

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

SUNI Review Complete
Template=ADM-013
E-RIDS=ADM-03
ADD: Donald Habib, Christine Richie,
Mary Neely

Comment (2)
Publication Date 9/17/2021
CITATION 86 FR 51926
PMD-07201051

September 13, 2021

Office of Administration
Mail Stop: TWFN-7-A60M
Attn: Program Management, Announcements and Editing Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Re: U.S. Nuclear Regulatory Commission's Environmental Impact Statement for Interim Storage Partners LLC's Application to Store High Level Nuclear Waste in Andrews County, Texas

To whom it may concern:

Below is the New Mexico Attorney General's commentary in opposition to the U.S. Nuclear Regulatory Commission's (NRC) evaluation, findings, and recommended approval in the Final Environmental Impact Statement's (EIS) for Interim Storage Partners LLC's (ISP) application for a license to store high level nuclear waste in Andrews County, Texas. Attached to the comments are letters in opposition from the New Mexico Governor's Office, the Secretary of the New Mexico Environment Department, and the Office of New Mexico State Senator Jeff Steinborn. The New Mexico Attorney General's office would be glad to discuss these comments at your earliest convenience.

Sincerely,

William G. Grantham
Assistant Attorney General

Encl.

THE OFFICE OF NEW MEXICO ATTORNEY GENERAL’S OPPOSITION TO
INTERIM STORAGE PARTNERS LLC (WASTE CONTROL SPECIALIST)
ENVIRONMENTAL IMPACT STATEMENT
TO CONSTRUCT A CONSOLIDATED INTERIM STORAGE FACILITY

The New Mexico Attorney General’s Office objects to the granting of ISP’s license application to operate a Consolidated Interim Storage Facility (“CISF”) for of high-level nuclear waste (“HLW”), because, amongst other reasons outlined below, such a license is barred under the express terms of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §§ 10101, *et seq.* (“NWPA”). NRC has provided no analysis in the Final Environmental Impact Statement (“FEIS”) supporting the legality of its decision.¹

It is well-established that in considering license applications, the NRC does not have the discretion to comply with less than all the mandates of the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (“NEPA”).² Indeed, NEPA mandates that federal agencies take a “hard look” at the cumulative impacts of a proposed action and prepare an EIS before undertaking any “major Federal actions significantly affecting the quality of the human environment.” *See* 43 U.S.C. § 4332(2)(c). The EIS is meant to ensure that federal agencies “*will not act on incomplete information, only to regret [their] decision after it is too late to correct.*”³

Specifically, NEPA requires a detailed statement by the responsible official on:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

Under Council on Environmental Quality (“CEQ”) Regulations, cumulative effects are defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions *regardless of what agency (Federal or non-Federal) or person undertakes such other actions.*” 40 C.F.R. § 1508.7 (emphasis added).

Here, the NRC failed in all of the above respects. As more fully discussed below, first, it is impossible to discern environmental and cumulative impacts of the proposed action given NRC’s piecemeal and carved-out approach. For instance, the cumulative impacts of transportation

¹“Environmental Impact Statement for Interim Storage Partners LLC’s License Application for a Consolidated Interim Storage Facility for Spent Nuclear Fuel in Andrews County, Texas, Final Report,” NUREG-2239, Published on August 5, 2021, Docket ID NRC-2016-0231-0387 (ML2120A120), herein after “FEIS.” *See also*, *State of New Mexico v. NRC*, Case No. 1:21-cv-00284-MV-JFR at Dkt No. 7, Amended Complaint (May 17, 2021).

² *See e.g.*, *Izaak Walton League of America v. Schlesinger*, 337 F. Supp. 287 (D.C. 1971).

³ *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989) (emphasis added).

of wastes to and from the site and of terrorism are carved out of the FEIS, or outside of a narrowly drawn radius or are simply not considered. Second, the FEIS blatantly and repeatedly ignores unavoidable adverse effects. Third, there is no meaningful consideration of alternatives to the proposed action.

Instead, the NRC is trying to tie general principles to case-specific concerns with this FEIS. For example, no consideration was given to storing casks in an environment that grows hotter from climate change and more prone to seismic activity.

NRC regulations implementing NEPA reflect amendments designed to improve regulatory efficiency in environmental reviews and to provide for “more focused and therefore more effective” NRC NEPA reviews by focusing on significant case-specific concerns. The purpose of an EIS is threefold: (1) to identify all potential environmental impacts; (2) to quantify and monetize all impacts that are significant; and (3) to identify ways to mitigate significant environmental impacts. All three purposes are clearly stated in 10 C.F.R. § 45(c), but sufficient mitigation planning received much less attention than it should have and was frequently punted to other regulators.⁴

Because the government stands by the reliability of the information and conclusions in its EISs, they are often used as references for a broad array of decisions. “*To casually include information that has not been independently verified for its reliability and completeness by the NRC would violate both NRC regulations and NEPA’s fundamental purpose of informing the public about environmental issues.*”⁵ Moreover, to protect the inclusion of information in an EIS from challenge in a licensing proceeding would violate NRC regulations governing public participation requirements. 10 C.F.R. § 51.104.

I. ISP’S UNREASONABLE SITE SELECTION PROCESS

NRC’s assessments in the ISP FEIS fail to consider major viewpoints and opposing viewpoints in violation of NEPA and NRC’s own regulations implementing NEPA. *See e.g.*, 10 C.F.R. § 51.91(b) (“[FEIS] will discuss any relevant responsible opposing view not adequately discussed in the [DEIS] or in any supplement to the [DEIS], and respond to the issues raised”).

