



October 21, 2020  
*Via Electronic Mail*

Secretary  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
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**Re: Lawyers Committee on Nuclear Policy Comment on Docket ID NRC-2020-0065.**

Dear Rulemakings and Adjudications Staff:

The Lawyers Committee on Nuclear Policy (LCNP) opposes the Nuclear Regulatory Commission's (NRC) proposed interpretative rule on the transfer of "very low-level waste" to exempt persons for the purpose of disposal.

LCNP, founded in 1981, is a non-profit educational association of lawyers and legal scholars that engages in research and advocacy in support of the global elimination of nuclear weapons and a more just and peaceful world through respect for domestic and international law.

**I. Summary of Comment**

As described further below, LCNP is concerned that the NRC's proposal would violate not only the Administrative Procedures Act and other legislation, such as the Atomic Energy Act and National Environmental Policy Act, but it also contravenes established human rights law as established by U.S.-ratified treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).

The NRC's proposal is classified as a reinterpretation of current guidance that only allows for the transfer of licensed material for disposal to licensed persons. In reality, the proposal functions as a substantive rulemaking that seeks to reclassify certain radioactive waste from low-level radioactive waste to "very" low-yield in order to bypass specific requirements for disposal in place to help ensure the safety of all persons. The arbitrary loosening of restrictions on disposal mechanisms for this radioactive waste places communities in close proximity to these dump sites in clear danger of adverse environmental and health effects. Reports consistently demonstrate that people of color, in particular Black and Native-American communities, are significantly more likely to be affected by landfill and waste dump sites. Given the lack of direction offered by the NRC in its proposal as to which sites would receive the arbitrarily and newly-classified "very low-level waste," it is highly and unacceptably likely that radioactive waste would be disposed of in a

discriminatory fashion, disproportionately affecting both the environment and health of communities of color. LCNP further asserts that, regardless of the naming convention of such waste, there is in fact no such thing as safe nuclear waste. This proposed “reinterpretation” is a violation of procedural, environmental, civil rights, and legislatively-ratified international law.

## **II. Violations of Law by this Proposed Rulemaking and LCNP’s Comments**

LCNP concurs with the arguments made by the Natural Resources Defense Council, *et al.*, emphasizing that the NRC’s proposed interpretive rule violates the Administrative Procedure Act, the Atomic Energy Act (AEA), the Resource Conservation & Recovery Act, and the National Environmental Policy Act (NEPA).<sup>1</sup> In particular, we highlight that the AEA’s definition of “low-level radioactive waste<sup>2</sup>,” in conjunction with NRC statutory and regulatory requirements<sup>3</sup>, requires disposal of such low-level radioactive waste (LLRW) in a licensed facility bound by many specific requirements precisely because this waste is dangerous and harmful.<sup>4</sup> Licensed LLRW sites must be selected with environmental, developmental, and human population growth in mind and also have a functioning early-warning system for the release of radionuclides from the site.<sup>5</sup>

The requirements set forth to establish LLRW disposal sites need to be strengthened and improved, not downgraded and loosened for some LLRW, as the NRC’s proposed interpretive rule sets out to do.

In addition to the above, the NRC’s proposed rule would offend long-established Executive Order No. 12898 and contravene the United States’ binding obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).

LCNP argues that the NRC should not implement the proposed “interpretation” and should not permit “very” LLRW to be disposed of by land burial by exempt persons. Not only is this proposal reckless, arbitrary, and in clear violation of established statutory and regulatory requirements, but it would also cause environmental ramifications affecting the health and safety of the ecosystem and its inhabitants. Disposing of low-level radioactive waste at unlicensed garbage dumps threatens to adversely affect the surrounding environment and communities, very likely disproportionately harming communities of color.

### **A. The proposed rule violates Executive Order 12898 and NEPA, because it fails to consider environmental justice and the disproportionate impact of disposing of radioactive waste in unlicensed facilities.**

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<sup>1</sup> Comment ID NRC-2020-0065-0178, <https://beta.regulations.gov/comment/NRC-2020-0065-0178>

<sup>2</sup> 42 U.S.C. § 2021(b)(9)

<sup>3</sup> *See* Low-Level Radioactive Waste Policy Act of 1985 (P.L. 99–240), 42 U.S.C. §2021(b) *et seq.*

<sup>4</sup> 10 C.F.R. §61.50(a)

<sup>5</sup> 10 C.F.R. §61.53(c)

Executive Order 12898, entitled *Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*, stipulates that “each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands.”<sup>6</sup> The order also establishes an Environmental Justice Working Group comprised of the heads of all major federal agencies and encourages other agencies to abide by the rules laid out in the order.

