

DRAFT FEB. 11, 2022

February __, 2022

Office of Spent Fuel and Waste Disposition
Office of Nuclear Energy
U.S. Department of Energy
consentbasedsiting@hq.doe.us

SUBJECT: *Request to Withdraw, Revise and Re-Publish Request for Information on Using a Consent-Based Siting Process to Identify Federal Interim Storage Facilities, 86 Fed. Reg. 68,244 (Dec. 1, 2021)*

To Whom it May Concern:

On behalf of itself and ## Native American non-governmental organizations (“NGOs”) and environmental organizations and individuals described in Section III below, Beyond Nuclear, Inc. (“Beyond Nuclear”) requests the U.S. Department of Energy to withdraw its *Request for Information on Using a Consent-Based Siting Process to Identify Federal Interim Storage Facilities*, 86 Fed. Reg. 68,244 (Dec. 1, 2021) (“2021 Request for Information”).

I. INTRODUCTION AND SUMMARY OF REQUEST FOR RELIEF

As discussed below in Section IV, the *2021 Request for Information* fails to comply with basic tenets of fair administrative decision-making, and violates the principles of transparency and inclusivity set forth in the 2012 President’s Blue Ribbon Commission Report on America’s Nuclear Future.¹ *See id.* at ix (“Transparency, flexibility, patience, responsiveness, and a heavy emphasis on consultation and cooperation will all be necessary – indeed, these are attributes that should apply not just to siting but to every aspect of program implementation.”) (emphasis added). Contrary to these goals and principles, the *2021 Request for Information* is fatally incomplete, unfocused, and unclear in its purpose, because DOE has failed to do the basic work of analyzing and responding to the two rounds of public comments and multiple stakeholder meetings it held between 2015 and 2017. Affected communities have no way of knowing whether DOE agreed with their previous input on the subject of consent-based siting, or what DOE still wants to know. Furthermore, the *2021 Request for Information* is misleading, because it conveys the false impression that federal interim storage of spent reactor fuel and high-level waste has received Congressional approval, and therefore is a *fait accompli*.

¹ (https://www.energy.gov/sites/prod/files/2013/04/f0/brc_finalreport_jan2012.pdf).

Finally, DOE has made no apparent attempt to seek broad participation in the commenting process beyond publication in the Federal Register – a demonstrably inadequate way of obtaining broad participation.²

As DOE notes in the 2021 *Request for Information*, “demonstrating a consent-based approach to siting” will “build trust and confidence with stakeholders.” 86 Fed. Reg. at 68,245. Ironically, DOE has served up a commenting process that is so erroneous, incomplete, and carelessly unfocused as to undermine that trust and confidence. This is exactly the type of government conduct that was identified as needing reform by the BRC. BRC Report at viiii (noting the “erosion of trust in the federal government’s nuclear waste management program”).

To rectify these significant defects and deficiencies, in a manner consistent with the BRC Report and DOE’s own goals for a well-informed and fair consent-based siting process, DOE should withdraw the 2021 *Request for Information*, and do the work of analyzing and responding to previous public comments on the issue of consent-based siting.

If, after completing that process, DOE believes it is still necessary to circulate a *Request for Information*, DOE should ensure that the *Request for Information* has the following features:

- A clear explanation of DOE’s current views on the appropriate elements of a consent-based siting process, and specific identification of any information that is still missing and on which DOE seeks a response;
- Correct and complete citations to all relevant documents in the history of the consent-based siting proceedings;
- An accurate description of current federal law regarding spent fuel storage and disposal, making it clear that federal interim storage has not been approved by Congress and therefore it is not a *fait accompli*;
- At least a 90-day period for written responses, and opportunities to provide input through interviews and public meetings; and
- A demonstration that the *Request for Information* has been circulated to affected communities via multiple means of communication, including direct correspondence and solicitations of oral input.

II. DESCRIPTION OF BEYOND NUCLEAR AND OTHER ORGANIZATIONS AND INDIVIDUALS SPONSORING THIS REQUEST

A. Beyond Nuclear

² Undersigned counsel attempted to contact DOE to confirm that the lack of information in the Federal Register notice about DOE outreach was due to DOE’s failure to conduct outreach, not a failure to record it. However, her phone call and e-mail message were not responded to.