ISP’s site selection process blatantly disregards its own stated primary criteria – willingness and support of the host communities. The lack of consent of host communities and overwhelming local opposition to the proposed CISF project alone renders ISP’s selection unreasonable. Moreover, the geologic unsuitability of the site, and risks involved with placing a *de facto* permanent nuclear waste storage facility amidst valuable subsurface natural resources that form a cornerstone of the State’s local economies render the ISP location unacceptable.

⁴ 10 CFR § 45(c) concerns the environmental report, a document license applicants prepare and upon which NRC relies to produce the EIS: “The environmental report must include an analysis that considers and balances the environmental effects of the proposed action, the environmental impacts of alternatives to the proposed action, and *alternatives available for reducing or avoiding adverse environmental effects*” (emphasis added).

⁵ TVA, Intervenor’s Reply to Responses in Opposition to Motion for Leave to File Contention 4 (Inadequate Discussion of Environmental Impacts of Spent Nuclear Fuel Pool Fires) and Contention 5 (Impermissible Discussion of Energy Alternatives and Need for The Proposed SMR), Docket No. 52-047-ESP (June 22, 2018), (ADAMS Accession No. ML18174A075) (emphasis added).

According to ISP FEIS, “[b]ecause many environmental impacts can be avoided or significantly reduced through a proper site selection, the NRC staff evaluated the ISP site-selection process to determine if a site ISP considered was environmentally preferable to the proposed Andrews County, Texas, site.”⁶

ISP’s first tier of its site selection process is based on political and community support for hosting a CISF “expressed at the time of the screening process.”⁷ ISP allegedly assessed the following five criteria in its first tier of selecting the proposed Andrews County ISP location along the border of southwest New Mexico and Texas: (1) *political support for the project*, (2) favorable seismological and geological characteristics, (3) availability to rail access, (4) land parcel size and (5) land parcel availability.⁸

Following the first round of screening, ISP eliminated alternative locations in five states and opted to assess potential CISF locations for only two states including two counties in Texas (Andrews and Loving) and two counties in New Mexico (Lea and Eddy). The second-round of screening allegedly based on operational needs / considerations (*e.g.* utilities, labor forces, transport routes and amenities) and environmental considerations (*e.g.* environmental protection, discharge routes, proximity to hazardous operations / high-risk facilities, ease of decommissioning and disposal of LLRW).⁹

The proposed ISP location along the Texas and New Mexico border clearly does not enjoy political support or consent from either state, is geologically unsuitable to store HLRW for period of 40 years or longer given unfavorable seismological conditions for at-surface storage above shallow groundwater and lacks the transportation infrastructure and emergency response services to accommodate such a facility. Contrary to its stated purpose, the ISP location does nothing to mitigate environmental impacts and an alternative site outside of the Permian Basin would be preferable.

A. Lack of consent and overwhelming opposition from host communities

New Mexico has a “vested interest” in the proposed action due to its close proximity. Lujan Grisham 2020.¹⁰ The ISP CISF is “situated approximately 0.6 kilometers (km) [0.37 mile (mi)] east of the Texas and New Mexico State boundary”¹¹ with the nearest resident located approx. 6km [3.8 mi] to the west of the ISP location in Eunice, New Mexico.¹² Because the “New Mexico side of the border is more densely populated. . .the proposed action would disproportionately impact New Mexicans in the immediate vicinity” and “poses unacceptable risk to New Mexico’s citizens, communities, and economy. . .” Lujan Grisham 2020; Governor Lujan Grisham, attached hereto as Ex. A.

⁶ ISP EIS at 2-23.

⁷ ISP EIS at 2-24.

⁸ ISP EIS at 2-24 (emphasis added)

⁹ ISP EIS at 2-24.

¹⁰ Governor Michelle Lujan Grisham Letter to NRC (Nov. 3, 2020).

¹¹ ISP EIS at xxxv (ISP, 2020).

¹² ISP EIS at xviii.

The proposed storage “poses significant and unacceptable risks to New Mexicans, [its] environment and [its] economy,” with risks and uncertainty that are elevated in the absence of a permanent repository. Lujan Grisham 2020, Ex. A, Governor Lujan Grisham. “Of concern is, over time. . . is likel[i]hood] that the canisters storing [SNF] and [HLRW] will lose integrity and will require repackaging” and “any inevitable repackaging of [SNF and HLRW] increases the risk of accidents and radiological health risks and contamination to surface and groundwater resources” as well as risks to communities along regional transportation routes. *Id.* Presently, the ISP CISF does not have and has not proposed the capability to repackage or retrieve the nuclear waste after initial packaging. This is a grave concern of the State. So, New Mexico does not “have the luxury of assuming canisters will be removed or replaced before the canisters have eroded or degraded and contamination is occurring.” Ex. B, Senator Steinborn.

ISP’s selection process is flawed and unreasonable, because of: (1) lack of state consent, Lujan Grisham 2020; Abbott 2020,¹³ (2) lack of local consent, Andrews County Resolution;¹⁴ (3) lack of meaningful environmental justice analysis,¹⁵; (4) lack of Texas authority to regulate, HB7¹⁶; (5) flawed analysis of adverse impact surrounding land use and valuable mineral industries and agricultural interests plus the added infrastructure, police, and emergency response costs greatly outweigh and local revenue benefit. Ex. A, Governor Lujan Grisham, Kenney 2021;¹⁷ Lujan Grisham 2020. In short, the ISP FEIS “does not adequately address many safety and social concerns that siting a CISF in Andrews County, Texas along the New Mexico border raises.” Ex. A, Governor Lujan Grisham Letter.

