From:	Jan Boudart
To:	Chairman Resource; CMBARAN@nrc.gov; CMRWright Resource; Trussell, Gregory; RulemakingComments Resource; Vietti-Cook, Annette
Subject:	[External_Sender] Docket ID NRC-2018-0300, Advance Notice of Proposed Rulemaking, Categorical Exclusions from Environmental Review"
Date:	Wednesday, July 21, 2021 1:02:53 PM
Attachments:	NIRS"sLtr2NRC-PDFFormat.pdf CategoricalExclusionsResponse4Submission.pdf

July 21, 2020

Christopher T. Hanson, Chairman
Jeff Baran, Commissioner
David A. Wright, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-4F00
Washington, DC 20555-0001
Via email only to
Chairman@NRC.gov,
CMRBARAN@nrc.gov,
CMRWright@nrc.gov

NRC Staff Contacts:
Gregory.Trussell@nrc.gov,
Rulemaking.Comments@nrc.gov
Annette Vietti-Cook, Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Via email only to annette.vietti-cook@nrc.gov

SUBJECT: Docket ID NRC-2018-0300, "Advance Notice of Proposed Rulemaking, Categorical Exclusions from Environmental Review" (Public Comments)

Dear NRC Commissioners:

I write this letter to comment on the NRC's "Advance Notice of Proposed Rulemaking" on "Categorical Exclusions from Environmental Review" ("Advance Notice") published in the Federal Register on May 7, 2021 (86 FR 24514). **Please note** this is also submitted by attachment as a PDF under "Categorical Exclusions Response 4 Submission".

Part I: Request for More Time to Respond
Request for public hearings

The public, even people who consider themselves to be well-informed on nuclear issues, have barely heard of this Federal Register notice; and they (myself included) have been overwhelmed with personal responsibilities and with the vocabulary and daunting presentation in the FR. Therefore I sincerely ask that more time be given for public comment. In spite of the previous 45 days, we are volunteers and have many other distractions. It has been tempting to avoid this responsibility as too ponderous. Please, now that we are alerted, give us another 60 days to respond. That would be until September 17 or 20, 2021. It would be greatly appreciated. Plutonium has a half-life of 24,000 years and most Uranium 4.5 Billion years, so there's really no need to hurry.

Also, I request at least one public hearing where the public would be allowed to ask for definition of terms in the FR document, and clarification of the 16 categories that NRC would like to add to Categorical Exclusions. I for one would like to talk about numbers 7-16, have concepts explained and possible outcomes projected. The future is deeply influenced by the actions of the NRC, yet there is very little back and forth between the administration/staff and the many, many people whose lives are affected. And I notice that this rulemaking has a CPR priority of "medium" at

https://www.nrc.gov/docs/ML1928/ML19289B867.pdf page 5. Another reason to let us have more time and plan some hearings.

Part II: Response to the Categorical Exclusions
That argue for streamlining the NRC process

N.B. These quotations are taken from 86 FR 24514

A: "Reorganization of the list of categorical exclusions to eliminate redundancy and add clarity."

Response: More information about how the list is organized now and how it would be revised is required to respond to this entry. For example, to respond we would have to know what categories are on the list. This information is only partially given and is couched in jargon.

B: "Revisions to eliminate distinctions in categorical exclusions between license amendments, exemptions, rulemaking, and other forms of NRC actions, to ensure that categorical exclusions are based on the activities that would be authorized rather than the administrative and legal differences between the different forms of NRC approvals. For example, the NRC might revise a categorical exclusion from 'Issuance of an amendment to a permit or license issued under this chapter which. . .' to 'An action under this chapter that. . .'"

Response: Of the three distinctions listed; license amendments, exemptions, rulemaking; it's "rulemaking" that stands out. Rulemaking is a years-long process that requires extensive study and examination by the NRC staff and administration. Requests for rule changes by the public are discouraged because, usually an immediate change is wanted, whereas to change the rules takes years. I have seen it argued by the NRA that a license amendment is not worthy of a new Environmental Impact Statement or a new Environmental Review. In any case it doesn't usually have the ponderous requirement of rulemaking.

Also, your example that substitutes "Issuance of an Amendment" to "An action" obscures the real action — issuing an amendment. A major difficulty we NRC watchers have is that amendments are issued, what seems to us, quickly and easily. Not to state that that is what you are doing would further confuse the issues under which amendments are wanted or needed.

C: "Revisions to consolidate categorical exclusions for exemptions into one category, for example, by moving the criterion for exemptions related to installation or use of a facility component located within the restricted area."

Response: If exemptions are all grouped under "categorical exclusion" (matters that will no longer be examined by the NRA), the NRA over time could silo almost every controversial actions it takes in a chosen excluded category, thereby escaping public scrutiny and much of its responsibility to protect workers and the public from levels of radiation that are outside EPA approval. For example, the NRC is seeking to remove from their responsibility people living near, but outside the footprint of, possible Small Modular Nuclear Reactors. Such an outcome, even though radiation should surely be monitored, would fall under the aegis of "categorical exclusion". And further, the disposition of high-level waste from these all-in-the-future projects would be hidden because, as soon as spent fuel is moved outside the footprint of the project, it would no longer be subject to NRC monitoring.

D: "Revisions to categorically exclude license terminations that are administrative acts that do not have the potential to affect the environment such as termination of licensees for which no construction or pre-construction activities have occurred or where all decommissioning activities have been completed and approved and license termination is a final administrative step."

Response: License termination of a decommissioned reactor must, necessarily be accompanied by a license transfer, not an isolated license termination. At Zion, the transfer at the end of decom was from Energy Solutions back to Exelon. This seems to have been uneventful. But it's important to distinguish between license termination, where no construction was ever done, and license transfers, where one party's license is terminated and another picks it up. In the latter case responsibility for the site still resides with a licensee and is part of a termination/transfer of the license.

E: "Revisions to categorically exclude the NRC's concurrence, under the Atomic Energy Act of

1954, as amended (AEA), § 274c., on termination by an Agreement State of licenses for AEA § 11e. (2) byproduct material where all decommissioning activities have been completed and approved and NRC's concurrence is a final administrative step."

