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U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

ATTN: Program Management, Announcements and Editing Staff

Submitted electronically to: <https://www.regulations.gov/comment?D=NRC-2020-0065-0001>

RE: March 6, 2020 Nuclear Regulatory Commission Proposed Interpretive Rule for Transfer of Very Low-Level Waste to Exempt Persons, Docket ID: NRC-2020-0065

Dear Sir or Madam,

On behalf of the New Mexico Environment Department (NMED), attached please find our comments on the May 29, 2020 Nuclear Regulatory Commission Proposed Interpretive Rule for Transfer of Very Low-Level Waste to Exempt Persons. See 85 FR 13076 (March 6, 2020).

Please do not hesitate to contact me to discuss further.

Sincerely,

James C. Kenney
Cabinet Secretary

Attachment (1)

cc: Courtney Kerster, Director of Federal Affairs, Office of Governor Michelle Lujan Grisham
Sandra Ely, Director, NMED Environmental Protection Division
Rebecca Roose, Director, NMED Water Protection Division
Stephane Stringer, Director, NMED Resource Protection Division

Attachment

Introduction

The U.S. Nuclear Regulatory Commission (NRC) issued a proposed interpretation of its low-level radioactive waste disposal regulations that would permit licensees to dispose of waste by transfer to persons who hold specific exemptions for the purpose of disposal. The NRC will consider approval of requests for specific exemptions for the purpose of disposal if they are for the disposal of very low-level radioactive waste (VLLW) by land burial. NRC's stated intent is that this interpretive rule will allow licensees to transfer very low-level radioactive waste to exempt persons for the purpose of disposal by land burial.

While NRC acknowledges that there is no statutory or regulatory definition of VLLW, NRC states that it will consider approval of specific exemption requests for unlicensed land burial facilities if the cumulative dose of the waste to be disposed were to be maintained below 25 millirem per year.

New Mexico is one of 37 states belonging to the Organization of Agreement States that is providing comments to the NRC. The New Mexico Environment Department (NMED) submits these comments separately and in addition to comments submitted by the Organization of Agreement States.

Comments

- 1. The Proposed Interpretive Rule describes VLLW as, "waste that contains some residual radioactivity, including naturally occurring radionuclides, which may be safely disposed of in hazardous or municipal solid waste landfills."¹ This conflicts with NMED's Solid Waste Regulations² and Radiation Protection Regulations³ which prohibit the disposal of radioactive waste of any level in municipal solid waste landfills.**

The federal Resource Conservation and Recovery Act (RCRA)⁴ required states to establish permit programs to ensure that municipal solid waste landfills (MSWLFs) comply with federal MSWLF criteria identified in 40 CFR Part 258. As mandated by RCRA, the U.S. Environmental Protection Agency (EPA) approved the adequacy of NMED's MSWLF permit program in December 1994, as addressed through the New Mexico Solid Waste Act⁵ and Solid Waste Management Regulations (which later became the Solid Waste Regulations). This delegated regulation of all active MSWLFs in New Mexico to the NMED, and all active MSWLFs hold solid waste facility permits issued by NMED pursuant to the NM Solid Waste Act and Rules.

NMED's Solid Waste Rules prohibit the disposal of "radioactive waste" in solid waste facilities.⁶ Although VLLW is not defined by federal statute or in any of the NRC's regulations, it is apparent that VLLW would fall within NMED's Solid Waste Rules definition of "radioactive waste."⁷ Therefore, NRC's proposed disposal of VLLW into MSWLFs is specifically prohibited and illegal in the State of New Mexico.

1 85 Fed. Reg. 13076, 13077 (March 6, 2020).

2 20.9.2 to 20.9.10 New Mexico Administrative Code (NMAC).

3 20.3.13 NMAC.

4 42 U.S.C. § 6901, *et seq.*

5 NMSA 1978, §§ 74-9-1 to 74-9-43.

6 *See* 20.9.2.10(A)(10) NMAC.

7 *See* 20.9.2.7(R)(1) NMAC.

Disposal of radioactive waste at an unlicensed facility such as a MSWLF is also prohibited by the New Mexico Radiation Protection Regulations, which state: “No person may receive, possess, and dispose of waste received from other persons at a land disposal facility, unless authorized by a license issued by the department pursuant to this part (20.3.13 NMAC), and 20.3.3 NMAC.”⁸

NRC’s Proposed Interpretive Rule, asserting that VLLW disposal in MSWLFs would result in the illegal disposal of VLLW in New Mexico landfills.

2. NRC’s Proposed Interpretive Rule will create hazards to MSWLF workers.

Regulatory oversight of waste disposal in New Mexico’s MSWLFs is the sole responsibility of NMED. If NRC asserts jurisdictional authority over MSWLFs in New Mexico, NRC’s proposal for disposal of radioactive waste in MSWLFs becomes problematic for several reasons. First, permanent isolation of radioactive waste placed in MSWLFs may not occur. Waste excavation is a common activity at MSWLFs and may be necessary for response to emergency situations (such as fires caused by hot loads), construction of landfill gas collection systems, connection of liner systems of new disposal cells to existing disposal cells, and performance of law enforcement investigations.

In addition, MSWLFs are not designed to contain low level radioactive waste, so radioactive waste may contaminate landfill gas and leachate collection systems. Further, typical operating practices for MSWLFs do not provide for training and protection for hazards posed by radioactive waste. MSWLF workers lack the knowledge and training necessary to ensure safe handling and disposal of such waste. Should the proposed NRC rule ultimately apply to New Mexico landfills, the stakeholder and public opposition could be significant, as well as an erosion of public trust in NMED.