Beyond Nuclear is a nonprofit, nonpartisan membership organization that aims to educate and activate the public about the connections between nuclear power and nuclear weapons and the need to abolish both to protect public health and safety, prevent environmental harms, and safeguard our future. For the past fifteen years, Beyond Nuclear has advocated for an end to the production of nuclear waste and for securing the existing reactor waste in hardened on-site storage until it can be permanently disposed of in a safe, sound, and suitable underground repository.

Beyond Nuclear's current work on safe storage and disposal of nuclear waste includes intervening in U.S. Nuclear Regulatory Commission ("NRC") licensing proceedings for the proposed Holtec International and Interim Storage Partners, L.L.C. ("ISP") consolidated interim storage facilities. In *Don't Waste Michigan, et al. v. NRC*, No. 21-1048, Beyond Nuclear appealed NRC's issuance of the ISP license to the U.S. Court of Appeals for the D.C. Circuit, on the ground that NRC's decision to license a private facility for storage of federally-owned spent reactor fuel violated the Nuclear Waste Policy Act. The case is pending.

B. Other Organizations

Citizens Awareness Network is a grassroots environmental organization working to end the production of unaffordable and dangerous nuclear waste and power, and replace it with sustainable, reliable, and affordable energy generation. We are therefore committed to a democratically led, environmentally just, and scientifically sound solution for nuclear waste.

Citizens Resistance at Fermi Two is an Indigenous-led, grassroots organization in Michigan dedicated to environmental justice and the well-being of the earth. The intergenerational, multi-racial, cross-cultural team is committed to halting nuclear destruction, promoting renewable energy, and embodying sound principles in the process.

The ***Council on Intelligent Energy & Conservation Policy*** advocates for safe, clean energy and conservation.

Don't Waste Arizona is a non-profit environmental organization created for the protection, conservation, and preservation of the human and natural environment in and around Phoenix, and the State of Arizona.

Earthkeeper Health Resources is a national technology, education and advocacy organization established to protect people who live, work or study near oil and gas infrastructure from toxic air emissions.

Multicultural Alliance for a Safe Environment is a group of southwestern U.S. communities impacted by the uranium mining and milling industry, that works to restore and protect the natural and cultural environment through respectfully promoting intercultural engagement among communities and institutions for the benefit of all life and future generations. Member organizations include:

- *Eastern Navajo Diné Against Uranium Mining,*
- *Red Water Pond Road Community Association,*
- *Laguna-Acoma Coalition for a Safe Environment,*
- *Post-71 Uranium Workers Committee, and*
- *Bluewater Downstream Valley Alliance.*

Northeastern New Mexicans United Against Nuclear Waste is a coalition of ranchers, farmers, and at businesses that was formed to oppose the DOE's proposed plan to bury high level nuclear waste in bore holes in Quay County in 2017.

Nuclear Energy Information Service is a non-profit organization committed to ending nuclear power and advocating for sustainable ecologically sound and socially just energy solutions. To accomplish this end, NEIS educates, activates and organizes the public on energy issues, builds and mobilizes grass roots power and nonviolent opposition to nuclear power, and advocates sustainable and ecologically sound energy alternatives.

Nuclear Watch South is a grassroots direct-action group dedicated to raising public awareness of nuclear power, nuclear waste, and nuclear weapons.

Nukewatch is a Wisconsin-based environmental and peace action group, dedicated to the abolition of nuclear power, weapons and continued radioactive waste production. Nukewatch publishes a newsletter that regularly reports on these issues and specifically the nonconsensual attempts to site waste at Yucca Mountain, and the centralized interim storage proposals of Holtec International in New Mexico and Interim Storage Partners, L.L.C. ("ISP") in Texas.

On Behalf of Planet Earth is a grassroots group of individuals, organizations, and spiritual communities working to end nuclear power.