Response: Unclear why the final administrative step seems onerous. What does it mean that the NRC wants to place it in a categorical exclusion?

Part III: Response to the 6th candidate for Categorical Exclusion

F: [Red Flag] "Revisions to categorically exclude issuance of exemptions to low-level waste disposal sites for the storage and disposal of special nuclear material regulated by Agreement States."

Response: Please find attached a document from Nuclear Information and Resource Service that was submitted in response to Docket ID NRC 2020-0065 "Transfer of VLL Waste to Exempt Persons for Disposal". Many activist organizations (including mine) signed on to this attached document in 2020 — only one year ago. I am very much supportive of the views expressed in the attached document. In fact, I thought the NRC had decided against allowing Very Low Level Radioactive Waste to go to a disposal unlicensed by the NRC. No categorical exclusion should apply to the disposal of waste with known radioactivity. There is no safe dose, not even the natural dose that emanates from the earth or impinges upon the earth from outer space. The arguments against using reference man as a standard for allowable radiation still stand. The health of women and children is more affected by radiation than that of reference man. What mankind has added to that background must be confined to a place where it can be monitored on a permanent basis, not a place where it will be subject to the "Boeing 737 MAX plan for protection of the public."

Nuclear power companies don't like to send their waste to Utah — it's expensive, it interferes with their profits. No matter the radiation level — low, medium, high or Very Low — companies that monitor themselves can be and should be expected to do the thing that will add to their profits and protect their shareholders' wealth. Protection of the public is always second fiddle to profits and shareholders. In other words, they — both the dumper and the dumpee — would cheat. Placing the disposal of VLLRW in a categorical exclusion with Agreement States would mean there is no federal agency monitoring it. Agreement States would have to tax their citizens to enforce laws and regulations while the NRC could declare, "not my job!"

Part IV: Categories Never Considered (Thus "Excluded") from NRC Concern

The NRC is the only agency U.S. citizens have to regulate the most dangerous private enterprise ever undertaken in this or any other country — the use of nuclear fission to produce electric power. I have categories, already excluded from NRC consideration, that should be, but aren't, NRC's job. My categories include responsibilities that are left to profit-making corporations whose primary concern (all corporate propaganda to the contrary) is maintaining their privilege, their profits and the wealth of their shareholders.

(1) My first category is "misplaced bonuses and tax breaks for on-time delivery of highly dangerous nuclear reactors". Had this exclusion not been in place, NRC might have prevented the rush to commission TMI Unit 2 on December 30 1978. FirstEnergy finished on the last possible day for the 1978 tax break. But less than 3 months later the infamous Unit 2 accident occurred. FirstEnergy saved a bundle in taxes, but UNOWHO got stuck with much of the clean up costs. And rate-payers, at least for 3 months, had to be billed for the cost of creating Unit 2. Taxpayers are still supporting the HLRW which is being stored at INL, to say nothing of the danger, and inevitable radiation, to the public of Unit 2's spent fuel transportation from Pennsylvania to Idaho. One could go on about the labor issues for the workers who disassembled the disabled reactor, etc.

{Off topic comment: Chernobyl Unit 4 is an example of an outright bonus paid to administrators and workers for "completing" the project ahead of time. [please see footnote.] Again, it was the end of the calendar year, December 31, 1983 when Reactor Number 4 was accepted into operation. But only 2 years and 3 months later those chickens came home to roost with the nuclear explosion that ended the short life of Unit 4.}

(2) My second category is "Existential threats to the safety of nuclear workers and the public that don't involve radiation *per se*". And, of course, I'm referring to

(a) continuing to allow 800-1000 itinerant refueling contractors to come in and out of small towns across the U.S. during the COVID 19 pandemic. This jeopardized citizens, permanent workers in the reactor control room and elsewhere, and the itinerant workers themselves. Much data is lacking or secret on the results of this practice. But were it not for the "this is not radiation, therefore not NRC's job" categorical exclusion, NRC might have ordered the reactors needing refueling and routine repairs to shut down during the pandemic, in spite of the (admittedly huge) loss in revenue to corporations and their shareholders.

(b) allowing the South Texas Project Electric Generating Station to continue operation with extreme weather and flooding during the winter of 2020-21. Some might admire the bravado with which the operators of the station maintain that it would come thru the storm. I, on the other hand, would have felt much more secure had the NRC been able to step in and shut down the reactors until the danger had passed. The reactor was OK, but it was very edgy and I feared the worst. And I resented not having a say in whether the reactor should be shut down.

In sum: Allowing corporations to make life and death decisions for the public, decisions that should be the responsibility of a non-profit making entity of the federal government (i.e. the NRC); letting oligarchy continue its juggernaut takeover of citizens' rights to be secure in their persons. For corporations to give deadline bonuses and perks tempts construction people to hurry matters that need consideration, deliberation and, perhaps, delay. This decision should be in the hands of a disinterested party (the NRC). And existential threats that increase the menace of fission reactors should be the purview of a government agency, not a corporation that cares more for profit and wealth than the lives of workers and citizens.

Part IV: Summary

1. I am forgoing comments on "categorical exclusions" 7 - 16 because their statements are in generalities and too many terms are undefined.

2. I am strongly in favor of the attached submission by NIRS on Docket No NRC 2018-0065 by Don't Waste Michigan, Nuclear Information and Resource Service, Beyond Nuclear, *et. al.*

3. Likewise the submission on this docket number (NRC 2018-0300) of the comment written by Terry J. Lodge, Esq.

Conclusion: Thank you for the opportunity to submit comments

Jan Boudart, board member NEIS.org, the Nuclear Energy Information Service

[footnote: Zhores Medvedev, The Legacy of Chernobyl, 1990, (Norton Edition) ISBN: 978-0-393-30814-3. "But it seems obvious that the acceptance document was signed on the last day of 1983 under pressure, in order to be able to declare that the works planned for 1983 had been fulfilled. If [not signed] thousands of workers, engineers and…superiors at the ministries and committees would have lost bonuses, awards and other extras (which often amount to as much as two or three times a monthly salary). Page 13 ¶4.]