3. NRC’s Proposed Interpretive Rule will result in VLLW disposal at sites that have no permits or regulatory oversight, posing unnecessary and unacceptable risk to New Mexico’s citizens and environment.

RCRA solid waste exclusions⁹ provide that special nuclear or by-product material, as defined by the 1954 Atomic Energy Act,¹⁰ is not a solid waste. Title 61 of the RCRA Land Disposal Restrictions¹¹ specifies the licensing requirements for land disposal. The NRC is proposing to modify the restriction on VLLW from only being disposed at locations which are licensed by NRC, to allow VLLW disposal at unlicensed facilities. Since VLLW is not defined as a solid waste and since disposal of VLLW at MSWLFs in New Mexico is prohibited, NRC is incenting VLLW disposal at locations without any permitting safeguards or regulatory oversight. This will result in VLLW land disposal at unregulated and uncontrolled locations increasing exposure to the public, livestock, crops and wildlife.

4. NRC’s Proposed Interpretive Rule does not explain monitoring and enforcement of the total allowable cumulative dose of 25 millirem per year.

The Proposed Interpretive Rule requires a safety analysis performed by states to estimate potential radiological impacts to members of the public and to ensure that the 25 millirem per year cumulative

8 20.3.13.1302(A) NMAC.

9 40 CFR 261.4(a)4.

10 42 U.S.C. 2014.

11 40 C.F.R. Part 268.

dose limit is not exceeded.¹² However, the Proposed Interpretive Rule contains no requirements for how the limit of 25 millirem cumulative dose to the public would be monitored and enforced at VLLW disposal sites. Aside from the inherent nature of the unfunded mandate imposed by the NRC on states, the NRC must engage states and the public on the proposed rule monitoring, tracking requirements, responsibilities for the dose limit, who/how the dose limit would be enforced, etc. The NRC failed to properly public notice these requirements for proper comment and address unfunded mandate to states.

5. NRC’s Proposed Interpretive Rule threatens human health and the environment in areas of New Mexico that contain a high percentage of minority and low-income populations. As such, NRC fails to comply with Executive Order 12898 requiring that all federal agencies achieve environmental justice for vulnerable populations that would be disproportionately affected by programs of the United States.

NRC’s Proposed Interpretive Rule, that would allow the transfer of VLLW to exempt persons for disposal by land burial, compounds the impacts of uranium mining and milling, legacy contamination at national laboratories, and disposal of defense waste at the Waste Isolation Pilot Plant (WIPP), which create risks to public health and the environment to New Mexicans and tribal communities that are disproportionately greater than such risks to the general population of the United States.

New Mexico’s percentages of minority and low-income populations are significantly greater than in the United States general population.

Demographic	United States	New Mexico
Hispanic or Latino	18.3%	49.1%
American Indian	1.3%	10.9%
Persons in poverty	11.8%	19.5%
Source: U.S. Census Bureau QuickFacts: https://www.census.gov/quickfacts/fact/table/US/PST045219		

Minority and low-income New Mexicans who may be employed by an “exempt person” pursuant to the Proposed Interpretive Rule for VLLW disposal,¹³ or who may be employed as workers at a MSWLF, or who may unwittingly come upon an unregulated and uncontrolled VLLW disposal site in the state, are at risk of exposure to, and health risks from, VLLW. Further, VLLW may travel in the environment and compromise air, surface waters, groundwaters and land.

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority and Low-Income Populations, February 11, 1994, states that “... each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionally high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations of the United States.”¹⁴

The Council on Environmental Quality (CEQ) issued Environmental Justice Guidance under the National Environmental Policy Act (NEPA)¹⁵ on December 10, 1997, that stated, “Agencies should

¹² 85 Fed. Reg. 13076, 13078.

¹³ 85 Fed. Reg. 13076.

¹⁴ <https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf>.

¹⁵ 42 U.S.C. § 4321 et seq.

consider the composition of the affected area, to determine whether minority populations, low-income populations, or Indian tribes are present in the area affected by the proposed action, and if so whether there may be disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, or Indian tribes.”¹⁶

On August 24, 2004, NRC issued a Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions that stated, “NRC believes that an analysis of disproportionately high and adverse impacts needs to be done as part of the agency's NEPA obligations to accurately identify and disclose all significant environmental impacts associated with a proposed action.”¹⁷

In its Proposed Interpretive Rule, NRC fails to include any discussion of environmental justice, much less demonstration of adherence to Executive Order 12898, to the CEQ environmental justice guidance, or to NRC’s own Environmental Justice Policy. NRC must demonstrate that its Proposed Interpretive Rule will achieve environmental justice for the high percentage of vulnerable minority and low-income populations in New Mexico who might be adversely affected by the Rule.

6. Since implementation of NRCs Proposed Interpretive Rule can create significant risks to human health and the environment, NRC must complete a thorough Environmental Impact Statement for the Proposed Interpretive Rule in accordance with NEPA.

NEPA mandates the NRC to prepare an Environmental Impact Statement (EIS) for its Proposed Interpretive Rule that fully evaluates the impacts of the proposed rule on the quality of the human environment. Section 102 of NEPA states that “all agencies of the Federal Government shall include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on the environmental impact of the proposed action,”¹⁸ Here, NRC is clearly an agency of the Federal Government and its proposed rule significantly affects the quality of the human environment because it will result in less regulatory control of VLLW disposal and potential human exposure to radioactive waste. This requires an EIS analyzing that potential exposure and its effects, as well as an investigation of other potential options and alternatives to the Proposed Interpretive Rule.

¹⁶ <https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf>.

¹⁷ <https://www.govinfo.gov/app/details/FR-2004-08-24/04-19305>.

¹⁸ 42 U.S.C. § 4332(C)(i).