

October 27, 2016

Victor M. McCree, Executive Director for Operations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
By e-mail to victor.mccree@nrc.gov

SUBJECT: *WCS License Application for Spent Fuel Storage Facility
In Andrews County, TX, Docket No. 72-1050*

Dear Mr. McCree:

On behalf of Beyond Nuclear, Nuclear Information and Resource Service, Public Citizen, Inc., and SEED Coalition,¹ we are writing to ask you to immediately order the dismissal of Waste Control Specialists, L.L.C.'s ("WCS") application for a license for a consolidated interim spent fuel storage facility ("CISF") in Andrews County, Texas, because the terms under which WCS seeks a license for the Andrews County facility are precluded by the Nuclear Waste Policy Act of 1982, as amended ("NWPA").

WCS' license application, filed April 28, 2016, seeks U.S. Nuclear Regulatory Commission ("NRC") approval to build and operate a storage facility for up to 5,000 metric tons ("MT") of spent fuel at the Andrews County site.² WCS also anticipates expanding the capacity of the facility to 40,000 MT through subsequent license amendments. Environmental Report at 1-1. NRC recently informed WCS that it has embarked on an environmental review of WCS' license

¹ Beyond Nuclear is a national nonprofit organization that aims to educate and activate the public about the connections between nuclear power and nuclear weapons and the need to abandon both to safeguard our future. Beyond Nuclear advocates for an energy future that is sustainable, benign and democratic.

Nuclear Information and Resource Service is the national information and networking center for organizations and individuals concerned about nuclear power, radioactive waste, radiation and sustainable energy issues.

Public Citizen, Inc., is a national, nonprofit consumer advocacy organization with over 400,000 members and supporters nationwide. Public Citizen's mission is to protect openness and democratic accountability in government and the health, safety and financial interests of consumers. Public Citizen advocates for policies that will lead to safe, affordable and environmentally sustainable energy.

SEED Coalition is an environmental nonprofit organization with 2,000 members that works in Texas and other states to protect human health and the environment, including land, air, water and wildlife. The organization focuses on clean energy advocacy as a means to reduce pollution. SEED Coalition opposes the storage of radioactive waste from around the U.S. in Texas or New Mexico due to health and safety and environmental concerns. SEED Coalition's members include neighbors of the proposed WCS facility and associated transportation routes.

² The NRC Staff has yet to approve the completeness of WCS' application. See letter from Mark D. Lombard, NRC, to Scott Kirk, WCS (June 22, 2016) (ML16175A305), asking WCS to provide a significant amount of additional information. WCS has proposed to complete the application by the end of October. Letter from J. Scott Kirk, WCS to Mark Lombard, NRC (July 21, 2016) (ML16229A340).

application, pursuant to the National Environmental Policy Act (“NEPA”). Letter from Mark D. Lombard, NRC, to Michael Ford, WCS (Oct. 7, 2016) (ML16285A317).

While WCS plans to construct and operate the proposed facility, it assumes that the U.S. Department of Energy (“DOE”) will take ownership of the spent fuel to be stored at the site. License Application at 1-1 – 1-6. For instance, at page 1-1, the application asserts that “[t]he U.S. Department of Energy (DOE) will be contractually responsible for taking title of the spent fuel at the commercial reactor sites and transporting the spent fuel to the CISF, by rail.” This assumption of federal ownership of spent fuel is central to WCS’ license application: WCS has stated that it does not intend to build or operate the proposed facility unless and until the federal government takes title to the spent fuel. License Application at 1-6 (“WCS shall not receive [spent nuclear fuel] until such a contract with the DOE is provided to the NRC as a condition of the license.”).

The NRC must drop its NEPA review and dismiss WCS’ license application because the key condition of WCS’ application -- federal acquisition of title to commercially-generated spent fuel prior to the opening of a permanent repository -- is inconsistent with the NWPA, Congress’ “comprehensive scheme for the interim and permanent disposal of high-level radioactive waste generated by civilian nuclear power plants.” *Indiana Mich. Power Co. v. DOE*, 88 F.3d 1272, 1273 (D.C. Cir. 1996).³ Section 111 of the NWPA specifically provides that the federal government will not take title to spent fuel until it is received at a repository:

The generators and owners of high-level radioactive waste and spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of such waste and spent fuel until such waste and spent fuel is accepted by the Secretary of Energy in accordance with the provisions of this Act [42 U.S.C. 10101 et seq.]

42 U.S.C. § 10131(a)(5). Further, Section 123 provides that “[d]elivery, and acceptance by the Secretary [of Energy], of any high-level radioactive waste or spent nuclear fuel *for a repository* . . . shall constitute a transfer to the Secretary of title to such waste or spent fuel.” 42 U.S.C. § 10143 (emphasis added); *see also* 42 U.S.C. § 10222(a)(5)(A) (requiring DOE to “take title” to spent fuel *only* “following commencement of operation of a repository”).

The *only* NWPA provision that allows transfer of title to spent fuel from commercial licensees to the DOE, prior to the opening of a repository, is the emergency “Interim Storage Program” found in Subtitle B of the NWPA. *But the Interim Storage Program expired in 1990.*

42 U.S.C. § 10156(a)(1). Thus the NWPA contains no current provision that would allow DOE to assume title and responsibility for the spent fuel to be stored at the proposed CISF.

³ In *Indiana Mich. Power Co.*, the court held that the NWPA required the DOE to meet its contractual obligation to dispose of spent fuel starting in 1998, but concluded that the obligation to take title was separate, and did not commence until a repository opened. 88 F.3d at 1276.