NRC’s determination that ISP’s site selection process is reasonable defies common sense and runs contrary to core recommendations of Blue Ribbon Commission advocating for consent based siting of storage facilities. The ISP FEIS fails to address the major viewpoints of host states, who will shoulder the burden of costs and risks for the proposed action, in violation of NEPA and NRC regulations. *See e.g.*, Lujan Grisham 2020 (“opposition includes both myself and Governor Abbott of Texas, who similarly recognizes the risk [of] a CISF in this region poses to Texas residents”). Contrary to the fundamentals of consent-based siting, “New Mexicans, tribes and local governments overwhelmingly oppose” Holtec’s proposed CISF given the “unfunded mandates on local communities.” Lujan Grisham 2019.¹⁸

¹³ Governor Greg Abbott Letter to then President Donald J. Trump (Sept. 30, 2020).

¹⁴ *See e.g.*, New Mexico Senator Jeff Steinborn, et al., Letter to NRC (Sept. 22, 2020) (noting “local governments representing close to 50% of the population have passed resolutions opposing the [Holtec CISF] or the transportation of high-level radioactive waste through their communities . . .”); Amended Complaint at ¶¶ 140, 143 and 144 (noting specific local government resolutions opposing CISFs and/ or the transport of SNF through local communities).

¹⁵ *See e.g.*, New Mexico Environment Department Letter to NRC (Nov. 3, 2020) (“the Proposed Action [ISP CISF] threatened human health and the environment in New Mexico where minority and low-income populations have already suffered disproportionately high adverse human health and environmental effects from nuclear energy and weapons programs of the United States.”); Lone Star Legal Aid Joint Comments on Draft Environmental Impact Statement (DEIS) for ISP CISF (Nov. 3, 2020) (ML20309B001).

¹⁶ NRC made a contrary assumption and relies on Texas to mitigate risk. HB 7 was a strong bipartisan vote and unanimous passage in state Senate in September 2021 sending crystal clear message of Texas opposition to ISP CISF project. <https://legiscan.com/TX/bill/HB7/2021/X2>.

¹⁷ New Mexico Environment Department Cabinet Secretary James Kenney Letter to NRC (September 14, 2021).

¹⁸ New Mexico Governor Michelle Lujan Grisham Letter to NRC (June 7, 2019).

The selection of ISP site is based on the false premise that local communities support the proposed ISP CISF project. As described herein, this is undeniably false. In the glaring absence of consent from the Texas and New Mexico Governors and legislature, the selected ISP site selection process is patently unreasonable.

B. Surrounding Land Use and Valuable Mineral Resources within Permian Basin

Beyond the primary criteria of community support, which is sorely lacking here, secondary considerations of ISP's site selection process would further preclude selection of Andrews County given the geologic unsuitability of placing what will become a *de facto* permanent nuclear waste storage facility amidst the nation's valuable mineral resources given the potentially devastating adverse impacts it could have on extensive and ongoing extraction operations that serve as the cornerstones of regional economies. Addressing significant economic concerns in June 2019 letter to NRC, the Governor emphatically states: "[e]stablishing an interim storage facility in this region would be economic malpractice" and that "[a]ny disruption of agricultural or oil and gas activities as a result of perceived or actual nuclear incident would be catastrophic to New Mexico, and any steps toward siting such a project could cause a decrease in investment[s] in two of [the] State's biggest industries." Lujan Grisham 2019. Governor Abbott shares those concerns, expressing opposition "to forcing states with low-level radioactive waste to accept more highly radioactive waste and its accompanying hazards without the consent of the state." Abbott, 2020.

The ISP's site selection process and the ISP FEIS generally discount the negative economic impacts and potentially catastrophic harm of the proposed action on existing industries. ISP FEIS relies on skewed cost benefit analyses, and the NRC touts less than a 1% beneficial socioeconomic impact on local revenues. ISR FEIS at 3-70 (listing two counties in New Mexico as included in socioeconomic "region of influence"). This overstates the benefit and even if accurate would not justify the risk for siting nuclear waste storage at the ISP's proposed location within the Permian Basin, "one of the world's top producing oil and gas regions" when any incident or radiological contamination "could have an adverse impact on one of New Mexico's key economic engines."¹⁹ See Ex. A, Governor Lujan Grisham; Ex. B, Senator Steinborn. Indeed, "[a]ny disruption of oil and gas activities as a result or perceived or actual nuclear incident would harm New Mexico's economy, and even taking steps toward siting a CISF in the area could cause a decrease in investment in two of New Mexico's biggest industries" as the State relies on southeast New Mexico as "a driver of economic growth." Ex. A, Governor Lujan Grisham.

C. Geologically Unsuitable Location

The ISP site, similar to the Holtec site, is in a region that is geologically unsuitable, "in an area that is underlain by concerns for sinkhole development and shallow groundwater, a precious resource" of the State and further "does not provide deep geologic isolation for indefinite [SNF] storage" and is "unsuitable. . .for storage over a period of decades." Lujan Grisham 2020. Furthermore, the proposed ISP surface level storage "over an area with shallow groundwater

¹⁹ See e.g., Stephanie Garcia Richard (New Mexico State Land Commissioner) Letter to Krishna Singh (Holtec President and CEO), starting at p.2 (July 2, 2019).

contradicts well-established scientific recommendations for radio-active wastes to be stored in deep, geologically stable formations.” NMED 2020.²⁰

ISP FEIS acknowledges the presence and existence of subsidence, sinkholes and kart fissures in the region not unjustifiably claims the ISP site will not be impacted, ignoring the reality that nuclear waste in over-sized railcars and/or heavy-haul trucks will be transported along rails and roads in the region which will inevitably traverse such geological instability. *See* ISP EIS 3-20. Similarly, the ISP FEIS fails to take a “hard look” at the status of approximately 600 boreholes on the ISP property or conduct an adequate risk assessment as to whether or not these boreholes have been improperly abandoned and pose a threat of subsidence or sinkholes. NMED 2020.