Portsmouth/Piketon Residents for Environmental Safety and Security works to educate, organize and empower residents and workers affected by the Piketon uranium enrichment site, and to represent their interest in economic vitality, environmental quality, health, justice and expanded job opportunities.

Southwest Research and Information Center works with New Mexico citizen groups, tribes, and state governments involved in the implementation of the Nuclear Waste Policy Act.

C. Individuals:

Stephanie Bilenko (Illinois)

Alice M. Evans, Ph.D. (Vermont)

Kathleen Russell (Michigan)

III. BACKGROUND INFORMATION

In the 1982 Nuclear Waste Policy Act, 42 U.S.C. § 10101, *et seq.* (“NWPA”), Congress established a national goal of siting and licensing a federal repository for permanent disposal of high-level radioactive waste and spent reactor fuel. As part of the NWPA’s statutory scheme, DOE was prohibited from assuming ownership of spent reactor fuel for any purpose, including interim storage, unless and until a repository was licensed and operating.

A. BRC Report

In 2012, the BRC Report confirmed Congress’ conclusion that the *only* acceptable means for separating this dangerous material from the environment for the long-term is disposal, not interim storage. *Id.* at xi (“The conclusion that disposal is needed and that deep geologic disposal is the scientifically preferred approach has been reached by every expert panel that has looked at the issue and by every other country that is pursuing a nuclear waste management program.”).

Recognizing that the siting process for a repository had failed, the BRC proposed a new and “integrated” program for spent fuel disposal that would include consolidated interim storage. *Id.* at vii. Among the critical features of such an integrated program were that (a) it must be “consent-based -- in the sense that affected communities have an opportunity to decide whether to accept facility siting decisions and retain significant local control” and (b) that it must be “transparent – in the sense that all stakeholders have an opportunity to understand key decisions and engage the process in a meaningful way.” *Id.* at 47.

Importantly, the BRC cautioned that “a robust repository program . . . will be as important to the success of a consolidated storage program as the consolidated storage program will be to the success of a disposal program.” *Id.* And the BRC also recognized that federal legislation would be needed before construction of a federal consolidated storage facility could begin. *Id.* at 41.

The BRC Report was based on significant public input, including taking public comments and holding more than two dozen meetings to hear testimony from a “wide variety of organizations, interest groups, and individuals.” *Id.*, Preamble.

B. DOE Proceedings for Public Comment

2015. In 2015, DOE embarked on the first in a series of proceedings to take public comment on repository and interim storage siting issues, including the concepts of consent and transparency. First, in 2015, DOE published *Invitation for Public Comment to Inform the Design of a Consent-Based Siting Process for Nuclear Waste Storage and Disposal Facilities*, 80 Fed. Reg. 79,872 (Dec. 23, 2015) (“*2015 Invitation for Public Comment*”). DOE posed the following questions:

- (1) How can the Department of Energy ensure that the process for selecting a site is fair?

- (2) What models and experience should the Department of Energy use in designing the process?
- (3) Who should be involved in the process for selecting a site, and what is their role?
- (4) What information and resources do you think would facilitate your participation?
- (5) What else should be considered?

80 Fed. Reg. at 79,873. While the notice set a comment deadline of June 15, 2016, the deadline was later extended to July 31, 2016. 81 Fed. Reg. 15,295 (Mar. 22, 2016). The extension gave the public a total of seven months to comment.

During the comment period, DOE conducted multiple public meetings with stakeholders, including tribal governments and organizations, environmental and civic organizations, and private individuals. DOE “solicited and received” hundreds of public comments and heard input from a “wide range of individuals, communities, states, Tribes, and stakeholders,” through the “multiple avenues” of public meetings and commenting opportunities. *Consent-Based Siting: Designing and Consent-Based Siting Process, Summary of Public Input* at 7 (Dec. 29, 2016) (“2016 Public Input Summary”). at 7. Several of the organizations and individuals making this extension request participated in that process of written comments and public meetings, including Beyond Nuclear, Council on Intelligent Energy and Conservation Policy, Nuclear Energy Information Service, Nukewatch, Southwest Research and Information Center, and Stephanie Bilenko.