Christine L. Svinicki, Chairman
Jeff Baran, Commissioner
Annie Caputo, Commissioner
David A. Wright, Commissioner
Christopher T. Hanson, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-4FO
Washington, DC 20555-0001
Via email to Chairman@NRC.gov, CMRBARAN@nrc.gov, CMRCaputo@nrc.gov, CMRWright@nrc.gov, CMRHanson@nrc.gov

NRC Staff Contacts: Marlayna Doell, Marlayna.Doell@nrc.gov and
Jennifer Borges, Jennifer.Borges@nrc.gov
Comment Submission Email Box: VLLWTransferComments.Resource@nrc.gov

Annette Vietti-Cook, Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Via email to annette.vietti-cook@nrc.gov

SUBJECT: Comments on Docket ID NRC-2020-0065, NRC proposed interpretive rulemaking, "Transfer of VLLW Nuclear Waste to Exempt Persons for Disposal" (Demand for rescission and cancellation of proposed rulemaking)

Dear NRC Commissioners, Ms. Doell, Ms. Borges and Ms. Vietti-Cook:

Don't Waste Michigan, Nuclear Information and Resource Service, Beyond Nuclear, and _____ ("Commenters") hereby call upon the Nuclear Regulatory Commission (NRC) to rescind and cancel the proposed rulemaking entitled "Transfer of VLLW Waste to Exempt Persons for Disposal" found at the Regulations.Gov website[1] as Docket ID NRC-2020-0065, 3-6-2020 ("Proposed Rule").

We further request that the Commission extend the comment period until 6 months after the termination of the COVID-19 crisis. All public comment opportunities should be

[1] https://www.regulations.gov/document?D=NRC-2020-0065-0001 ("Proposed Rule").

made flexible so as to allow the affected public to have the necessary time to evaluate and respond to this controversial VLLW proposal. For many the COVID-19 crisis continues in its severity. This comment letter is being submitted in the midst of a massive national recurrence of the virus that has engulfed 40 of the 50 states. The regulatory decision to be made by the NRC has potentially long-lasting effects, in the form of needless radiation contamination and exposure across centuries and threatens public health for many generations. It has implications for hundreds or even thousands of years to come, need not be made hastily, and certainly should not be made in the middle of the pandemic. The coronavirus is undeniably causing personal strife and trauma, economic uncertainty and dislocation, and countless personal demands requiring immediate attention. Many people who would otherwise be interested in joining the VLLW debate cannot divert from their immediate troubles. Considerations of due process and fundamental fairness require extended time for public investigation and comment.

The NRC proposes, by way of supposed reinterpretation, to reverse longstanding requirements that require licensed control over radioactive wastes and materials generated by a licensed nuclear facility. The NRC seeks to abandon its regulatory authority over the destination and disposition of untold quantities of variably radioactive waste. The NRC's reinterpretation would authorize any of the 2,600 municipal and private sanitary and industrial landfills and hazardous waste sites in the United States[2] to seek an "exemption" to receive and dispose of radioactive waste. The proposed new "exemption" procedure is actually a permit for unregulated disposition of licensed radioactive material and waste by another name. The process of granting "exemptions" or *de facto* permits will not be carried out publicly, transparently, democratically or adversarially and will spur creation of an entirely new class of radioactive waste disposal and processing sites. The site-specific radiation emission limitations data and extrapolations from modeling will be nonpublic, proprietary secrets. Even if local governments or members of the public discover that a local landfill or waste site is accepting radioactive waste, they will have no notice or right to know how radioactive that material may be, how much has been received, treated or disposed, nor will they have any say in whether or how effectively it is being physically contained over time.

By this "reinterpretation," the NRC would misleadingly rename an undefined and potentially huge share of nuclear power waste, as "Very Low-Level Waste" (VLLW), and release it from regulatory control and documentation. The term "very low-level waste" is

[2] https://www.epa.gov/lmop/project-and-landfill-data-state

not defined in the Atomic Energy Act[3] or in regulations and is being deceptively invoked to minimize public concern while this dramatic deregulation of potentially all "low-level" radioactive waste takes place. With this change, unlicensed entities, including but not limited to sanitary landfill and hazardous landfill operators, could easily become "specific exempt" radioactive waste dumpers or dispersers. The NRC aspires to have its dangerous new interpretation apply only to landfills but is not mandating it. The proposed 25 millirem/year dose limitation on "specific exempt" entities to receive radioactive waste is an invitation for "specific exempt" facilities to spring up in semi-secrecy to dispose of nearly all of the "low-level" radioactive waste in the U.S., and low and intermediate level waste from abroad. "Very Low-Level Waste" is a concocted term for what could include all commercial nuclear waste except irradiated fuel, an amalgam of many different objects and materials that are currently licensed radioactive waste and materials including resins, filters, equipment, components, metal, soil, wood, plastic, concrete, demolition debris and more that are or have become radioactive as a result of nuclear fuel chain industrial processes.

The NRC is peddling its proposal as an "interpretative" rule and a "voluntary relaxation" of its legislative regulations.[4] The spectre of adding unknown numbers of landfills and waste sites to the known facilities for nuclear waste disposal, coupled with the exemption of these new players from any continuing regulatory oversight by the NRC, creates the potential for many new and invisible threats to public health and the environment.

I. Background

VLLW comprises a reincarnation and expansion of recurring campaigns, beginning with the former Atomic Energy Commission down through the present hegemony of the Nuclear Regulatory Commission and the U.S. Department of Energy, to de-control less-concentrated radioactive waste from the nuclear power and weapons fuel chains. These efforts began about 1962 and have persisted to the present, each time confronted by concerned organizations, individuals, church-women, health professionals, workers, unions, the steel industry, local and state governments, and many others. Over the decades, the proponents of these deregulation drives have come up with many euphemisms to describe and justify releasing untold amounts of man-made radioactivity

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[3] The NRC admits in the Proposed Rule “IV. Discussion” section: “The term VLLW is not defined by statute or in the NRC’s regulations.”