Additionally, seismicity concerns at and around the ISP site are not adequately addressed, with ISP site selection process glossing over the recent March 2020 magnitude 5.0 earthquake and the potential for more frequent and more powerful earthquakes in the region in the future.²¹ Kenney, 2021. The ISP FEIS provides “general information” but does not include discussion of mitigation measures to limit such impacts or “provide specific information about [] safeguards” to protect against same. Ex. B, Senator Steinborn.

D. Potential for Terrorist Attacks / Sabotage

NRC’s failure to conduct any terrorist risk assessment is inconsistent with DOE’s policy requiring evaluation of same and ignores NRC’s requirement for such evaluation for NRC licenses operating in the Ninth Circuit, where many shipments to the ISP CISF will originate.²² Instead, NRC arbitrarily assesses such risks differently in different regions of the country, and maintains that evaluation of potential acts of sabotage and terrorism is only required in the Ninth Circuit. *See* NUREG-2157 (Sept. 2014).

The NRC unjustifiably maintains that multiple rounds of transport across the nation will result in zero possibility of a release, refusing to conduct any assessment at all for potential terrorist or sabotage attacks for the proposed action, which New Mexico’s and Texas’s Governors agree poses unacceptable risks and puts a target on the back of the Permian Basin. *See* Abbott 2020, Lujan Grisham 2020. In Governor Abbott’s words, a “stable oil and gas industry is essential to the economy, and crucial to the security of our great nation” and allowing CISFs “at sites near the largest producing oilfield in the world will compromise the safety of the region.” Abbott, 2020.

Multiple rounds of SNF transport in and out of the Permian Basin unnecessarily heightens the risk for potentially catastrophic attacks and the risk for fire or thermal issues regardless of whether or not a breach occurs. Given the evolution and sophistication of modern technology and

²⁰ New Mexico Environment Department Letter to NRC (Nov. 3, 2020).

²¹ *See Id.* (citing USGS website).

²² Memorandum from Carol S. Borgstrom, Director, DOE Office of NEPA Policy and Compliance, to DOE NEPA Community, “Need to Consider Intentional Destructive Acts in NEPA Documents” (Dec. 1, 2006), available at http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-DOE-intentdestructacts.pdf; *See San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006) (finding analysis required); *c.f. N.J. Dept. of Env’tl Protection v. NRC*, 561 F.3d 132 (3d Cir. 2009).

repeated travel on routes, these risks are further compounded. These risks have been repeatedly brought to NRC's attention and repeatedly ignored.²³

Given that the proposed action involves national transport of SNF, that DOE may take title to and transport the SNF and HLRW waste, and that the waste would be shipped from multiple locations within the Ninth Circuit and stored in the Permian Basin, a vital energy and security sector, the NRC must conduct a risk assessment for potential terrorist attacks and sabotage compliant with NEPA.

E. Precious Water / Ecological Resources

Because the ISP site is “an area that is underlain by concerns for sinkhole development and shallow groundwater that does not provide deep geologic isolation for indefinite SNF storage” and because the flow of groundwater from the ISP site is “predominately southwest towards New Mexico. . . if there is any discharge of SNF” or any other non-radiological contaminant, New Mexico's water resources will be directly impacted. Ex. A, Governor Lujan Grisham. The NRC does not comprehensively assess such potential impacts or mitigation measures to limit adverse effects on New Mexico's waters. This risk is made worse by geological faults, unplugged wells, countless boreholes and seismic activity. Kenney, 2021.

The ISP location and its habitat are unsuitable for long-term / indefinite storage of nuclear waste. It contains 230.5 acres of mesquite thorn scrub, 76 acres of shinnery oak, and 17.8 acres of maintained grassland. All shinnery oak and 109 acres of mesquite will be destroyed. This habitat is essential for numerous species and contains primary sources of food for species of greatest conservation needs. The destruction of shinnery oak will mean the permanent demise of non-migratory *Dunes Sagebrush Lizard* and *Lesser Prairie Chicken*. Indeed, NRC failed to even consult FWS or endangered species list within last 90 days of ISP FEIS with respect to FWS's pending proposal to designate the *Lesser Prairie Chicken* and its habitat, stating without support that proposed action will have “no effect” on any proposed endangered or threatened species. Similarly, the NRC ignored that the proposed location and region is suitable habitat for *Pronghorn Antelopes*.

In all these cases, the NRC ignores adverse ecological impacts in favor of simply assuming that its pre-determined decision to license ISP was appropriate. NRC's conclusory allegations do not meet NEPA's “hard look” requirement.

The ISP site, if approved, will further New Mexico's limited water resources at risk and could have adverse impacts on ecological resources that could easily be mitigated with an alternative location. Great Ecology Report pp. 15-18 and 23-27.

II. BIASED ANALYSIS OF ENVIRONMENTAL JUSTICE CONCERNS

²³ See e.g., Marvin Resnikoff Comments in Response to ISP DEIS (Nov. 3, 2020) (highlighting risk of rail accidents and fires); Institute for Resources and Security

NRC's faulty cost and benefit analyses misleadingly overstates a beneficial socioeconomic impact while discounting adverse impacts to environmental justice communities. Ex. B, Steinborn ("The NRC and ISP's engagement with New Mexico and the surrounding communities have fallen short of meaningful participation essential to environmental justice. There has been no consent-based siting for this proposal or any proactive interviews with the affected communities about its potential impacts, and the public engagement webinars failed to reach the public who lack internet service."). Moreover, NRC's severely skewed environmental justice review turns a blind eye to existing minority and low-income populations in the region and along undisclosed transportation routes. Minority populations in this region far exceeds the national average for minority populations and the NRC improperly skews the disproportionate impacts on environmental justice communities by not accounting for this in its evaluation. Disparate impacts on populations residing in Nuclear Alley will only be compounded by proposed action. *See* NMED 2020 ("the Proposed Action [ISP CISF] threatened human health and the environment in New Mexico where minority and low-income populations have already suffered disproportionately high adverse human health and environmental effects from nuclear energy and weapons programs of the United States.") *See also*, Lone Star Legal Aid Joint Comments on Draft Environmental Impact Statement (DEIS) for ISP CISF (Nov. 3, 2020) (ML20309B001).