Public feedback was summarized in the *2016 Public Input Summary*, but not analyzed. *Id.*

2017. In 2017, DOE published a Federal Register notice seeking public comment on a report entitled *Draft Consent-Based Siting Process for Consolidated Storage and Disposal Facilities for Spent Nuclear Fuel and High-Level Radioactive Waste* (Jan. 12, 2017) (“2017 Draft Report”). 82 Fed. Reg. 4,333 (Jan. 14, 2017). Based on the comments DOE had received in the 2015 process, as well as input from “expert groups” like the BRC, the *2017 Draft Report* described “DOE’s current thinking regarding specific steps and broader design principles for implementing a consent-based siting process.” *Id.* at 2. The report listed eleven design principles for a consent-based siting process:

- Prioritization of Safety;
- Environmental Responsibility;
- Regulatory Requirements;
- Trust Relationship with Indian Tribes;
- Environmental Justice;
- Informed Participation;
- Equal Treatment and Full Consideration of Impacts;
- Community Well-Being;

- Voluntariness/Right to Withdraw;
- Transparency; and
- Stepwise and Collaborative Decision-Making that is Objective and Science-Base

Id. at 6. DOE provided a 90-day comment period.

In response, DOE received thirty “unique” pieces of correspondence from organizations and individuals, including Southwest Research and Information Center. These comments were summarized in *Summary of 2017 Public Comments on the Draft Consent-Based Siting Process for Consolidated Storage and Disposal Facilities for Spent Nuclear Fuel and High-Level Waste* (undated) (“*Summary of 2017 Public Comments*”), <https://www.energy.gov/sites/prod/files/2016/12/f34/Summary%20of%20Public%20Input%20Report%20FINAL.pdf>).

2021. On December 1, 2021, DOE published the *2021 Request for Information* in the Federal Register. DOE stated that it intended to use anticipated responses to the *2021 Request for Information*, together with comments on the *2017 Draft Report*, to “help develop a consent-based siting process for use in siting federal interim storage facilities, the overall strategy for development and operation of an integrated waste management system, and possibly a funding opportunity.” 86 Fed. Reg. at 68,245. DOE also posed a total of sixteen questions in three “Areas:”

Area 1: Consent-Based Siting Process

Area 2: Removing Barriers to Meaningful Participation

Area 3: Interim Storage as Part of a Waste Management System

Id. at 68,245-46. While DOE stated that it intended to rely on public comments regarding the *2017 Draft Report*, the Federal Register notice provided no link to the comments. Instead, it contained three separate links to the *2017 Draft Report*, none of which was correct or functional.

DOE provided a 90-day comment period for responses to the *2021 Request for Information*.

On December 27, 2021, DOE published a correction to the malfunctioning links to the *2017 Draft Report*. 86 Fed. Reg. 73,269. Although almost an entire month had lapsed since publication of the *2021 Request for Information*, DOE added no time to the comment period.

IV. FATAL DEFICIENCIES IN 2021 REQUEST FOR INFORMATION

The *2021 Request for Information* is fatally incomplete, unfocused, and unclear in its purpose, because DOE has failed to do the basic work of analyzing and responding to the two rounds of public comments and multiple stakeholder meetings it held between 2015 and 2017. Affected communities have no way of knowing whether DOE agreed with their previous input on the

subject of consent-based siting, or what DOE still wants to know. Furthermore, the *2021 Request for Information* is misleading, because it conveys the false impression that federal interim storage of spent reactor fuel and high-level waste has received Congressional approval, and therefore is a *fait accompli*.

A. The *2021 Request for Information* is Unfocused and Unclear Because DOE Has Never Analyzed or Responded to the Comments it Already Received on Consent-Based Siting.

The *2021 Request for Information* is unfocused and unclear because, as demonstrated above, DOE has never analyzed or responded to the significant public feedback it *already has* on the issue of consent-based siting. DOE has provided summaries and digests of the written and oral comments it received in response to the *2015 Invitation for Public Comment*, and the written comments it received in response to the *2017 Draft Report*. but it has never analyzed them. Instead, in the *2021 Request for Information*, DOE asks another set of questions that are largely repetitive of questions it asked in the prior proceedings.