[4] Proposed Rule at “VI. Backfitting:” “The proposed interpretive rule is a non-mandatory, voluntary relaxation.”

into sectors where people would be placed at risk. The below list of euphemisms is non-exhaustive but depicts how nuclear waste promoters have tried to divert public attention and understanding from the actual stakes:

Alternative methods of disposal (10 C.F.R. § 20.2002)
BRC, Below Regulatory /concern
Beneath Regulatory Control
Beneficial Reuse
Clean
Clearance, Clear
De minimus or *de minimis* (such minimal radiation that it is not worth considering)
Deregulation
Dose-Based Standards
Exempt, Exemptions
Exempt from regulatory control
Excluded from regulation (International Atomic Energy Agency term for naturally-occurring radioactivity)
Health-based Standard
Indistinguishable from Background
Free Release
Law of Concentrated Benefit over Diffuse Injury

Linguistic Detoxification
Low Activity Radioactive Waste
Low Activity Waste
Non-detect
Non-regulatory approach to management of radioactive waste (U.S. EPA)
Not Amenable to Control
Not Radioactive
Not Relevant to Radiation Protection Dispositions
Optimization (cost benefit analysis carried out by waste generator)
Reclassification
Recycling
Release
Restricted Release
Restricted Reuse (usually over 1st reuse only)

Risk-Based Standard
Risk-informing or Risk-informed (analysis carried out by generator)
Slightly Radioactive Scrap Metal or Material (SRSM)
Slightly Radioactive Waste
Special Waste
Trivial (risk, dose, contamination)
Very Low Level Radioactive Waste (VLLW)

And for 2020, add
"Specific Exempt" as proposed by NRC 3-6-2020
PCW Potentially Clean or Potentially Contaminated Waste

Source: D'Arrigo, D. and Olson, M., Out of Control"'On Purpose: DOE's Dispersal of Radioactive Waste into Landfills and Consumer Products, p. 27 (Nuclear Information and Resource Service, Takoma Park, MD 2007).

II. The Proposal Is Not An "˜Interpretive Rule;' It Is A Legislative Rulemaking

There are considerable flaws with the proposal. For one, it is not, in reality, an "interpretive rule," but is, instead, a legislative rule or regulation that must be considered according to the requirements of the Administrative Procedure Act. The NRC admits that the "NRC's guidance on § 20.2001 states that the transfer of material to exempt persons is not an authorized method of disposal. . . ."[5] Consistent with that, the legislative regulation 10 C.F.R. § 20.2001(a) requires that "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; . . ." According to § 20.2006(b), at present the only "authorized recipient" is "[a]ny licensee shipping radioactive waste intended for ultimate disposal at a licensed land disposal facility." Additionally, § 20.2001(b) indisputably requires that "A person must be specifically licensed to receive waste containing licensed material from other persons for . . . (4) Disposal at a land disposal facility licensed under part 61 of this chapter. . . ." That provision in current regulations clearly limits the range of "authorized recipients" to non-exempt (*i.e.,* licensed) persons. Solid and hazardous "disposal facility operators" are not licensed (non-exempt).

[5] https://www.nrc.gov/waste/llw-disposal/transfer-vllw.html

NRC's proposed reinterpretation would change the guidance for the Section 20.2001 regulations to the opposite of its current meaning. To make things even more complicated and confusing this reversal of position is voluntary.

The new interpretation would transform some solid and hazardous waste facility operators into a class of ***un***licensed entities, "specifically exempted" and thus granted permission by NRC to dispose of radioactive waste. The NRC apparently does not intend to limit how many new "specific exempt" radioactive waste disposal sites would be created by its proposed reinterpretation, but creating such a broad deregulatory "exemption" would mock the rules and guidance limiting the invocation of exemptions in the NRC regulatory framework. The potential cumulative effects of the new interpretation would surely create large new burdens upon the environment and public health that must be considered under NEPA (see below). The ruse of a new interpretation would eviscerate 10 C.F.R. Part 61 while leaving it on the books. The effects of the new interpretation are legislative, but are being peddled as "interpretive." By calling the change "interpretive," the NRC attempts to evade court challenges.

A. The NRC's Proposed Reinterpretation Provides No Explanation Or Justification For the Change

By introducing a breathtaking new interpretation of a longstanding regulation, the NRC will beget more corporate welfare for nuclear materials licensees, *i.e.,* avoidance of the higher expenses of waste treatment and containment and disposal in NRC-licensed waste facilities. To justify this, the NRC mentions only a vague need to "exempt" persons conducting landfilling activities. Consequently, the NRC has changed its policy but has not ""˜provide[d] a reasoned explanation for the change.'" *Jimenez-Cedillo v. Sessions*, 885 F.3d 292, 298 (4th Cir. 2018) (quoting *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125, 195 L.Ed.2d 382 (2016). "At a minimum, an agency must "˜display awareness that it is changing position and show that there are good reasons for the new policy.'" *Id.* (quoting *Encino Motorcars*, 136 S.Ct. at 2126).

By providing essentially no rationale for this change, other than supposedly to create more "voluntary" alternatives for waste disposal, the NRC tries to project its proposal as nominal. The NRC does not address the "facts and circumstances that underlay or were engendered by the prior policy," including any "serious reliance interests." *Encino Motorcars*, 136 S.Ct. at 2126 (quoting *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515-16, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009)). By not explicating the depth and breadth of the pre-existing interpretation, the public has little means of seeing the sharp

contrasts and inconsistencies between the new proposal and the old one. "An "˜unexplained inconsistency' in agency policy indicates that the agency's action is arbitrary and capricious, and therefore unlawful." *Jimenez-Cedillo*, 885 F.3d at 298 (quoting *Encino Motorcars,* 136 S.Ct. at 2125); *Casa De Maryland v. U.S. Department of Homeland Security*, 924 F.3d 684, 704-705 (4th Cir. 2019).

In sum, this is not a mere "interpretive rulemaking," although the NRC has contrived to make it appear to be. There is no legally satisfactory justification for the change that would enable it to be seen as a simple clarification of pre-existing policy. It is more than that.