III. UNFUNDED FEDERAL MANDATES

The DEIS assumes without foundation that New Mexico and its political sub-divisions will provide resources, personnel, equipment, medical facilities, fire departments, and necessary training to mitigate radiation accidents during transportation or continued storage at the site. This is another example of NRC saying another party or entity will mitigate the risk without evaluating the impacts in violation of NEPA. At the same time, the costs incurred by New Mexico and its political subdivisions are not considered in the ISP FEIS, in the "No Action" or alternatives analyses.

The risks, hazards and feasibility of transport to the ISP site are ignored as are the added infrastructure costs, and whether such costs outweigh any alleged economic benefits of the project. Indeed, New Mexico and its political subdivisions are tasked with responding to any accident or disaster without any funding, or analysis of New Mexico's resources and training needs. Great Ecology, pp 9-13. Ex. B, Steinborn ("I strongly oppose any action that would place New Mexico citizens at risk and place the liability of emergency response on local communities without consent-based siting and without the provision of corresponding resources to respond to an emergency.")

This leads New Mexico to a broader and more fundamental point: contrary to its representation of consultation with New Mexico, the NRC never meaningfully consulted with New Mexico in the EIS process. Such consultation would have revealed ecological, transportation, emergency response, and economic costs, among others, that the ISP project creates for New Mexico (and Texas). It also would have revealed the need for State agency approvals and permits.

New Mexico and its communities will further unfairly shoulder the burden and responsibility for providing services to the ISP CISF located along the border through the imposition of unfunded federal mandates left unaccounted for in the ISP EIS. NRC's flawed cost benefit analyses fails to acknowledge the negative economic impacts on the State in terms of

royalties lost, reduction in property values and loss of agricultural land and business investments, misleadingly touting only beneficial impacts to local revenues.

A. Transportation Not Considered as Connected Activity

NRC improperly segments the financially and functionally connected activity of transportation in the ISP FEIS, in violation of NEPA, and instead relies on untimely and piecemeal evaluations that fail to capture costs and impacts to the State, its communities and existing industries. *See* Ex. B, Senator Steinborn (“transportation of SNF creates risk anywhere along the transportation routes, but transportation was not considered as a connected activity by the EIS, and improvements to rail lines and rail infrastructure were not evaluated.”)

In terms of unanalyzed impacts to New Mexico, the ISP CISO will undeniably rely on New Mexico roads and rails. *See* ISP FEIS at 3-6 (regional access to proposed CISO project area is by New Mexico State Route 18); ISP FEIS at 2-11 (shipments of SNF will be transported across U.S. to Monahans, Texas and then transported north to Eunice, New Mexico, on existing rail the Texas New Mexico Railroad owns and operates). NRC relies on risk assessments and prior DOE analyses with the underlying assumption that facilities can retrieve and/or repackage fuel or only go so far as Deaf Smith, Texas. NUREG-2125. NRC’s reliance erroneously assumes ISP CISO has such capabilities and further ignores the acknowledged regional leg of transport into New Mexico.

NRC’s allowance for segmentation of transportation impacts is largely silent on the cumulative impacts, potential risks from wear and tear and geologic instability, adverse impacts on regional industries use of the transportation infrastructure and inevitable need for infrastructure improvement costs or the costs associated with first responder and training, equipment and emergency services to respond to a radiological incident in this rural region (i.e. what the New Mexico governor refers to as “unfunded mandates”). As acknowledged in the ISP FEIS, but left unanalyzed this has serious and substantial implications for the State:

- “NRC staff also recognize that the presence of a facility that stores nuclear materials may require additional preparedness of first responders in the event of an incident requiring fire, law enforcement, and health service support. . . detailed analysis of the costs associated with these potential additional resources are not evaluated in detail. . . States are recognized as responsible for protecting public health and safety during transportation accidents involving radioactive materials.”
- “. . .NRC staff recognize that if SNF is shipped to a CISO, some States, Tribes, or municipalities along [*largely undisclosed] transportation routes may incur costs for emergency response training and equipment that would otherwise likely be eligible for funding under NWPA Section 180(c) provisions if the SNF were shipped by DOE from existing sites to a repository. Because needs of individual municipalities . . . and the costs of this training and equipment vary widely, quantification of such would be speculative.” State’s distribution of “funding for first-responder training and equipment to local municipalities is not within NRC’s authority [it]] is beyond the scope.”
- “The impacts of using these other modes to supplement rail transportation of SNF was previously evaluated by DOE (DOE, 2008; 2002) and found to not significantly change the minor radiological impacts from a national mostly-rail SNF transportation campaign and therefore are not evaluated further in this impact analysis.”

- *“[M]itigation measures for the avoidance of potential adverse impacts that . . . would be required under . . . State permits or processes.”*

NRC cannot ignore impacts of regional transportation in its site-specific ISP FEIS or the associated costs and impacts for the State to mitigate and accommodate transport of SNF. Because the proposed action involves extensive use of New Mexico rails and roads, the NRC must consider the “need for improved infrastructure along railway lines and funding for emergency personnel and equipment to respond to emergency spills.” Ex. A, Governor Lujan Grisham Letter. Nor can NRC ignore that a permanent repository does not exist, “there is no existing plan to build one” and there is no “guarantee that a permanent repository for SNF in the [U.S.] will be developed in the foreseeable future.” Ex. B, Senator Steinborn.