The reiteration of previous questions begs the question, “What information does DOE think is missing at this point?” There is no way to tell, because DOE has provided no analysis of the significant amount of information it has already received. Nor has it explained why the *2017 Draft Report* is still in draft form after four years. And even though the *2021 Request for Information* repeats the same web address for the *2017 Draft Report* three times, DOE does not ask for additional comments on the report.

By failing to provide focus or clarity about the purpose of its questions, in the aftermath of two previous public comment proceedings, DOE wastes the limited time and resources of affected communities. Their willingness to participate in serious and well-noticed DOE proceedings is well-established: when DOE sought public input on its *2015 Invitation for Public Comment*, a significant number of organizations and individuals participated and dedicated their time to the process. (While the *2017 Draft Report* had fewer commenters, this may be more attributable to a lack of outreach and associated lack of knowledge rather than unwillingness to participate). Having made a significant contribution to the BRC Report and the 2015-16 commenting process, these communities are entitled to know what information DOE still lacks. Yet, the questions posed in the *2021 Request for Information* are elementary, as if DOE is going back to square one.

Taken together with the erroneous and incomplete character of the *2021 Request for Information*, its lack of focus or clarity with respect to its purposes gives the unmistakable impression that DOE is not serious about its *Request for Information*, but is simply asking rhetorical questions. This misuse of the time and resources of the affected public undermines DOE’s own stated purpose of encouraging public trust and confidence through a consent-based siting process. 86 Fed. Reg. at 68,245. In order to prevent further “erosion” of public trust in DOE (BRC Report at

viii), DOE should finalize the *2017 Draft Report*, or prepare a new draft that clearly identifies the information it still lacks, and explains why the information is needed.

B. The 2021 Request for Information is Fatally Misleading.

The *2021 Request for Information* is also fatally misleading. The Federal Register notice refers to “Congressional appropriations to move forward with interim storage activities,” as if Congress has authorized DOE to take responsibility for interim storage of spent fuel and high-level waste before a repository has opened. 86 Fed. Reg. at 68,245. And virtually all of the questions posed in the Federal Register notice refer to federal interim storage facilities without acknowledging that currently, such facilities are not lawful. *Id.* at 68,245-46. DOE’s language thus appears designed to mislead affected communities into thinking that federal interim storage of spent fuel is a *fait accompli* that they must accept.

DOE’s misleading language constitutes a gross and intolerable abuse of the concept of informed consent. *See* BRC Report at 7 (“In a democracy, informed participation is at the heart of durable solutions to significant policy challenges.”) DOE must correct its sleight-of-hand misinformation by acknowledging that (a) it remains Congress’ prerogative – not DOE’s -- to allow federal storage of spent fuel before a repository opens; and (b) that Congress has previously determined that to allow federal storage of spent fuel and high-level waste before opening of a repository could permanently undermine the best strategy for isolating these highly radioactive substances from the affected communities: a permanent repository. Otherwise, DOE can be justly charged with attempting to hoodwink affected communities into sleeping on their right to participate in the political process to maximize their protection from highly toxic and radioactive materials.

C. The 2021 Request for Information is Fatally Incorrect and Incomplete.

The *2021 Request for Information* is incorrect and incomplete in significant respects. First, the original December 1, 2021, Federal Register notice contained an incorrect weblink for a critical document, the *2017 Draft Report*. As DOE stated in the December 1, 2021, Federal Register notice, DOE intends to rely on the *2017 Draft Report* to “help develop a consent-based siting process.” 86 Fed. Reg. at 68,245. While DOE corrected the broken weblink in its December 27, 2021, Federal Register notice, it did not provide any additional time for comments. Given the central role played by the *2017 Draft Report* in DOE’s deliberations, DOE should have compensated for its error by providing more time to comment.

Second, the *2021 Request for Information* contains no link to the *2016 Public Input Summary* or the *Summary of 2017 Public Comments*. Both of these documents summarize the public comments DOE received regarding the *2015 Invitation for Public Comment* and the *2017 Draft Report*. Thus, they provide an important and valuable history of the public input that DOE

already has received regarding the issue of consent-based siting. DOE's failure to include links to these documents is a fatal deficiency that must be corrected in a re-published notice.