B. The Proposed Interpretive Change Masks An Improper Legislative Rulemaking That Violates The Administrative Procedure Act

As mentioned, the NRC describes its proposed interpretive rule as "a non-mandatory, voluntary relaxation." But allowing exempt persons to become waste disposal site operators would require a legislative rulemaking accompanied by the agency's provision of explanation and justification for the changes, as prescribed by the Administrative Procedure Act (APA), 5 U.S.C. § 553.[6]

The NRC is calling its proposal an "interpretive rule" as a subterfuge. With an interpretive (also called interpretative) rule, use of the notice-and-comment process required by the APA for legislative rules is merely gratuitous and the change is immune from court attack. New interpretations are not bound to follow the notice-and-comment process of the APA because they are, after all, simply reinterpretations that are not supposed to change the substance of the rules. *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 135 S.Ct. 1199, syll. (2015). The NRC's solicitation of comment here, if this were truly an "interpretive rule" would not be challengeable in court.

But the proposal is not merely procedural; it represents a major, substantive change of direction, namely, to allow the use of unlicensed radiological waste dumps. A truly procedural rule "covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." *James V. Hurson Associates, Inc. v. Glickman*, 229 F.3d 277, 280, 343 U.S. App. D.C. 313 (D.C. Cir. 2000) (internal quotation marks omitted).

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[6] According to 5 U.S.C. § 553(a)(3)(a), “Except when notice or hearing is required by statute, this subsection does not apply — (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice. . . .”

The agency action proposed here alters substantial rights and interests and creates a significant new class of parties (albeit calling them "exempt" entities) that just happen to be accorded the same, or indeed, superior, rights to those of NRC licensees.

An interpretative rule is limited to explaining ambiguous language, or reminding parties of existing duties; it is not a mechanism to create new law. *See Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 876 n. 153 (D.C. Cir. 1979). An agency may not, under the interpretative rule exception, "constructively rewrite [a] regulation" or "effect a totally different result." *National Family Planning and Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 236 (D.C. Cir. 1992). *Id., Sentara-Hampton Gen. Hosp. v. Sullivan*, 980 F.2d 749, 759 (D.C. Cir. 1992).

An interpretative rule may not be used to substantively change existing rights and duties. *Fertilizer Institute v. E.P.A*., 935 F.2d 1303, 1308 (D.C. Cir. 1991); *General Motors v. Ruckelshaus,* 742 F.2d 1561, 1565 (D.C. Cir. 1984), *cert. denied,* 471 U.S. 1074, 105 S.Ct. 2153, 85 L.Ed.2d 509 (1985).

The NRC's characterization of this dramatic change as an "interpretive rulemaking" is incorrect, misleading, and it cannot stand. The effect of the proposal would be extensive changes in the nature, type and number of participants in the radioactive waste disposal industry.

C. The Proposal Violates The Atomic Energy Act

The proposal violates the Atomic Energy Act (AEA) by not defining the radioactive waste to be disposed of while simultaneously releasing it from radioactive regulatory control. This is not the purpose of the power accorded the NRC to create exemptions under the AEA. The proposal would allow radioactive waste to be sent to entities that will not be regulating radioactivity or radiation exposure levels. Landfill operators would be left by the NRC to intuit -- or contrive to show -- how the aggregate dose from waste deliveries will not exceed 25 millirems per year.

The NRC is authorized by the AEA, at 42 U.S.C. § 2077(d):

> [T]o establish classes of special nuclear material and to exempt certain classes or quantities of special nuclear material or kinds of uses or users from the requirements for a license . . . when it makes a finding that the exemption of such classes or quantities of special nuclear material or such kinds of uses or users

would not be inimical to the common defense and security and would not constitute unreasonable risk to the health and safety of the public.

So while the AEA conceives of exempting "classes or quantities," and "kinds of . . . users," the law does not contemplate customizing waste disposal standards and then exempting the landfill or waste site operator from all accountability to enforce those standards. That is not an AEA "exemption." Also, the published notice of the new interpretation does not contain the findings mentioned in the statute.

The AEA does not define VLLW. Surprisingly, the NRC interpretation would define the waste by who disposes of it! "Specific exempt" "“ *i.e, unregulated* "“ recipients and disposers where the NRC has arbitrarily set a dose limit without regard to whether it constitutes an "unreasonable risk to the health and safety of the public." This reinterpretation does not create "kinds of users;" it creates a class of "specific exempt" recipients. Section 2077(d) does not allow special nuclear material to be disposed of under the AEA as the NRC envisions.

Respecting byproduct material, the AEA uses essentially identical language as to exemptions. 42 U.S.C. § 2111(a) requires "classes or quantities" of byproduct material, and contains the same "kinds of . . . users" language.[7] Hence byproduct material may not be disposed of by "specific exempt" entities, either.

In sum, the NRC has contorted the exemption power under the AEA -- which is reserved to address nonrecurring situations -- into a massive expansion of unregulated radioactive waste disposal. VLLW is not an "interpretive" rule; *it is legislative* because it "supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy." *Children's Hosp. of the King's Daughters, Inc. v. Azar,* 896 F.3d 615, 620 (4th Cir. 2018). The NRC's re-interpretation "conflict[s] with the plain meaning of the wording used in [existing] regulation[s]," and the existing legislative regulations in the end "of course must prevail." *See Long Island Lighting Co.* (Shoreham Nuclear Station, Unit 1), ALAB-900, 28 NRC 275, 288-90 (1988), *review declined*, CLI-88-11, 28 NRC 603 (1988).

The NRC's reinterpretation contradicts the Atomic Energy Act and fails for that reason.

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[7] “The Commission is authorized to establish classes of byproduct material and to exempt certain classes or quantities of material or kinds of uses or users from the requirements for a license set forth in this section when it makes a finding that the exemption of such classes or quantities of such material or such kinds of uses or users will not constitute an unreasonable risk to the common defense and security and to the health and safety of the public.”

D. The Rulemaking Proposal Is A "˜Major Federal Action' That Requires An Environmental Impact Statement

The NRC's proposal will authorize the dramatic redirection of hundreds of thousands of tons of irradiated, activated and otherwise radioactively contaminated nuclear materials and waste to an unknown number of the nation's 2,600 landfills, including hazardous waste ("Title C") landfills and possibly to new sites formed to take radioactive waste without the burden of getting a 10 CFR 61 or comparable Agreement State license. The cost of radioactive waste disposal will likely drop significantly as a result of new disposers. Why go through the time and expense of characterizing every load of waste and spending more to dispose of licensed "low-level" radioactive waste in a licensed facility, if a proprietarily-protected pledge to limit doses to less than 25 mrem/yr is all that is required? The NRC's mere intention that the waste go to landfills does not guarantee that radioactive waste will end up in landfills; it could end up in unlined, "specific exempt" pits or other destinations. Even licensed sanitary landfills are categorically unequipped to contain irradiated wastes that will leach isotopic material for hundreds or thousands of years.

