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July 23, 2015

Ms. Annette Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
ATTN: Rulemaking and Adjudications Staff

Subject: Proposed 10 CFR Part 61 Rule on Low Level Radioactive Waste Disposal (80FR16082); NRC Docket NRC-2011-0012

Project Number: 689

Dear Madam Secretary:

On behalf of the nuclear energy industry, the Nuclear Energy Institute (NEI)¹ appreciates the opportunity to provide comments on the proposed Part 61 rulemaking published in the Federal Register on March 26, 2015 (80FR16082). We appreciate the many public meetings held by the U.S. Nuclear Regulatory Commission (NRC) staff on this rulemaking, and look forward to future interactions on this and other low level radioactive waste (LLRW) regulatory matters. We also appreciated the opportunity afforded to NEI to participate as a panel member in the June 25, 2015 Commission briefing. It was clear during the briefing that this rulemaking raises several complex regulatory and policy issues, and we trust that this letter along with those of other stakeholders will help inform the agency's decision on how to proceed.

At first glance, one might assume that the current operators of the existing Agreement State-licensed LLRW disposal sites are the only stakeholders impacted by this rule. However, it should be recognized that any modification to the existing radioactive waste regulatory framework has a direct and potentially unintended impact on radioactive waste processors and generators, e.g., nuclear power plants, uranium enrichment facilities, and broad scope licensees. Therefore, we offer comments on the proposed rule and have identified potential or unintended impacts from its implementation, which we trust will be fully considered by NRC.

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

In Summary, the current rulemaking should be discontinued or, at minimum, its scope narrowed.

We acknowledge the staff's exhaustive and transparent efforts to date in developing the proposed rule made available for comment. However, the current rule's scope has expanded beyond its original intent, the current Regulatory Cost-Benefit Analysis is deficient, and future NRC decisions on the Part 61 Waste Classification (WC) Tables could require subsequent conforming modifications to this proposed rule (see item 5 below). Therefore, this rulemaking should be discontinued in its current form and other options pursued (see item 2 below). As was discussed during the June 25, 2015 Commission briefing, a question regarding the safe disposal of large quantities of depleted uranium (DU) arose during the licensing of the Louisiana Energy Services facility now operating in New Mexico (CLI-05-20). Since then, the issue of unique LLRW streams other than DU was raised and the rulemaking's scope expanded. The rule expansion is unnecessary and will introduce undue burden and unintended consequences that will negatively impact the industry and Agreement States, as well as the potential for new LLRW disposal sites.

Should NRC proceed with this rulemaking, the scope of the rule should be narrowed to its original intent, i.e., the safe disposal of large quantities of DU. Further, the rule should only apply prospectively to those sites that seek authorization from their regulators to dispose of large quantities of DU. With this approach, current licensees or future applicants would not be required to conduct an initial or updated Performance Assessment (PA) at site closure if they do not plan to accept large quantities of DU for disposal. Should circumstances change, it is reasonable that a PA would be required. (See item 3 below).

General Comments:

We offer the following comments, which we trust will inform NRC's decision on whether or how to proceed with this rulemaking.

1. *First and most importantly: Current regulations "ensure public health and safety are protected in the operation of any commercial LLRW disposal facility."*² The staff recognizes and industry supports the NRC statement that LLRW disposed of in accordance with Part 61 or its Agreement State equivalent ensures public health and safety today through, in part, application of the integrated systems approach. NRC, Agreement States and industry work to ensure that all forms of LLRW are disposed of in accordance with applicable regulations and with pre-approval by the appropriate regulatory agency. There is no information to suggest that disposal of LLRW pursuant to the current regulatory framework is unsafe or is not adequately protective of public health and safety and the environment. Current disposal practices include, but are not limited to safe disposals authorized under the alternate pathway allowed under 10 CFR 20.2002. In fact, adequate pathways for LLRW disposal exist nationwide and are utilized as allowed under the current national regulatory framework. Therefore, from a public health and safety perspective, this rulemaking is not necessary.

² *Federal Register* Notice dated March 26, 2015, "Low-Level Radioactive Waste Disposal," (80FR16082), page 16084.

