby submits comments in response to the NRC's March 6, 2020, proposed interpretive rule, which seeks to reinterpret NRC regulations and modify NRC guidance to allow licensees to transfer very low-level radioactive waste (VLLW) to persons holding specific exemptions under 10 CFR Parts 30, 40, and 70 for disposal of VLLW by land burial. See *Transfer of Very Low-Level Waste to Exempt Persons for Disposal; Proposed Interpretive Rule; Request for Comments*, 85 Fed. Reg. 13,076 (Mar. 6, 2020). The NRC extended the original comment deadline to July 20, 2020, by *Federal Register* notice dated April 9, 2020 (85 Fed. Reg. 19,907). On May 8, 2020 (85 Fed. Reg. 27,332), the NRC provided the above e-mail address (VLLWTransferComments.Resource@nrc.gov) as an additional method for submitting comments.

Martin J. O'Neill, Associate General Counsel, NEI

on behalf of

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Submitted via [VLLWTransferComments.Resource@nrc.gov](https://www.nrc.gov/portal/0/ohp/ohp.cfm?ohp=VLLWTransferComments.Resource@nrc.gov)

Subject: NEI Comments on NRC's Proposed Interpretive Rule: Transfer of Very Low-Level Waste to Exempt Persons for Disposal, 85 Fed. Reg. 13,076 (Mar. 6, 2020)

The Nuclear Energy Institute (NEI),¹ on behalf of its members, hereby submits comments in response to the NRC's March 6, 2020, proposed interpretive rule, which seeks to reinterpret NRC regulations and modify NRC guidance to allow licensees to transfer very low-level radioactive waste (VLLW) to persons holding specific exemptions under 10 CFR Parts 30, 40, and 70 for disposal of VLLW by land burial.² We appreciate the NRC's efforts to improve the efficiency and flexibility of the VLLW disposal approval process. As discussed below, however, we have identified a number of legal, policy, and process-related concerns that we believe the NRC must carefully consider (along with other stakeholder comments) before it takes further action on the proposed interpretive rule. We further recommend that the NRC consider information and comments gathered during its VLLW Scoping Study, which it initiated in 2018 to identify possible options to improve and strengthen its regulatory framework for VLLW disposal. Finally, given the key role of the states in the low-level radioactive waste (LLW) disposal arena, we urge the NRC to ensure full and proper coordination with Agreement States, LLW compact commissions, and other relevant state organizations on VLLW disposal issues, including the proposed interpretive rule.

¹ NEI is responsible for establishing unified policy on behalf of its members relating to matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect and engineering firms, fuel cycle facilities, nuclear materials licensees, and other organizations involved in the nuclear energy industry.

² Transfer of Very Low-Level Waste to Exempt Persons for Disposal; Proposed Interpretive Rule; Request for Comments, 85 Fed. Reg. 13,076 (Mar. 6, 2020) (Proposed Interpretive Rule). The NRC describes the meaning of VLLW, which also is known as low-activity waste (LAW), in the proposed interpretive rule. *See id.* at 13,077.

I. The NRC Should Clarify that the Proposed Interpretive Rule Does Not Seek to Invalidate, Modify, or Supplant Current Agreement State Authorizations for the Disposal of VLLW in Solid Waste or Hazardous Waste Landfills

Before providing our specific comments, NEI raises a threshold concern regarding the proposed interpretive rule's relationship to and potential effect on existing Agreement State authorizations, should it be adopted by the NRC. The proposed interpretive rule states that if an "NRC licensee proposes to dispose of the [VLLW] material in an unlicensed facility under Agreement State jurisdiction, then the Agreement State would separately authorize such disposal, whether by license, exemption, or other regulatory vehicle."³ It also notes that "Agreement States have the authority to exempt persons from the requirement to hold a license when doing so continues to adequately protect the public health and safety from radiation hazards," and that such "regulatory approvals might be exemptions or be in another form, such as an approval letter."⁴ According to the NRC, "[w]here Agreement States have exercised their exemption authority to authorize persons who do not hold a license to receive and dispose of licensed material, this interpretive rule contemplates the transfer of licensed material to those persons for disposal."⁵