The potential for an unknown number of new radioactive waste disposal destinations with a "specific, exempt" designation attainable on the cheap in permitting terms ominously portends a "major federal action" within the meaning of National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.* that requires serious and public analysis. NEPA requires the NRC to examine and report on the environmental consequences of its anticipated grants of open-ended "exemptions."

An agency must compile an Environmental Impact Statement (EIS) before taking a "major Federal action[ ] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). *See Sierra Club v. Dep't of Transp*., 753 F.2d 120, 127 (D.C. Cir. 1985); *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503-04 (D.C. Cir. 2010) (explaining NEPA procedures in detail). A formal NRC rulemaking constitutes a "major federal action" even where its promulgation would cause "[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *New York v. Nuclear Regulatory Comm'n*, 589 F.3d 551, 553 (2d Cir. 2009) (discussing NRC's "waste confidence decision" rule (WCD) and citing 40 C.F.R. §§ 1508.8, 1508.18).

The NRC's reinterpretation of its regulations will open the prospects for creation of thousands or millions of cubic yards of new disposal space in geographically, climatologically, topographically and geologically dispersed locations. The reinterpretation would institute a generic permitting regime using one-time radioactive waste characterization and superficial site assessment inquiry. Radioactive waste deliveries will not be recorded on manifests in this huge new market niche. Documentation of its receipt at disposal sites would be at best subjected to the vagaries of record keeping at hundreds of different landfills. The NRC would conduct zero periodic review or environmental auditing. The release of liability consequences for landfill operators inherent in an "exemption" means there will be incentives not to create or maintain records of the arrival, nature and radiotoxicity of material being dumped. The NRC's proposal assures that the bulk of scientific data that might have informed regulators and the public of serious threats to the environment and public health will be concealed and unlikely even to be generated at all.

There is a stupendous irony raised by the proposal itself, which alone justifies NEPA scrutiny: the 25 mr/yr effective dose equivalent ("EDE") calculation could allow *more* radioactive waste to go to exempt landfills than to licensed 10 C.F.R. Part 61 facilities. At least two of the existing 10 C.F.R. Part 61-licensed facilities are limited to 25/75/25 mr/yr (not EDE), which according to the U.S. Environmental Protection Agency is approximately equal to 10 mr/yr EDE. Consequently, new, exempt sites could accept at least 2.5 times as much radioactivity as licensed, regulated ones are permitted. This is additional evidence of a significant change in the substance of radioactive waste regulation.

Because of the potentially significant impacts of both this reinterpretation across the country and the potentially significant impacts at each "specific exempt" site, NEPA requires either a programatic or generic Environmental Impact Statement (PEIS or GEIS) on the rule change, and site specific EIS's at each site that applies. A PEIS is a tiered document. NEPA's CEQ implementing regulations recognize that in addition to site-specific projects, the types of "major Federal action" subject to NEPA analysis requirements include "Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based . . . and adoption of programs, such as a group of concerted actions to implement a specific policy or plan; [and] systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive." 40 C.F.R. § 1508.18(b)(2)-(3), which provides the conceptual underpinning for the use of PEIS's. See also 10 C.F.R. §

1502.4(b)("Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs . . .Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decision making").

A PEIS "provides an occasion for a more exhaustive consideration of effects and alternatives than would be practicable in a statement on an individual action. It ensures consideration of cumulative impacts that might be slighted in a case-by-case analysis. And it avoids duplicative reconsideration of basic policy questions." CEQ Memorandum to Federal Agencies on Procedures for Environmental Impact Statements. 2 ELR 46162 (May 16, 1972).

The Supreme Court has recognized the need for national programmatic environmental analysis under NEPA where a program "is a coherent plan of national scope, and its adoption surely has significant environmental consequences." *Kleppe v. Sierra Club*, 427 U.S. 390, 400 (1976). Programmatic direction can often help "determine the scope of future site-specific proposals." *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1089 (9th Cir. 2003). CEQ regulations define this practice as "tiering." 40 C.F.R. § 1502.20 ("Whenever a broad environmental impact statement has been prepared . . . and a subsequent statement or environmental assessment is then prepared on an action included within the . . . program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action").

Tiering allows an agency to meet its NEPA obligations in steps: First, the agency publishes a PEIS assessing the entire scope of a coordinated federal program. *See Nevada v. Dep't of Energy*, 457 F.3d 78, 91 (D.C. Cir. 2006). The PEIS ensures that the agency assesses "the broad environmental consequences attendant upon a wide-ranging federal program." Id. at 92. The agency later supplements that programmatic analysis with narrower EISs analyzing the incremental impacts of each specific action taken as part of a program. Id. at 91. A PEIS would examine the entire NRC policy initiative rather than performing a piecemeal analysis within the structure of a single agency action. *Ass'n of Pub. Agency Customers v. Bonneville Power Administration*, 126 F.3d 1158, 1184 (9th Cir.1997).

Agencies such as the NRC must "take a "˜hard look' at their proposed actions' environmental consequences in advance of deciding whether and how to proceed." *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 37 (D.C. Cir. 2015). There is zero evidence in the proposed rulemaking papers that any such inquiry has been performed. The NRC has an obligation to do so, irrespective of whether its proposal is an "interpretive regulation" revision or a legislative rulemaking. "Compliance with NEPA is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 558-59 (9th Cir. 2000) (*quoting City of Davis* v. *Coleman*, 521 F.2d 661, 667 (9th Cir. 1975). The NRC is required to apply a "rule of reason" to the decision whether or not to prepare an EIS. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-74 (1989). A NEPA document must be compiled to encompass this very controversial change.