2. *Draft Regulatory Analysis is Deficient* – The current Draft Regulatory Analysis considers only two options, i.e., do nothing or proceed with a limited site-specific rule. Further, no benefits from the current rulemaking were identified. We believe that other viable options, not all of which include rulemaking, should have been analyzed and included for completeness. Such options include:
- Option 1: discontinue the rulemaking, finalize the NRC guidance and work with the sited Agreement States (each of which has an existing site-specific regulatory framework in place) to address the disposal of large quantities of DU;
 - Option 2: option 1 without finalizing the NRC guidance; or
 - Option 3: revise the proposed rule to limit it to its original intent as directed by the Commission in its 2009 staff requirements memorandum³. For example, the rule would simply require licensees or applicants to submit, and receive prior approval from the appropriate regulatory authority of, a site-specific PA if they seek authorization to dispose of large quantities of DU. This approach is consistent with that currently allowed under 10 CFR 61.58 and compatible Agreement State regulations. Such flexibility should be retained.

With any of the options, it should be recognized that the sited Agreement States, who are the only regulators of existing commercial LLRW disposal sites, have the necessary regulatory framework in place today to address this matter. In fact, each Agreement State has made, or is in the process of making, licensing decisions about the need for site-specific PAs and whether disposal of the waste streams captured by this proposed rule would be allowed at their respective sites. In addition, the NRC has an effective oversight tool in place today to coordinate with the sited Agreement States. Specifically, NRC determines the adequacy and compatibility of each sited States' LLRW management regulatory program through its Integrated Materials Performance Evaluation Program (IMPEP) and reports its findings publicly.

Draft Cost-Benefit Analysis is Deficient: NRC has stated that the rule's impact is limited to LLRW disposal site operators. However, as was discussed during the Commission briefing, the regulatory analysis fails to: 1) identify and consider the impacts to all categories of NRC licensees impacted by this proposed rule; and 2) conduct the necessary cost-benefit analysis for such licensees. Such licensees include but are not limited to commercial uranium enrichment facilities licensed under Part 70 which generate DU and LLRW, and commercial nuclear power plants, fuel fabricators, byproduct materials licensees and other generators of LLRW. It is clear that costs imposed on the LLRW disposal site operators to comply with this rule would ultimately be borne by the LLRW generators since the site operators must recoup any rule implementation costs. To that end, the LLRW Northwest Compact representative stated during the June Commission briefing that increased associated permit costs was currently estimated at approximately 8% should the rule go into effect. Further, and equally important, is the fact that NRC did not evaluate the cost-benefit associated with requiring a disposal site operator, who does not intend to dispose of DU and where the sited

³ Staff requirements memorandum dated March 18, 2009 in response to SECY-08-147, "Staff Response to Commission Order CLI-05-20 Regarding Depleted Uranium."

Agreement State will not allow future disposals of DU, to perform a PA. Again, these unjustified and unanalyzed costs would likely be borne by waste generators and processors.

3. *The rule should only apply prospectively to those sites that seek authorization to dispose of large quantities of DU.* First, a prospective approach is consistent with that implemented by NRC and the Agreement States when the original Part 61 went into effect. The regulators recognized that there was no safety basis to apply all or some of the new requirements to LLRW that had already been disposed of in accordance with requirements in effect at the time. In fact, implementing some of the then new Part 61 requirements, e.g., intruder protection would result in unjustified or impractical technical and economic burdens to licensees and the regulator. Thus, requirements were imposed on a case-by-case basis. In that regard, the case-by-case decision making currently allowed under 10 CFR 61.1(a) should be retained; however, it appears that the language proposed for 10 CFR 61.13 would supersede 10 CFR 61.1(a). NRC should clarify this issue.

Secondly, LLRW is safely disposed of today in accordance with site-specific licenses issued by the sited Agreement State. There is no evidence to suggest otherwise or that the current regulatory framework is inadequate from a public health and safety perspective. The sited Agreement State programs, in combination with NRC's oversight through the IMPEP, help ensure that current and future waste management operations are in compliance with all applicable regulations. Therefore, should NRC proceed with this rulemaking, the rule should only apply prospectively to those sites that seek authorization from their regulators to dispose of large quantities of DU. With this approach, current licensees or future applicants would not be required to conduct an initial PA or updated PA at site closure if they do not plan to accept large quantities of DU for disposal. Should circumstances change, it is reasonable that a PA would be required.