NEI requests that the NRC clarify that nothing in the proposed interpretive rule, including the Staff's modified interpretation of Section 20.2001, would invalidate or modify *current* Agreement State authorizations permitting the safe disposal of VLLW in solid or hazardous waste landfills, or otherwise require a separate approval from the NRC. Our concern stems in part from the NRC's recently-modified position regarding 10 CFR § 20.2002-type requests from reactor licensees to dispose of VLLW from their facilities; i.e., the position that the NRC, rather than Agreement States, must approve of all Section 20.2002 requests. NEI has expressly disagreed with the NRC's modified position regarding Section 20.2002⁶ and challenged it in federal court due to concerns about the clarity, transparency, and legality of the NRC's actions vis-à-vis applicable statutory and regulatory requirements.⁷ The industry wishes to avoid similar uncertainty and disagreement in the context of the proposed interpretive rule regarding Section 20.2001.

Importantly, the Agreement State VLLW disposal authorizations to which NEI refers above are made in accordance with applicable state laws and NRC-compatible state regulations. To provide one specific example, under Texas Health and Safety Code (THSC) Chapter 401 and the State of Texas' Agreement State regulations, certain radioactive materials (including VLLW) can be exempted from radioactive material licensing requirements as exempt concentration or exempt quantity materials.⁸ Due to their exempt status,

³ Proposed Interpretive Rule, 85 Fed. Reg. at 13,078.

⁴ *Id.* at 13,077.

⁵ *Id.*

⁶ See Letter from Ellen C. Ginsberg, Senior Vice President, General Counsel & Secretary, NEI, to Ho Nieh and Scott Moore, NRC, Subject: Comments on Regulatory Issue Summary 2016-11, "Requests to Dispose of Very Low-Level Radioactive Waste Pursuant to 10 CFR 20.2002" (Feb. 28, 2019) (ML19086A320).

⁷ See *Nuclear Energy Institute v. NRC*, No. 19-1240 (D.C. Circuit) (pending).

⁸ The authorization and requirement concerning exempt materials are found in THSC § 401.106(a). 25 Texas Administrative Code (TAC) § 289.251(e) establishes exempt concentrations and quantity limits for radioactive material other than source material. Radionuclide concentrations and quantities below these limits do not represent a hazard to

these materials do not need to be sent to a facility that is specifically licensed for LLW disposal, and can be disposed of in an authorized solid waste disposal facility (e.g., Texas Class 1 or Class 2 industrial landfill) or a Resource Conservation and Recovery Act (RCRA) hazardous waste disposal facility under 25 TAC § 289.201(c). Before accepting exempt materials or waste, a disposal facility may obtain a letter from the Texas regulator (called an exemption concurrence) stating that the waste meets the exemption criteria found in the regulations and is thereby exempt from other regulations concerning radioactive-waste disposal.⁹ Texas issues these exemption concurrences pursuant to 30 TAC § 336.5, which addresses both materials exempted by rule and materials exempted on a case-by-case basis. The latter is permitted by 30 TAC § 336.5(a),¹⁰ which the NRC has found consistent with NRC's exemption requirements.¹¹

In view of the above, the NRC should clarify that Agreement State authorizations of this sort—whether by statute, regulation, or otherwise—allow an unlicensed disposal facility to be considered an “authorized recipient” for purposes of 10 CFR § 20.2001(a)(1) and the proposed interpretive rule. It bears emphasis that through processes like those described above, the Agreement States ensure that any VLLW disposals do not pose an unacceptable risk to the public health and safety or the environment. Additionally, under the Integrated Materials Performance Evaluation Program (IMPEP), the NRC provides comprehensive oversight of Agreement State programs, including LLW disposal programs. These IMPEP reviews ensure that public health and safety are adequately protected from the potential hazards associated with the use of radioactive materials, and that all Agreement State programs are compatible with NRC's program.