The proposed interpretive rule would violate this Order, because it fails to consider the adverse effects on human health and the environment of minority and low-income populations and instead seeks to bypass the limited regulations in place to prompt consideration of such matters. Furthermore, under the National Environmental Policy Act (NEPA), federal agencies must consider environmental justice in their activities. In response to EO 12898, the White House Council on Environmental Quality (CEQ) issued *Environmental Justice; Guidance Under the National Environmental Policy Act*. This guidance includes six principles to guide environmental justice analyses, looking in particular for disproportionate effects on human health and the environment for low-income, minority, and tribal populations. On this guidance, agencies must consider in an environmental justice analysis whether its action will disproportionately affect these populations and must also consider relevant data concerning “the potential for multiple exposures or cumulative exposure to human health of environmental hazards...as well as historical patterns of exposure to environmental hazards.”<sup>7</sup>

The NRC has no environmental justice plan in its proposed reinterpretation of rules relating to low-level radioactive waste—at least not one that it publicly states. The proposition to reclassify certain low-level radioactive waste to “very low-level radioactive waste” is in conflict with the obligations established under EO 12898 and environmental justice guidance, as the agency has made no clear efforts to mitigate the potential health risks the disposal of this waste may cause in the surrounding populations and communities.

Low-income populations and communities of color will be disproportionately affected by the NRC’s action, because waste disposal facilities and landfills are more frequently located in their proximity. According to the report *Toxic Wastes and Race at Twenty*, “people of color are found to be more concentrated around hazardous waste facilities than previously shown.”<sup>8</sup> This report is an update from an original 1987 report on toxic wastes and race. The original report argued that hazardous waste sites, landfills, incinerators, and polluting industries were predominately being placed in communities inhabited by African Americans, Hispanics, Native Americans, Asians and Pacific Islanders, farm workers, and the working poor. This report posited the reason for this intentional placement was that these groups are particularly vulnerable, “because they are perceived as weak and passive citizens who will not fight back against the poisoning of

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<sup>6</sup> <https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf>; <https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice>

<sup>7</sup> [https://www.epa.gov/sites/production/files/2015-02/documents/ej\\_guidance\\_nepa\\_ceq1297.pdf](https://www.epa.gov/sites/production/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf)

<sup>8</sup> <https://www.nrdc.org/sites/default/files/toxic-wastes-and-race-at-twenty-1987-2007.pdf>

their neighborhoods in fear that it may jeopardize jobs and economic survival.”<sup>9</sup> Whether or not the placement of these facilities in these communities is intentional or not, the updated *Toxic Wastes and Race at Twenty* demonstrates that the communities surrounding these waste and landfill facilities are still—and even more so—predominately inhabited by low-income and minority populations.

These communities are already affected by pollutants of landfills, hazardous waste facilities, and other waste dumps—adding any level of radioactive material would not only cause additional environmental damage but also create a whole host of new adverse health effects. Pollution is already substantially worse in low-income and minority neighborhoods in the U.S.; adding radiation to the mix of pollutants these communities experience would constitute a violation of their civil and environmental rights.<sup>10</sup> Without adequately addressing these potential health and environmental impacts, the NRC’s proposed rule clearly violates Executive Order 12898 and the National Environmental Policy Act with its related guidance.

B. The proposed rule violates the ICCPR’s right to life, because it fails to preserve the environment and shield it from harm and pollution.

The United States is a party to the International Covenant on Civil and Political Rights (ICCPR) and is thus legally-bound to fulfill the obligations established under this treaty. Article 6 of the ICCPR, on the right to life, states that: “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”<sup>11</sup> The Human Rights Committee, the ICCPR’s treaty body, notes in its General Comment 36, paragraph 62:

Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors.<sup>12</sup>

A recent report by the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes highlights that the ICCPR’s right to life, right to a life with dignity, and right to bodily integrity provisions require countries to protect individuals and communities from exposure to hazardous substances, including radioactive waste.<sup>13</sup> The Special Rapporteur cites exposure of individuals and communities to hazardous waste as a “prima facie failure” of the state’s duty to prevent exposure.<sup>14</sup> Relatedly, the Human Rights Committee has held that states “may be in violation of the rights to life and a life with dignity when they take insufficient measures or otherwise fail to take measures to prevent chronic exposure to hazardous substances.”<sup>15</sup>

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<sup>9</sup> Ibid.