IV. ALTERNATIVES *NOT* CONSIDERED

NRC failed to conduct robust analysis of the baseline “No Action” scenario and refuses to assess a single reasonable alternative. This is inconsistent with NRC’s prior EIS evaluations for ISFSIs and further violates NEPA and NRC regulations.

A. “No Action” Alternative

First, there is no analysis of the baseline or “No Action” alternative.²⁴ NRC for years has found continued on-site storage of HLW at its various current locations to be safe. The status quo does not require action, including transporting all of the nations (HLW) to ISP, and then transporting it to a permanent site, if one is ever approved and opened.

Second, no substantive analysis is provided regarding the likelihood that a permanent repository will be constructed, making ISP’s facility a *de facto* permanent repository without any of the essential safeguards required for such a facility. Great Ecology pp 3-4. Governor Lujan Grisham has objected to the “interim” label, because “at this time, NRC cannot guarantee that a permanent repository for spent nuclear fuel in the United States will be developed in 40, 80 or 120 years.” Lujan Grisham 2020. Texas agrees. Abbott 2020; Abbott 2021. The courts agree. “The [NRC] apparently has no long-term plan other than hoping for a geological repository, with Yucca Mountain effectively having been abandoned” *New York v. NRC*, 824 F.3d 1012, 1014-15 (D.C. Cir. 2016); *In re Aiken County*, 645 F.3d 428, 430-33 (D.C. Cir. 2011). Once again, then, “[t]he [NRC] apparently has no long-term plan other than hoping for a geologic repository. If the government continues to fail in its quest to establish one, then [spent nuclear fuel] will seemingly be stored on site at nuclear plants on a permanent basis. The [NRC] can and must assess the potential environmental effects of such a failure.” *New York v. NRC*, 681 F.3d 471, 479 (D.C. Cir. 2012).

The NRC cannot duck its head in the sand and fail to meaningfully evaluate or establish a baseline for status quo. This renders any comparison to proposed action effectively useless. Nor can NRC skirt its statutory duties by summarily stating such analyses would be speculative, conclusory or outside of its authority. This will not suffice under NEPA.

²⁴ The State is not ranking or prioritizing its concerns.

B. Reasonable Alternatives

NRC did not consider a single other alternative considered by NRC, inconsistent with its own prior EIS evaluations for Yucca and other ISFSIs licensed under 10 CFR Part 72 and in violation of NEPA requirements. *See* NUREG-1714 at xxxiii to xxxvii.

Given the unreasonable site selection process and overwhelming opposition to proposed action, NRC should have considered reasonable alternative site locations. Likewise, to mitigate the environmental impacts and risks from multiple rounds of transportation of SNF, NRC should have more robustly analyzed baseline status quo and reasonable alternatives including on site hardened storage technologies and SNF storage and management at existing reactors.

Moreover, given the NRC has already licensed the Private Fuel Storage facility (under 10 C.F.R. Part 72) and it satisfies the stated purpose and need objectives of the proposed action, the NRC should have considered PFS as a reasonable alternative. *See* NUREG-1714; ISP FEIS at xviii (defining purpose as proposed action “to provide an option for storing SNF, GTCC and a small quantity of MOX from nuclear power plants before a permanent repository is available” and the need to provide away-from reactor storage capacity “to provide the option for [] storage so that stored SNF at decommissioned reactor sites may be removed so that these sites [are] available for other uses”). Instead, the reasonable and already NRC licensed and analyzed alternative was summarily dismissed by the NRC in violation of NEPA. *See* ISP FEIS at D-42 (conclusory stating without any substantive discussion of NRC’s reasoning for eliminating PFS as an alternative that ISP’s site selection process “appears reasonable.”)

CONCLUSION

Because the government stands by the reliability of the information and conclusions in its EISs, they are often used as references for a broad array of decisions. “*To casually include information that has not been independently verified for its reliability and completeness by the NRC would violate both NRC regulations and NEPA’s fundamental purpose of informing the public about environmental issues.*”²⁵ One of the underlying purposes of preparing an EIS is to ensure that federal agencies “*will not act on incomplete information, only to regret [their] decision after it is too late to correct.*”²⁶

The State of New Mexico objects to the ISP FEIS as stated herein and requests that the ISP CISO licensing action be stayed or suspended until NRC’s assessment of cumulative and environmental impacts and unfunded mandates imposed on the State are adequately analyzed and it can demonstrate compliance with NEPA and NRC implementing regulations.

²⁵ *TVA, Intervenor’s Reply to Responses in Opposition to Motion for Leave to File Contention 4 (Inadequate Discussion of Environmental Impacts of Spent Nuclear Fuel Pool Fires) and Contention 5 (Impermissible Discussion of Energy Alternatives and Need for The Proposed SMR)*, Docket No. 52-047-ESP (June 22, 2018), (ADAMS Accession No. ML18174A075) (emphasis added).

²⁶ *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989) (emphasis added)

Exhibit A



State of New Mexico

Michelle Lujan Grisham
Governor

September 13, 2021

The Honorable Christopher T. Hanson, Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Re: Letter in support of the State of New Mexico's letter opposing the Nuclear Regulatory Commission's final environmental impact statement's recommendation to grant interim storage partner LLC's license to store spent nuclear fuel

Dear Chairman Hanson,

My Office supports the New Mexico Attorney General's Office in its opposition to the U.S. Nuclear Regulatory Commission's (the Commission's) recommendation to grant the Interim Storage Partners, LLC's (ISP's) license application to construct and operate a consolidated interim storage facility (the Facility) to store up to 40,000 metric tons of uranium and other waste in Andrews County, Texas.