II. The NRC Should More Clearly Explain How the Proposed Interpretive Rule Is Consistent with the Plain Language and Structure of the NRC Regulations in Question

The proposed interpretive rule would modify the guidance in NUREG-1736 as it relates to the NRC's interpretation and application of 10 CFR § 20.2001,¹² which identifies the specific mechanisms by which a

the public or environment, such that the materials may be deemed exempt from the State's radioactive material licensing requirements. The criteria that materials containing radioactivity must meet to qualify for an exemption from licensing requirements are found mainly in 25 TAC §§ 289.251 and 289.259.

⁹ See Texas Commission on Environmental Quality, RG-486, “Disposal of Exempt Waste That Contains Radioactive Material,” at 1, 3-4, 25-26, 33 (Nov. 2010).

¹⁰ Under 30 TAC § 336.5(a), an exemption application must include: (1) the nature of the request, (2) a legal analysis demonstrating that the exemption is not prohibited by law, and (3) a technical analysis demonstrating that the exemption will not result in a significant risk to public health and safety or the environment. It also must demonstrate that the proposed exemption is not prohibited by law and is at least as protective of the environment and the public health as the method or standard prescribed by the rule or regulation that would otherwise apply.

¹¹ See, e.g., Letter from Charles L. Miller, NRC, to Susan Jablonski, Texas Commission on Environmental Quality (Oct. 28, 2008) (ML082890854) (“Texas is free to grant an exemption to its own regulations, but any exemption must meet the criteria in your regulation 30 TAC 336.5. . . . We have found these exemption criteria in the 30 TAC 336.5 to be compatible with exemption provisions in our [NRC] regulations.”).

¹² See Proposed Interpretive Rule, 85 Fed. Reg. at 13,077; NUREG-1736, “Consolidated Guidance: 10 CFR Part 20 – Standards for Protection Against Radiation,” Final Report at 3-152 to 3-153 (Oct. 2001) (ML013330106).

licensee may lawfully “dispose” of “licensed material,” including “waste” containing licensed material.¹³ Section 20.2001 states in full:

(a) A licensee shall dispose of licensed material only—

- (1) By *transfer 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;
- (2) By decay in storage; or
- (3) By release in effluents within the limits in § 20.1301; or
- (4) *As authorized under §§ 20.2002, 20.2003, 20.2004, 20.2005, or 20.2008.*

(b) A person must be *specifically licensed* to receive waste containing licensed material from other persons for:

- (1) Treatment prior to disposal; or
- (2) Treatment or disposal by incineration; or
- (3) Decay in storage; or
- (4) *Disposal at a land disposal facility licensed under part 61* of this chapter; or
- (5) Disposal at a geologic repository under part 60 or part 63 of this chapter.¹⁴

Although Section 20.2001(a)(1) refers to the “transfer” of licensed material to an “authorized recipient” in accordance with Section 20.2006¹⁵ or NRC regulations in parts 10 CFR Parts 30, 40, 60, 61, 63, 70, and 72, Part 20 does not define “authorized recipient.” NUREG-1736 defines an “authorized recipient” as “a person or an organization *licensed* to possess the material being transferred in the form and in the quantity being transferred.”¹⁶ It further states that a licensee may “transfer licensed material to another person or entity who, in turn, disposes of that material in an NRC-approved manner,” but “the person or entity receiving the licensed material must be *authorized by an NRC license* to receive such material in the form and in the quantity being transferred.”¹⁷

In the proposed interpretive rule, the NRC seeks to modify the NUREG-1736 guidance to allow “a method by which licensees could dispose of licensed material—by transfer to persons who hold *specific exemptions for the purpose of disposal.*”¹⁸ In essence, the NRC seeks to create a new “specific exemption for disposal”

¹³ As defined in Part 20, “licensed material” “means source material, special nuclear material, or byproduct material received, possessed, used, transferred or disposed of under a general or specific license issued by the Commission.” 10 CFR § 20.1003. “Waste” is defined as “those low-level radioactive wastes containing source, special nuclear, or byproduct material that are acceptable for disposal in a land disposal facility.” *Id.*

¹⁴ 10 CFR § 20.2001 (emphasis added).

¹⁵ Section 20.2006 provides, in principal part, that waste transferred to a land disposal facility, either directly from the licensee to that facility or through one or more intermediaries (e.g. waste processors), must be accompanied by a shipping manifest. *See* 10 CFR § 20.2006(a)-(b).