4. *Compatibility Level for the Rule.* Should the rulemaking proceed, we offer the following comments on the complex issue of compatibility. Industry generally supports and is sensitive to the need for national consistency and uniformity in most regulatory arenas. As such, we recognize that a Compatibility Level B designation for this rule has appeal to some. However, for all intents and purposes, a designation of Level B may not be a practical or implementable approach for this rule, nor is it meaningful in its application. Further, the location of the LLRW disposal facilities and the fact that LLRW is transported across the nation from generators and processors to the disposal sites is not, in and of itself, a "transboundary implication" necessitating a Compatibility Level B. Rather, the determination of "transboundary implications" has most often been applied to address the movement of goods and services under reciprocity between NRC and the Agreement States and not simply the transport of radioactive material or waste from one location to another, e.g., LLRW, sealed sources, used fuel. Further, the issue of more clearly defining "transboundary implications" under Compatibility Level B is discussed in SECY-15-0087 now before the Commission for consideration.

In addition, unlike other NRC regulatory business lines where NRC either has sole jurisdiction or has relinquished its authority to an Agreement State, there are no LLRW disposal sites licensed by NRC under Part 61. Rather, each sited Agreement State has a Part 61-compatible regulation in place to address LLRW disposal, including the disposal of DU and other waste streams envisioned by this

rule. As such, disposal site-specific waste acceptance criteria is in place today and would continue to be used by LLRW disposal site operators when implementing the proposed rule as written. This fact remains regardless of the compatibility level designation assigned to Part 61, and we fully support the necessary flexibility afforded by the current rule. Therefore, unless NRC demonstrates that, based on public health and safety, the Agreement States must adopt a rule that is either "identical" or "essentially identical" to NRC's rule (as required by Compatibility Levels A and B, respectively) national uniformity is not necessary. While we recognize that the Compatibility Level is a matter of consultation between the NRC, Agreement States and the Commission, we respectfully suggest that the most appropriate Compatibility Level appears to be C. Specifically, Level C would allow Agreement States to be more restrictive than the NRC's rule (which some already are) and allow each sited Agreement State to retain its current approach to regulating LLRW disposal. Finally, we are confident that NRC will continue to monitor the adequacy and compatibility of the Agreement State programs through the IMPEP.

5. *Part 61 Waste Classification (WC) Tables*: As stated by NRC staff, the Part 61 WC tables are maintained for now, but could be revised during a subsequent rulemaking which could necessitate conforming changes to the final version of this proposed rule, i.e., "a whiplash effect on licensees." Therefore, we are commenting on this proposed rule without the benefit of being fully aware of or informed by potential impacts from future Part 61 rulemakings. Such modifications could include incorporating up to date science or removal of the Part 61 waste classification tables⁴. Clearly, this is a significant disadvantage of proceeding with a limited rulemaking at this time and perhaps, in combination with the Agreement State programs and safe disposal practices in place today, reason enough not to proceed. Instead, the issues surrounding the WC tables should be fully vetted and evaluated by NRC to determine which impacts might be realized from such modifications. It should also be recognized that there are significant statutory implications of modifying the WC tables or removing them in their entirety from Part 61—and compatible Agreement State regulations--since the WC tables are explicitly referenced in the Low Level Radioactive Waste Policy Act of 1985. These issues are not insurmountable but should be carefully identified and analyzed for impacts to this rulemaking.
6. *Use of the word "analysis" versus "consideration"*: NRC's introduction of the word, "analysis" in the context of "defense-in-depth" is a new requirement and a concept without definition in the proposed rule. "Analysis" implies the need for an unprecedented and perhaps unjustified, unnecessary and impractical quantitative approach for evaluating long-term site performance in addition to the explicit consideration of uncertainty and variability. Therefore, NRC should delete "analysis" and use a term that more clearly reflects the historical approach to defense-in-depth used by licensees, NRC and the Agreement States, e.g., "consideration."

⁴ U.S. Nuclear Regulatory Commission Staff Requirements Memorandum on SECY-2013-0001.

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We trust the comments above help inform any decision on whether to proceed with this rulemaking and we look forward to learning how stakeholder comments are resolved. I would be pleased to answer any questions on the comments contained herein.

Sincerely,

A handwritten signature in cursive script, appearing to read "Janet R. Schlueter".

Janet R. Schlueter

c: Mr. Larry Camper, NMSS/DUWP, NRC
Ms. Marissa Bailey, NMSS/FSCE, NRC
Mr. David Esh, NMSS/DUWP/PAB, NRC