New Mexicans have a vested interest in this proposed action due to the proximity of the ISP site to the Texas/New Mexico border, which is just .37 miles east of the border and four miles east of the City of Eunice, New Mexico. Notably, the New Mexico side of the border is more densely populated than the Texas side of the border—meaning that the proposed action would disproportionately impact New Mexicans in the immediate area. However, there has been a complete absence of coordination with our state government and inadequate consideration of the lack of a permanent repository site for spent nuclear fuel (SNF), the site's geology and seismicity, the cost of emergency response and cleanup, and the risks of transporting the SNF through New Mexico. Accordingly, the New Mexico Governor's Office strongly objects to granting ISP a license to store SNF, as recommended by the Commission.

After review of the Commission's July 29, 2021, final environmental impact statement (EIS) published in support of its environmental review, my Office has found that it does not adequately address many safety and social concerns, including:

1. There is no permanent storage facilities planned in the United States

The proposed action is the issuance of a Commission license authorizing a consolidated interim storage facility to store up to 5,000 metric tons of uranium (MTUs) (5,500 short tons) for a license period of 40 years at the WCS site that can be renewed at the end of every term. ISP plans to subsequently request amendments to the license that, if approved, would authorize ISP to store an additional 5,000 MTUs (5,500 short tons) for each of seven planned expansion phases of the Facility (a total of eight phases) to be completed over the course of 20 years, to expand the facility to eventually store up to 40,000 MTUs (44,000 short tons) of SNF.

The likelihood that the canisters storing spent nuclear fuel and high-level waste will lose integrity and will require repackaging over time is particularly concerning. The potential SNF storage is nearly enough for the entire United States' existing SNF. Significantly, there is no plan for a permanent repository for SNF underway, and the Commission cannot guarantee that a permanent repository for SNF in the United States will be developed within the foreseeable lifespan of the proposed storage canisters or that the Facility will not become the *de facto* permanent repository. Further, any inevitable repackaging of spent nuclear fuel and high-level waste increases the risk of accidents and radiological health risks and contamination to surface and groundwater resources.

2. There is potential for contamination to New Mexico resources

The consequences of a release of radiation due to accidental events (e.g., fire, flood, earthquakes, ruptures of fuel rods, explosion, lightning, extreme temperatures, etc.), potential acts of terrorism or sabotage, and the risks associated with aging spent nuclear fuel canisters all pose unacceptable health, safety, and environmental risks to New Mexico's citizens and environment.

The EIS's seismic hazard analysis was deficient and failed to account for a magnitude 5.0 earthquake that struck in West Texas recently near the New Mexico border. The geologic formation in the area is heavily faulted and poses a seismic hazard to the ISP site, as there is a possibility that more powerful earthquakes may occur. Yet the EIS fails to account for the potential for geologic activity to impact the Facility.

The proposed site is also in an area underlain by concerns for sinkhole development and shallow groundwater that does not provide deep geologic isolation for indefinite SNF storage. This is especially troubling because groundwater flow beneath the existing waste cells at ISP site is predominantly to the southwest towards New Mexico, and surface water flow from the ISC site is directed through outfalls that flow directly into New Mexico. Accordingly, any discharge of SNF at the Facility site would directly impact New Mexico's groundwater and surface water.

3. The approval of the license would create unfunded mandates to New Mexico

New Mexico and its communities will unfairly shoulder the burden and responsibility for providing services to the Facility located along the border through the imposition of unfunded federal mandates left unaccounted for in the EIS. The storage and transportation of spent nuclear fuel requires both well-maintained infrastructure and highly specialized emergency response equipment and personnel that can respond quickly to an incident at the Facility or on transit routes. However, the proposed action did not address how the emergency response personnel, equipment, and training, as well as necessary infrastructure upgrades, would be funded.

4. The risk of transporting nuclear waste through New Mexico has not been thoroughly investigated

The SNF that will be stored at ISP will be transported to and from the site by railroads within New Mexico and on New Mexico state roads. New Mexico residents cannot afford and should not be expected to bear the costs associated with transporting material to the Facility or responding to a nuclear fuel spill along the hundreds of miles of railway lines in New Mexico.

Transporting SNF across the nation is complex and extremely dangerous. Yet the transportation of SNF was not considered a connected activity in the EIS. The EIS did not account for the amount of waste that will be coming from nuclear reactor sites all over the country (and eventually transported off of the ISP site to a permanent storage at some unforeseeable time in the future). The amount of SNF transported to and from the ISP site requires considerable use of New Mexico roads and railways. There is also a need for improved infrastructure along railway lines and funding for emergency personnel and equipment to respond to emergency spills. The failure to consider transportation issues creates an unacceptable risk of an environmental catastrophe while the SNF is in transit.

5. The storage of nuclear waste in New Mexico poses economic risk

The proposed action poses an unacceptable economic risk to New Mexicans, who look to southeastern New Mexico as a driver of economic growth. New Mexico's agricultural industry contributes approximately \$3 billion per year to the state's economy, \$300 million of which is generated in Eddy and Lea County, which are adjacent to the site. The proposed site is located in the Permian Basin, which is the largest inland oil and gas reservoir and the most prolific oil and gas producing region in the world. New Mexico's oil and natural gas industry contributed billions of dollars to the state last year, driven by production in Lea and Eddy County. Any disruption of agricultural or oil and gas activities as a result of a perceived or actual nuclear incident would harm New Mexico's economy, and even taking steps toward siting a consolidated interim storage facility in the area could cause a decrease in investment in two of New Mexico's biggest industries.