¹⁶ NUREG-1736 at 3-152 (emphasis added).

¹⁷ *Id.* at 3-153 (emphasis added).

¹⁸ Proposed Interpretive Rule, 85 Fed. Reg. at 13,077 (emphasis added).

process as an alternative to the Part 61 specific licensing and the Section 20.2002 alternative disposal processes now used to authorize the land disposal of LLW at a given facility (*see* 10 CFR § 20.2001(a)(4) and (b)(4)) and to redefine “authorized recipient” accordingly. In other words, the NRC conceives of a process whereby the NRC (or an Agreement State) may exempt entities to whom licensed material can be legally transferred under 10 CFR §§ 30.41(c)-(d), 40.51(c)-(d), and 70.42(c)-(d) from the specific licensing requirements that apply to *facilities* seeking to undertake land disposal of licensed VLLW material.

It is well established that an agency’s interpretation of a regulation begins with the language and structure of the provision itself.¹⁹ In this case, the NRC’s modified reading of “authorized recipient” is not implausible on its face. That is, one reasonably could argue that the agency authorization implicit in the term “authorized recipient” could include an exemption, as an exemption is a form of agency approval or authorization.²⁰ Furthermore, in granting an exemption under 10 CFR §§ 30.11, 40.14, or 70.17, the NRC must ultimately determine that the requested exemption is indeed “authorized by law.”

The NRCs proposed interpretive rule, however, overlooks important aspects of the regulations that call into question its new interpretation of Section 20.2001(a)(1). Although Section 20.2001(a)(1) refers to a licensee’s “dispos[al] of licensed material . . . [b]y transfer to an authorized recipient,” it contains no reference to “land disposal.” Further, the cited provisions of 10 CFR §§ 30.41, 40.51, and 70.42 that address the “transfer” of licensed material to entities exempt from NRC or Agreement State licensing requirements do not refer to the disposal of licensed material—by any method. Thus, based on a plain language reading of the regulation, “disposal” as used in Section 20.2001(a)(1) denotes a licensee’s *transfer* of ownership, possession, or use of licensed material to an entity that is authorized to receive, acquire, own, possess, or use such material via specific or general license, an exemption, or other means specified in Sections 30.41, 40.51, and 70.42. In this regard, Section 20.2001(a)(1) appears to address licensed users of radioactive material who seek to transfer it to other licensed users of such material (e.g., regulated users such as utilities, hospitals, and industrial users). This is distinctly different than transferring the material to a facility for disposal as waste via land burial. This presumably explains why “[t]he NRC’s guidance on § 20.2001 states that the transfer of material to exempt persons is not an authorized method of disposal.”²¹

In contrast to Section 20.2001(a)(1), Section 20.2001(b)(4) makes explicit reference to land disposal. Specifically, it provides that a person or entity that receives waste containing licensed material from other persons for land disposal must be “specifically licensed” to do so under 10 CFR Part 61. Although the NRC

¹⁹ *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 361 (2001).

²⁰ *Cf.* 5 USC § 551(8) (Administrative Procedure Act section defining “license” to include “the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission”). *But see Honeywell Int’l, Inc.* (Metropolis Works Uranium Conversion Facility) CLI-13-1, 77 NRC 1, 9 (2013) (noting that NRC’s statutory authority to provide exemption procedures is “to allow for special circumstances”).

²¹ Proposed Interpretive Rule, 85 Fed. Reg. at 13,076. *Cf.* Memorandum from L. J. Cunningham, Chief, Operating Reactor Programs Branch, to NRC Regional Section Chiefs, Subject: Disposal of Exempt Quantities of Byproduct Material – OGC Views (Feb. 12, 1987) (forwarding OGC concurrence with enforcement action based on “the long-standing NRC staff position that 10 CFR Sections 20.301 [now 20.2001], 30.14, 30.18 and 40.13(a) do not authorize waste disposal by transfer to persons who do not hold a specific license authorizing them to receive it”) (ML103470253).