E. Conclusion

The NRC is pushing a disguised legislative rulemaking; it must be acknowledged and publicly noticed as such and the Administrative Procedure Act's procedural requirements must be strictly followed. The Atomic Energy Act limitations on creation of exemptions must be respected, and that means that the proposal is not "interpretive," but is legislative. A NEPA document must be created as a prerequisite to any consideration of this proposal.

The NRC has tried repeatedly for decades to deregulate radioactive garbage to allow it to be disposed of as if not radioactive, or to hide or dilute contaminated wastes in commercially recycled metal, concrete, soil, plastic, asphalt and other streams to make consumer products and building supplies. The present NRC word game would shift even more radioactive wastes and liability from the nuclear power industry onto the public by releasing the wastes from regulatory control. The undersigned organizations oppose this gambit and demand that it be abandoned.

Thank you very much.

July 21, 2020

Christopher T. Hanson, Chairman
Jeff Baran, Commissioner
David A. Wright, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-4F00
Washington, DC 20555-0001
Via email only to
Chairman@NRC.gov,
CMRBARAN@nrc.gov,
CMRWright@nrc.gov

NRC Staff Contacts:
Gregory.Trussell@nrc.gov,
Rulemaking.Comments@nrc.gov
Annette Vietti-Cook, Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Via email only to annette.vietti-cook@nrc.gov

SUBJECT: Docket ID NRC-2018-0300, "Advance Notice of Proposed Rulemaking, Categorical Exclusions from Environmental Review" (Public Comments)

Dear NRC Commissioners:

I write this letter to comment on the NRC's "Advance Notice of Proposed Rulemaking" on "Categorical Exclusions from Environmental Review" ("Advance Notice") published in the Federal Register on May 7, 2021 (86 FR 24514). Please note this is also submitted by attachment as a PDF under "Categorical Exclusions Response 4 Submission".

Part I: Request for More Time to Respond
Request for public hearings

The public, even people who consider themselves to be well-informed on nuclear issues, have barely heard of this Federal Register notice; and they (myself included) have been overwhelmed with personal responsibilities and with the vocabulary and daunting presentation in the FR. Therefore I sincerely ask that more time be given for public comment. In spite of the previous 45 days, we are volunteers and have many other distractions. It has been tempting to avoid this responsibility as too ponderous. Please, now that we are alerted, give us another 60 days to respond. That would be until September 17 or 20, 2021. It would be

greatly appreciated. Plutonium has a half-life of 24,000 years and most Uranium 4.5 Billion years, so there's really no need to hurry.

Also, I request at least one public hearing where the public would be allowed to ask for definition of terms in the FR document, and clarification of the 16 categories that NRC would like to add to Categorical Exclusions. I for one would like to talk about numbers 7-16, have concepts explained and possible outcomes projected. The future is deeply influenced by the actions of the NRC, yet there is very little back and forth between the administration/staff and the many, many people whose lives are affected. And I notice that this rulemaking has a CPR priority of "medium" at https://www.nrc.gov/docs/ML1928/ML19289B867.pdf page 5. Another reason to let us have more time and plan some hearings.

Part II: Response to the Categorical Exclusions That argue for streamlining the NRC process

N.B. These quotations are taken from 86 FR 24514

A: "Reorganization of the list of categorical exclusions to eliminate redundancy and add clarity."

Response: More information about how the list is organized now and how it would be revised is required to respond to this entry. For example, to respond we would have to know what categories are on the list. This information is only partially given and is couched in jargon.

B: "Revisions to eliminate distinctions in categorical exclusions between license amendments, exemptions, rulemaking, and other forms of NRC actions, to ensure that categorical exclusions are based on the activities that would be authorized rather than the administrative and legal differences between the different forms of NRC approvals. For example, the NRC might revise a categorical exclusion from 'Issuance of an amendment to a permit or license issued under this chapter which. . .' to 'An action under this chapter that. . .'"

Response: Of the three distinctions listed; license amendments, exemptions, rulemaking; it's "rulemaking" that stands out. Rulemaking is a years-long process that requires extensive study and examination by the NRC staff and administration. Requests for rule changes by the public are discouraged because, usually an immediate change is wanted, whereas to change the rules takes years. I have seen it argued by the NRA that a license amendment is not worthy of a new Environmental Impact Statement or a new Environmental Review. In any case it doesn't usually have the ponderous requirement of rulemaking.

Also, your example that substitutes "Issuance of an Amendment" to "An action" obscures the real action — issuing an amendment. A major difficulty we NRC watchers have is that amendments are issued, what seems to us, quickly and easily. Not to state that that is what

you are doing would further confuse the issues under which amendments are wanted or needed.

C: "Revisions to consolidate categorical exclusions for exemptions into one category, for example, by moving the criterion for exemptions related to installation or use of a facility component located within the restricted area."

Response: If exemptions are all grouped under "categorical exclusion" (matters that will no longer be examined by the NRA), the NRA over time could silo almost every controversial actions it takes in a chosen excluded category, thereby escaping public scrutiny and much of its responsibility to protect workers and the public from levels of radiation that are outside EPA approval. For example, the NRC is seeking to remove from their responsibility people living near, but outside the footprint of, possible Small Modular Nuclear Reactors. Such an outcome, even though radiation should surely be monitored, would fall under the aegis of "categorical exclusion". And further, the disposition of high-level waste from these all-in-the-future projects would be hidden because, as soon as spent fuel is moved outside the footprint of the project, it would no longer be subject to NRC monitoring.

D: "Revisions to categorically exclude license terminations that are administrative acts that do not have the potential to affect the environment such as termination of licensees for which no construction or pre-construction activities have occurred or where all decommissioning activities have been completed and approved and license termination is a final administrative step."

Response: License termination of a decommissioned reactor must, necessarily be accompanied by a license transfer, not an isolated license termination. At Zion, the transfer at the end of decom was from Energy Solutions back to Exelon. This seems to have been uneventful. But it's important to distinguish between license termination, where no construction was ever done, and license transfers, where one party's license is terminated and another picks it up. In the latter case responsibility for the site still resides with a licensee and is part of a termination/transfer of the license.

E: "Revisions to categorically exclude the NRC's concurrence, under the Atomic Energy Act of 1954, as amended (AEA), § 274c., on termination by an Agreement State of licenses for AEA § 11e.(2) byproduct material where all decommissioning activities have been completed and approved and NRC's concurrence is a final administrative step."