<sup>10</sup> <https://www.washingtonpost.com/news/wonk/wp/2014/04/15/pollution-is-substantially-worse-in-minority-neighborhoods-across-the-u-s/>

<sup>11</sup> <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>12</sup> [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1\\_Global/CCPR\\_C\\_GC\\_36\\_8785\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf)

<sup>13</sup> A/74/480 para. 7., <https://undocs.org/en/A/74/480>

<sup>14</sup> *Id.* para. 15.

<sup>15</sup> *Id.* para. 13.

The NRC’s proposed rule not only would not “preserve” the environment, but it would actively harm the environment instead, *contributing* to further harm and pollution. Deregulating the disposal of certain radioactive wastes ensures that this waste, no matter how “low-level,” will infiltrate communities and cause irreparable damage to the environment through the contamination of water supplies, agriculture, livestock, and people. This exposure to hazardous waste would implicate clear violations of the rights to life, to a life with dignity, and to bodily integrity, as affirmed by the Special Rapporteur and Human Rights Committee. While the NRC casually refers to its “intent” only to dispose of the “least hazardous level of waste” as well as the “intent” to dispose of waste away from people and the environment, the NRC makes no effort to describe how this intent will be enacted, and local communities are set to bear the brunt of any damage of the actual impact of the proposed rule. The ICCPR instead requires that the NRC ensure the protection of the environment and of the people therein from exposure to nuclear waste that may end up in nearby landfills upon the implementation of this rule.

C. The proposed rule violates CERD, because the environmental and health impacts of the NRC’s “reinterpretation” will be absorbed by communities of color in the United States.

The Convention on the Elimination of All Forms of Racial Discrimination (CERD), to which the U.S. is a state party, defines “racial discrimination” in article 1 as:

Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>16</sup>  
*Emphasis added.*

Given the violation of the right to life under the ICCPR, and the consistent studies showing that waste sites and landfills are disproportionately established in and near communities of color in the U.S., the NRC’s proposed interpretive rule clearly also violates CERD.

CERD establishes positive obligations on states party to eliminate and prohibit racial discrimination as related to enjoyment of many rights, including civil, political, economic, social, and cultural rights, including the right to protection by the state against bodily harm.<sup>17</sup> Furthermore, CERD requires that states party review and rescind or nullify any laws or regulations, “which have the effect of creating or perpetuating racial discrimination.”<sup>18</sup> The U.S. historically has dumped highly-toxic waste, including radiological waste, in the land and waters of Indigenous tribes in breach of CERD.<sup>19</sup> In light of the environmental racism on display throughout U.S. history, the NRC must take particular care to highlight how any reinterpretation of the regulations surrounding LLRW will account for the *protection* of Indigenous communities and other communities of color most likely to be harmed. By failing to account in detail the process by which exemptions will be made for certain unlicensed facilities to be able to accept low-yield radioactive waste, the NRC removes any transparency from the current law—which specifically proscribes

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<sup>16</sup> <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>

<sup>17</sup> *Id.* Article 5.

<sup>18</sup> *Id.* Article 2(1)(c).

<sup>19</sup> [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT\\_CERD\\_NGO\\_USA\\_17655\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17655_E.pdf)

land burial of LLRW in unlicensed facilities<sup>20</sup>—all but ensuring that its proposed rule will only exacerbate the current state of discriminatory affairs when it comes to toxic waste sites in the United States.

The U.S. has both an obligation to prevent the discriminatory harm that would result from the disposal of nuclear waste of any type in or near minority communities, and to nullify any regulations that perpetuate racial discrimination. If the NRC finalizes this proposed rule, the effect, as discussed above, would be to disproportionately harm minority communities, and the U.S. would thus be under obligation to reverse the interpretative rule. The NRC has the obligation under these provisions not to enact the rule in the first place.

### **III. Conclusion**

For the aforementioned reasons and in accordance with human rights law, LCNP strongly urges the NRC to withdraw this proposed interpretive rule and to instead consider regulations that will safeguard, not harm, human health and the environment from toxic, radioactive waste.



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<sup>20</sup> 10 C.F.R. §61.3