has issued exemptions to allow the disposal of VLLW at facilities that are not licensed under Part 61, those exemptions have been issued “in conjunction with individual § 20.2002 authorizations for offsite disposal of VLLW” on a case-by-case, waste stream-specific basis.²² Such exemptions, in other words, have not been used to categorically authorize non-licensed facilities to accept VLLW in lieu of “a case-by-case review and approval of the transfers,” as the proposed interpretive rule would allow.²³

In summary, while Section 20.2001(a) permits licensed users of radioactive material to “dispose” of material by “transfer” to persons authorized to receive that material via license or exemption, it does not address the authority for the recipient to dispose of such material by land burial. Section 20.2001(b)(4) and Section 20.2001(a)(4) (through its reference to § 20.2002) provide that authority via specific disposal licenses and case-by-case alternative disposal approvals, respectively. Thus, the NRC has not fully reconciled its proposed new definition of “authorized recipient” with the plain language and structure of Section 20.2001.

III. The NRC Must Fully Explain the Regulatory Need and Bases for the Proposed Interpretive Rule, Including Its Relationship to Prior NRC VLLW Disposal Initiatives

When an agency changes its interpretation of a rule or regulation, it is expected to “show that there are good reasons for the new policy.”²⁴ Here, the NRC’s decision to pursue an interpretive rule to modify its interpretation of 10 CFR § 20.2001(a)(1) comes as a surprise to NEI and the industry at large. The expected level of advance NRC coordination with the Agreement States also is not evident. While the NRC has cited “flexibility [for] waste generators to dispose of VLLW in a manner commensurate with its safety significance” as an objective,²⁵ the exact impetus and underlying rationale for the proposed interpretive rule are, in actuality, not clear.²⁶ Moreover, the NRC’s use of an “interpretive rule” seems procedurally anomalous, especially when compared to prior NRC efforts to identify alternative mechanisms for dispositioning low-activity materials or waste at NRC-licensed sites.²⁷ The proposed interpretive rule does

²² *Id.* at 13,078. Section 20.2002 is a general provision that allows for other alternative disposal methods, provided that radiation doses are maintained as low as is reasonably achievable (ALARA) and within Part 20 dose limits. Section 20.2002 has been used, for example, to authorize the disposal of specific quantities of VLLW in hazardous or solid waste landfills permitted under RCRA. *See, e.g.,* Issuance of Hematite Amendment No. 65 Approving Westinghouse Hematite Request For Alternate Disposal of Specified Low-Activity Radioactive Material and Granting Exemptions to § 30.3 and § 70.3 (Apr. 29, 2015): § 20.2002 Approval Letter, Safety Evaluation, Environmental Assessment, and Amendment (ML15086A364) (package).

²³ Proposed Interpretive Rule, 85 Fed. Reg. at 13,078.

²⁴ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

²⁵ *See* “NRC’s Proposed Interpretive Rule on Transfer of Very Low-Level Waste to Exempt Persons for the Disposal” (Apr. 2020) (ML20120A048), available at <https://www.nrc.gov/waste/llw-disposal/transfer-vllw.html>.

²⁶ For example, among other things, it is unclear whether the proposed interpretive rule is intended to facilitate the disposal of large volumes of VLLW by decommissioning reactor licensees, or to accommodate discrete VLLW streams or certain types of licensees (e.g., materials licensees).

²⁷ Those efforts—which involved substantial stakeholder participation—include the NRC’s recent VLLW Scoping Study, the 2005 draft proposed rule on radiological criteria for controlling the disposition of solid materials, and the NRC’s 1986 and 1990 Below Regulatory Concern (BRC) policy statements. *See* Very Low-Level Radioactive Waste Scoping Study, 83 Fed. Reg. 6619 (Feb. 14, 2018); SECY-05-0054, “Proposed Rule: Radiological Criteria for Controlling the Disposition of Solid

not—but should in our view—explain how it relates to those past NRC activities and how, if at all, those activities may have informed the NRC’s current decision to alter its interpretation of Section 20.2001.