Response: Unclear why the final administrative step seems onerous. What does it mean that the NRC wants to place it in a categorical exclusion?

Part III: Response to the 6th candidate for Categorical Exclusion

F: [Red Flag] "Revisions to categorically exclude issuance of exemptions to low-level waste disposal sites for the storage and disposal of special nuclear material regulated by Agreement States."

Response: Please find attached a document from Nuclear Information and Resource Service that was submitted in response to Docket ID NRC 2020-0065 "Transfer of VLL Waste to Exempt Persons for Disposal". Many activist organizations (including mine) signed on to this attached document in 2020 — only one year ago. I am very much supportive of the views expressed in the attached document. In fact, I thought the NRC had decided against allowing Very Low Level Radioactive Waste to go to a disposal unlicensed by the NRC. No categorical exclusion should apply to the disposal of waste with known radioactivity. There is no safe dose, not even the natural dose that emanates from the earth or impinges upon the earth from outer space. The arguments against using reference man as a standard for allowable radiation still stand. The health of women and children is more affected by radiation than that of reference man. What mankind has added to that background must be confined to a place where it can be monitored on a permanent basis, not a place where it will be subject to the "Boeing 737 MAX plan for protection of the public."

Nuclear power companies don't like to send their waste to Utah — it's expensive, it interferes with their profits. No matter the radiation level — low, medium, high or Very Low — companies that monitor themselves can be and should be expected to do the thing that will add to their profits and protect their shareholders' wealth. Protection of the public is always second fiddle to profits and shareholders. In other words, they — both the dumper and the dumpee — would cheat. Placing the disposal of VLLRW in a categorical exclusion with Agreement States would mean there is no federal agency monitoring it. Agreement States would have to tax their citizens to enforce laws and regulations while the NRC could declare, "not my job!"

Part IV: Categories Never Considered (Thus "Excluded") from NRC Concern

The NRC is the only agency U.S. citizens have to regulate the most dangerous private enterprise ever undertaken in this or any other country — the use of nuclear fission to produce electric power. I have categories, already excluded from NRC consideration, that should be, but aren't, NRC's job. My categories include responsibilities that are left to profit-making corporations whose primary concern (all corporate propaganda to the contrary) is maintaining their privilege, their profits and the wealth of their shareholders.

(1) My first category is "misplaced bonuses and tax breaks for on-time delivery of highly dangerous nuclear reactors". Had this exclusion not been in place, NRC might have prevented the rush to commission TMI Unit 2 on December 30 1978. FirstEnergy finished on the last possible day for the 1978 tax break. But less than 3 months later the infamous Unit 2 accident occurred. FirstEnergy saved a bundle in taxes, but UNOWHO got stuck with much of the clean up costs. And rate-payers, at least for 3 months, had to be billed for the cost of

creating Unit 2. Taxpayers are still supporting the HLRW which is being stored at INL, to say nothing of the danger, and inevitable radiation, to the public of Unit 2's spent fuel transportation from Pennsylvania to Idaho. One could go on about the labor issues for the workers who dissembled the disabled reactor, etc.

{Off topic comment: Chernobyl Unit 4 is an example of an outright bonus paid to administrators and workers for "completing" the project ahead of time. Again, it was the end of the calendar year, December 31, 1983 when Reactor Number 4 was accepted into operation.[1] But only 2 years and 3 months later those chickens came home to roost with the nuclear explosion that ended the short life of Unit 4.}

(2) My second category is "Existential threats to the safety of nuclear workers and the public that don't involve radiation *per se*". And, of course, I'm referring to

(a) continuing to allow 800-1000 itinerant refueling contractors to come in and out of small towns across the U.S. during the COVID 19 pandemic. This jeopardized citizens, permanent workers in the reactor control room and elsewhere, and the itinerant workers themselves. Much data is lacking or secret on the results of this practice. But were it not for the "this is not radiation, therefore not NRC's job" categorical exclusion, NRC might have ordered the reactors needing refueling and routine repairs to shut down during the pandemic, in spite of the (admittedly huge) loss in revenue to corporations and their shareholders.

(b) allowing the South Texas Project Electric Generating Station to continue operation with extreme weather and flooding during the winter of 2020-21. Some might admire the bravado with which the operators of the station maintain that it would come thru the storm. I, on the other hand, would have felt much more secure had the NRC been able to step in and shut down the reactors until the danger had passed. The reactor was OK, but it was very edgy and I feared the worst. And I resented not having a say in whether the reactor should be shut down.

In sum: Allowing corporations to make life and death decisions for the public, decisions that should be the responsibility of a non-profit making entity of the federal government (i.e. the NRC); letting oligarchy continue its juggernaut takeover of citizens' rights to be secure in their persons. For corporations to give deadline bonuses and perks tempts construction people to hurry matters that need consideration, deliberation and, perhaps, delay. This decision should be in the hands of a disinterested party (the NRC). And existential threats that increase the menace of fission reactors should be the purview of a government agency, not a corporation that cares more for profit and wealth than the lives of workers and citizens.

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[1] Zhores Medvedev, The Legacy of Chernobyl, 1990, (Norton Edition) ISBN: 978-0-393-30814-3. "But it seems obvious that the acceptance document was signed on the last day of 1983 under pressure, in order to be able to declare that the works planned for 1983 had been fulfilled. If [not signed] thousands of workers, engineers and… superiors at the ministries and committees would have lost bonuses, awards and other extras (which often amount to as much as two or three times a monthly salary). Page 13 ¶4.

Part IV: Summary

1. I am forgoing comments on "categorical exclusions" 7 - 16 because their statements are in generalities and too many terms are undefined.

2. I am strongly in favor of the attached submission by NIRS on Docket No NRC 2018-0065 by Don't Waste Michigan, Nuclear Information and Resource Service, Beyond Nuclear, *et. al.*

3. Likewise the submission on this docket number (NRC 2018-0300) of the comment written by Terry J. Lodge, Esq.

Conclusion: Thank you for the opportunity to submit comments

Jan Boudart, board member NEIS.org, the Nuclear Energy Information Service