6. There is strong community opposition

A broad range of businesses, state, local, and tribal leaders have expressed their opposition to this project and to a similar project in New Mexico proposed by Holtec International. That opposition includes both myself and Governor Abbott of Texas, who similarly recognizes the risk a consolidated interim storage facility in this region poses to nearby residents.

New Mexico is already home to uranium mining and milling, legacy contamination at national laboratories, and disposal of defense waste at the Waste Isolation Pilot Plant (WIPP), which have long created risks to public health and the environment in the State of New Mexico. The proposed action threatens minority and low-income populations in New Mexico that have already suffered disproportionately high adverse human health and environment effects from nuclear energy and weapons programs of the United States.

For the above reasons, the ISP proposal poses an unacceptable risk to New Mexico's citizens, communities, and economy. My Office, therefore, strongly opposes granting the ISP license application and suggests that the Commission should, at the very least, stay its decision the license until new environmental justice protocols are in place.

Sincerely,



Michelle Lujan Grisham
Governor of New Mexico

Exhibit B



New Mexico State Senate

State Capitol
Santa Fe

COMMITTEES:

MEMBER:

- Finance

INTERIM COMMITTEES:

CHAIR:

- Radioactive & Hazardous Materials Committee

MEMBER:

- Water & Natural Resources Committee

SENATOR JEFF STEINBORN

D-Dofia Ana-36

P.O. Box 562
Las Cruces, NM 88004

Cell: (575) 635-5615

E-mail: jeff.steinborn@nmlegis.gov

September 13, 2021

NEW MEXICO SENATOR JEFF STEINBORN

LETTER IN SUPPORT OF THE STATE OF NEW MEXICO'S LETTER OPPOSING THE NUCLEAR REGULATORY COMMISSION'S FINAL ENVIRONMENTAL IMPACT STATEMENT'S RECOMMENDATION TO GRANT INTERIM STORAGE PARTNER LLC'S LICENSE TO STORE SPENT NUCLEAR FUEL

I am a member of both the Radioactive and Hazardous Materials and Water and Natural Resources Committee. Part of my duties are to monitor issues and policies pertaining to radioactive waste in the state of New Mexico. As such, I have taken a lead role to help my colleagues and I understand and evaluate the proposal to store high level nuclear waste in New Mexico.

I am concerned with the final recommendation of the U.S. Nuclear Regulatory Commission (NRC) in its July 29, 2021 final environmental impact statement (EIS) documenting the NRC's environmental review of the Interim Storage Partners, LLC (ISP) license application to construct and operate a highly radioactive nuclear waste site at the Waste Control Specialists (WCS) site in Andrew County, Texas. Against opposition from the New Mexico governor's office, various New Mexico agencies, and local communities, the NRC has recommended granting licensure for ISP to store up to 40,000 metric tons of uranium of spent nuclear fuel (SNF) and other waste less than a mile from the New Mexico state line for an initial license period of 40 years with an option to renew an additional 40 years at the end of each term.

Despite the proximity to New Mexico and the City of Eunice, multiple letters and comments from state officials and community representatives, there has been a lack of involvement with New Mexico's state agencies and local communities regarding the proposed action. The NRC and ISP's engagement with New Mexico and the surrounding communities have fallen short of meaningful participation essential to environmental justice. There has been no consent-based siting for this proposal or any proactive interviews with the affected communities about its potential impacts, and the

public engagement webinars failed to reach the public who lack internet service. It is no surprise the proposed action has met with opposition from the Texas and New Mexico legislatures.

I strongly oppose any action that would place New Mexico citizens at risk and place the liability of emergency response on local communities without consent-based siting and without the provision of corresponding resources to respond to an emergency. The EIS accepts the risk that spent nuclear fuel canisters will be shipped multiple times using railways in New Mexico. Each shipment of nuclear waste through New Mexico creates the risk of an environmental accident, yet transportation was not evaluated. The proposed action does not include funding for a comprehensive emergency response capability for a nationwide plan to transport and store spent nuclear fuel through New Mexico and West Texas, or explain how a local response will avert or mitigate a disaster. In some locations there would also be insufficient medical personnel with radiation expertise along the railroads in New Mexico. As recommended by the NRC, the proposed action would leave the burden of emergency cleanup on the local communities.

Lastly, the NRC has recommended granting ISP a license for an *interim* nuclear waste storage location, not a permanent location. However, there is no plan for a permanent disposal site for the nation's high-level radioactive waste, and the NRC cannot provide any assurances that a permanent SNF storage site will be completed within the next century, and that the ISP site (and the pending Holtec site in New Mexico) will not become the de facto permanent storage sites for the nation's nuclear waste. Also of concern, the NRC and ISP cannot predict with complete assurance the safety and performance of the dry casks and canisters that will be used to hold the SNF for an indefinite period of time. The current performance history of the canisters is less than the initial 40-year license period for the proposed ISP facility, and the EIS does not address the possibility of having to repackage the spent nuclear fuel on-site if the canisters are cracked during transportation or delivery or become corroded during storage. New Mexico doesn't have the luxury of assuming the canisters will not fail before a permanent SNF storage location is constructed because there is no presumable end date to the proposed interim storage. The proposed action unacceptably puts New Mexico communities at risk without a permanent storage site plan and without a long term study on SNF canister durability.

For the above reasons, I urge the NRC to deny the issuance of a license to store spent nuclear fuel at the ISP facility or at least stay a decision on the license until new environmental justice protocols are in place.

A handwritten signature in black ink, appearing to read "Jeff Steinborn". The signature is stylized with a large, looped initial "J" and a cursive "S".

Senator Jeff Steinborn