The results of the NRC’s recent VLLW Scoping Study (originally called the LAW Scoping Study) would appear to be of particular relevance to the NRC’s proposed interpretive rule. The NRC initiated the VLLW Scoping Study in 2018 specifically to “identify possible options to improve and strengthen the NRC’s regulatory framework for the disposal of the anticipated large volumes of VLLW associated with the decommissioning of nuclear power plants,” among other potential waste streams.²⁸ The Study stemmed from the NRC’s 2007 strategic and 2016 programmatic assessments of its LLW program. As documented in SECY-07-0180, the 2007 strategic assessment identified the need to coordinate with other agencies on consistency in regulating LAW disposal and to develop guidance that summarizes disposition options for low-end materials and waste.²⁹ The 2016 programmatic assessment, which is documented in SECY-16-0118, identified the need to perform a LAW scoping study as a medium priority.³⁰ As Enclosure 1 to SECY-16-0118 further explains:

Several tasks in the 2007 assessment were related to LAW, including *coordinating with other agencies on consistency in regulating LAW disposal* (Task 10), developing guidance that summarizes disposition options for low-end materials and waste (Task 11), and promulgating a rule for disposal of LAW (Task 15). The NRC has combined these tasks into one, titled, “Perform LAW Scoping Study.” The study will consider the divergent stakeholder comments submitted as part of this programmatic assessment; lessons learned from the below regulatory concern policy statements published in the *Federal Register* on July 3, 1990 (55 FR 27522), and August 29, 1986 (51 FR 30839); lessons learned from the Commission’s 2005 decision not to publish a proposed rule (the “Clearance” rule) on radiological criteria for controlling the disposition of solid materials; learnings from other countries with respect to LAW disposal; and other factors to inform the NRC staff’s recommendation for addressing LAW. . . . *In addition, as part of the scoping study, the NRC would evaluate regulatory options that would define the conditions under which LAW, including mixed waste, could be disposed of in RCRA hazardous waste facilities. As the staff’s work progresses, policy issues identified will be raised to the Commission.*³¹

Materials,” dated March 31, 2005 (ML041550790); Radioactive Waste Below Regulatory Concern: Policy Statement, 51 Fed. Reg. 30,839 Aug. 29, 1986); Below Regulatory Concern: Policy Statement, 55 Fed. Reg. 27,522 (July 3, 1990).

²⁸ VLLW Scoping Study, 83 Fed. Reg. at 6619.

²⁹ SECY-07-0180, “Strategic Assessment of Low-Level Radioactive Waste Regulatory Program” (Oct. 17, 2007) (ML071350291) (package).

³⁰ SECY-16-0118, “Programmatic Assessment of Low-Level Radioactive Waste Regulatory Program” (Oct. 11, 2016) (ML15208A305) (package).

³¹ SECY-16-0118, Enclosure 1 at 8 (ML15243A205) (emphasis added).

As noted above, the NRC ultimately proceeded with the VLLW Scoping Study, holding a public meeting and seeking comments from “a broad range of stakeholders.”³² The NRC received comments from private companies, state agencies, LLW compact commissions, and members of the public.³³ There is no indication that the NRC responded to those comments, prepared a related report (e.g., a SECY paper or comment response document), or formally abandoned the effort. Moreover, we cannot discern whether the NRC has considered those comments, some of which speak to specific queries made by the NRC in its proposed interpretive rule, namely whether the NRC should: (1) still require case-by-case reviews and approvals of VLLW transfers; (2) consider VLLW “transboundary transfer” issues; (3) require the use of Uniform Waste Manifests for waste transferred to exempted disposal facilities; (4) consider other criteria when reviewing requests for specific exemptions for the purpose of disposal; and (5) reconsider the current designation of Section 20.2001 as a “compatibility C” regulation.³⁴ It also is unclear whether the NRC has considered the other information sources cited in SECY-16-0118 (e.g., stakeholder comments from the 2016 programmatic assessment) in formulating the proposed interpretive rule.