D. Publication in the Federal Register is Insufficient to Meet DOE's and the BRC's Goals of Broad Participation by Affected Communities.

In developing a policy on consent-based siting, DOE has recognized the importance of seeking participation by a wide spectrum of the affected public. *See 2021 Request for Information* at 68,244 (acknowledging that "communities; governments at the local, State, and Tribal levels; members of the public; energy and environmental justice groups; organizations or corporations; and other stakeholders may be interested in responding to this Request for Information") *2017 Draft Report* at 8 (defining the scope of the engaged "community" as the "local community," "local and state government," "Congressional delegations," and "any affected Tribal governing body"); *2015 Invitation to Public Comment*, 80 Fed. Reg. at 79,872 (seeking "feedback" from "communities, states, Tribes, and other interested stakeholders"); BRC Report at 8 ("The job of better communicating information and effectively engaging different constituencies must be seen as one of the core missions of a revitalized waste management program.").

Based on the content of the *2021 Request for Information*, it appears the only method DOE has used to seek comment on the *2021 Request for Information* is to publish it in the Federal Register.³ But DOE is well-aware that mere publication in the Federal Register will not achieve the degree of public participation that is necessary for development of a robust consent-based siting policy. This inadequacy can be seen clearly by comparing DOE's two previous proceedings for taking comments on the concept of informed consent. In its *2015 Invitation to Public Comment*, DOE published a Federal Register notice *and* reached out to affected communities with invitations to public meetings. As a result, DOE received 450 "unique pieces of correspondence." *2016 Public Input Summary* at 7. DOE's *2016 Public Input Summary* was 98 pages in length.

In contrast, DOE's only public notice of the *2017 Draft Report* was to post a request for comment in the Federal Register. In response, DOE received only thirty "unique pieces of correspondence." *Summary of 2017 Public Comments* at 1. And its *Summary of 2017 Public Comments* was only eleven pages in length.

Instead of seeking the broad participation achieved in the *2015 Invitation to Comment*, DOE simply published the *2021 Request for Information* in the Federal Register. Unsurprisingly, many affected communities – including several of the groups represented in this request letter, were unaware of the notice until they were alerted to it by Beyond Nuclear. These groups have participated in previous BRC and DOE proceedings, and would do so again if given adequate

³ See note 1 above.

notice of DOE's specific questions and concerns. Their input is essential to ensuring that DOE obtains the views of the communities that historically have been the most likely hosts for toxic and radioactive industries and storage facilities in the U.S.

V. CONCLUSION AND REQUEST FOR REVISION AND RE-PUBLICATION

As demonstrated above, the *2021 Request for Information* is fatally incorrect, incomplete, unfocused, unclear, and misleading. In addition, publication in the Federal Register is demonstrably inadequate to obtain meaningful participation by affected communities, including Native American tribes and organizations.

To rectify these significant defects and deficiencies, in a manner consistent with the BRC Report and DOE's own goals for a well-informed and fair consent-based siting process, DOE should withdraw the *2021 Request for Information*, and do the work of analyzing and responding to previous public comments on the issue of consent-based siting.

If, after completing that process, DOE believes it is still necessary to circulate a *Request for Information*, DOE should ensure that the *Request for Information* has the following features:

- A clear explanation of DOE's current views on the appropriate elements of a consent-based siting process, and specific identification of any information that is still missing and on which DOE seeks a response;
- Correct and complete citations to all relevant documents in the history of the consent-based siting proceedings;
- An accurate description of current federal law regarding spent fuel storage and disposal, making it clear that federal interim storage has not been approved by Congress and therefore it is not a *fait accompli*;
- At least a 90-day period for written responses, and opportunities to provide input through interviews and public meetings; and
- A demonstration that the *Request for Information* has been circulated to affected communities via multiple means of communication, including direct correspondence and solicitations of oral input.

Sincerely,

Diane Curran