As the Commission has recognized, by providing, in the Interim Storage Program, a narrow time period (1982 to 1990) when DOE could take title to spent fuel prior to the opening of a repository, “Congress intended to force the utilities to solve their own interim storage solutions after the federal program had ‘bought them time’ to do so.”⁴ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-29, 56 NRC 390, 405-06 (2002). This resolve to force licensees to solve their own problems was based on “Congress’ belief that interim storage was the generators’ responsibility.” *Id.* at 404.

Congressional intent to place responsibility for interim spent fuel storage squarely on licensees also is reflected in the other, extremely narrow, provisions of the Interim Storage Program. For instance, the Interim Storage Program limited the amount of spent fuel that could be transferred to the DOE to only 1,900 metric tons (“MT”). 42 U.S.C. §§10151(b)(2), 10155(a)(1). And before transferring that stopgap quantity of spent fuel to the DOE, a reactor licensee was required to persuade the NRC that a lack of adequate spent fuel storage capacity at an operating nuclear reactor would jeopardize “the continued, orderly operation” of the reactor. 42 U.S.C. § 10151(a)(3). Finally, the Interim Storage Program required spent fuel storage at a federal facility, not a privately owned facility. 42 U.S.C. § 10151(b)(2).⁵ All of these provisions show that Congress intended, prior to the opening of a repository, to sharply restrict the time and circumstances under which the DOE could take title to spent fuel.

⁴ In *Private Fuel Storage*, the Commission concluded that the NWPA did not preclude it from licensing a private away-from-reactor spent fuel storage facility. But that decision concerned only privately owned waste. The Commission has never asserted that in licensing a private spent fuel storage facility, it could ignore the NWPA’s prohibition against transfer of title of spent fuel to the federal government in the absence of a repository.

⁵ Notably, even if the Interim Storage Program remained effective today, none of its requirements could be satisfied by WCS’ license application:

- WCS would not be able to demonstrate that a lack of adequate spent fuel storage capacity at an operating nuclear reactor would jeopardize “the continued, orderly operation” of the reactor, as required by 42 U.S.C. § 10151(a)(3), because the first installment of spent fuel proposed for storage at the WCS facility would be from closed reactors. Thus the continued operation of nuclear reactors is not at issue. For the remaining 35,000 MT of spent fuel to be stored at the facility, WCS has made no attempt to show that additional offsite storage capacity is needed for the continued, orderly operation of existing reactors.
- While the Interim Storage Program was intended for only 1,900 MT of spent fuel, 42 U.S.C. §§10151(b)(2), 10155(a)(1), WCS’ proposed facility would store up to 40,000 MT of spent fuel. Even the first installment of the application seeks authorization to store 5,000 MT of spent fuel – more than twice the quantity of spent fuel authorized by the NWPA for federal government ownership.
- The Interim Storage Program required that reactor licensees must pay the costs of spent fuel storage and related activities. 42 U.S.C. § 10156(a)(3). In contrast, WCS assumes that DOE will pay for the costs of building the facility, storing spent fuel, and decommissioning the facility after it is closed. License Application at 1-5 – 1-6.
- While the Interim Storage Program provided for spent fuel storage at a federal facility, 42 U.S.C. § 10151(b)(2), WCS proposes to store federally-owned spent fuel at a private facility.



By assuming that DOE will take title to the spent fuel to be stored at the CISF, WCS flouts the limitations of the NWPA and the “responsibility” of spent fuel generators to come up with “their own interim storage solutions.” *Private Fuel Storage*, 56 NRC at 404-06. Taking responsibility for spent fuel logically includes all obligations incident to the ownership of spent fuel, such as financing the cost of building and maintaining a facility to safely house the spent fuel, and liability for operational problems and accidents.⁶ But WCS would have the DOE assume all responsibility for the spent fuel, including title to the spent fuel and financial responsibility for maintaining it. *See, e.g.*, License Application at 1-5 (“The funding for constructing the CISF is expected to be primarily through a contract for storage of [spent fuel] with the DOE”); *id.* at 1-6 (“WCS will obtain funds to operate the CISF pursuant to a contract with the DOE.”). These assertions are diametrically opposed to the plain language and the intent of the NWPA.

Accordingly, the NWPA precludes the DOE from taking title to commercial spent fuel for storage at WCS’ proposed facility. And by the same token, the NWPA would preclude NRC from permitting individual reactor licensees to transfer title of spent fuel to the federal government for purposes of storing spent fuel at the CISF. Having previously issued reactor licensees a “general license” to “receive title to and own spent fuel” under 10 C.F.R. § 72.6, the NRC could not approve a subsequent transfer of spent fuel title and ownership to the federal government because such a transfer would not be “consistent with applicable provisions of the law. . .” 10 C.F.R. § 72.50(c)(2).

Given the fundamental incompatibility of WCS’ license application with the NWPA, the NRC has no lawful basis to review WCS’ application. Therefore, the NRC must dismiss the application and drop its NEPA review.

Please provide us with immediate written assurance that you will instruct the NRC Staff to refuse to continue to review WCS’ application and reject it as inconsistent with the NWPA. To continue to review WCS’ license application, forcing citizen groups to review it and prepare for a hearing as if it were a legitimate and lawful license application, would be grossly unfair to the affected public.

⁶ Under 10 C.F.R. § 72.6(b), the NRC issues a general license for title and ownership of spent fuel, without requiring an application; but transfer requires authorization in a specific license.



Sincerely,

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