Thus, the NRC should fully explain the relationship between the proposed interpretive rule and the agency’s prior LLW-related activities, including how those activities did (or did not) inform the NRC’s reinterpretation of Section 20.2001 and the agency’s perceived need for the instant action.³⁵ Such an explanation is warranted given the complexity of the LLW disposal scheme established by Congress via statute and the NRC via its Part 61 regulations, and the considerable authority that scheme vests in interstate LLW compacts and Agreement State regulators. Specifically, the Low-Level Radioactive Waste Policy Amendments Act of 1985, as amended, gives Agreement States the responsibility to dispose of LLW generated within their borders and allows interstate compacts to accept LLW for disposal in licensed facilities authorized by host states. Accordingly, the NRC must work closely with the Agreement States on matters—including this one—that could materially affect LLW disposal policies and practices, as well as the economic viability of currently-licensed land disposal facilities. The proposed interpretive rule is lacking in this regard.

³² LLW Scoping Study, 83 Fed. Reg. at 6620.

³³ For example, the following entities submitted comments: Exelon Generation; EnergySolutions; U.S. Ecology, Inc.; the Northwest Interstate Compact; the State of Washington Department of Health, Office of Radiation Protection; the Texas Low-Level Radioactive Waste Disposal Compact Commission; the State of Utah Department of Environmental Quality, Division of Waste Management and Radiation Control; the Illinois Emergency Management Agency; the State of Nevada Division of Environmental Protection; the Nuclear Information and Resource Service.

³⁴ Proposed Interpretive Rule, 85 Fed. Reg. at 13,078. *See, e.g.*, Letter from Brandon Hurley, Chair, Texas Low-Level Radioactive Waste Disposal Compact Commission (TLLRWDC), to NRC (May 15, 2018) (ML18144A782) (noting the TLLRWDC’s opposition to “any new definition of VLLW that is inconsistent with federal law and diminishes the Commission’s ability to regulate VLLW as part of the larger definition of low-level waste,” and the need to “understand and assess the economic repercussions [of VLLW disposal] to ensure that low-level waste disposal facilities remain financially viable”); Letter from Earl Fordham, Executive Director, Northwest Interstate Compact, to NRC (May 15, 2018) (ML18144A768) (citing the need to “maintain consistency with the already established Part 61 waste classification system” and to consider “viability impacts to current Part 61 disposal facilities due to the reduced waste volumes”).

³⁵ *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 63 U.S. 29, 43 (1983) (noting that an agency must “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”) (citation omitted).

IV. The NRC Should Better Explain the Administrative Process Being Used to Develop and Promulgate the Proposed Interpretive Rule

NEI also has important concerns regarding the administrative process being used by the NRC to develop and promulgate the proposed interpretive rule. These concerns center on the precise nature or legal effect of the proposed interpretive rule. As discussed above, the proposed interpretive rule raises important questions of regulatory interpretation and policy, despite being described as “a non-mandatory, voluntary relaxation.”³⁶ However, there is no indication that it will be subject to Commission review and approval, despite the NRC Staff’s statement in SECY-16-0118 that “[a]s the staff’s work progresses, policy issues identified will be raised to the Commission.”

In addition, while the NRC has sought public feedback via two public meetings and written comments, it is not clear when and how the NRC will address those comments, or in what form it will articulate the basis for its final decision on the proposed interpretive rule. In most rulemaking contexts, the NRC would prepare a statement of considerations and possibly a regulatory analysis when modifying its rules or its implementation thereof. Also, even if the Staff intends only to modify its guidance, it is unclear whether such modifications will be limited to specific portions of NUREG-1736, or include other guidance documents. In short, NEI respectfully submits that the NRC’s administrative process for developing and promulgating a proposed interpretive rule would benefit from greater clarity and transparency.

* * *

In conclusion, NEI urges the NRC to carefully consider the legal, policy, and process questions and concerns raised in these comments before taking further action on the proposed interpretive rule. We also recommend that the NRC consider comments provided by other stakeholders in response to the proposed interpretive rule and the VLLW Scoping Study, and fully engage relevant state organizations.

If you have questions concerning this letter, please contact me or Martin O’Neill, Associate General Counsel (202.739.8139 or mjo@nei.org).

Sincerely,



Ellen C. Ginsberg
Senior Vice President, General Counsel & Secretary

³⁶ Proposed Interpretive Rule, 85 Fed. Reg. at 13,078.