

From: Kevin Kamps <kevin@beyondnuclear.org>
Sent: Saturday, June 27, 2020 3:09 PM
To: Holtec-CISFEIS Resource
Subject: [External_Sender] Beyond Nuclear public comment #4, re: NRC's Holtec/ELEA CISF DEIS, Docket ID NRC-2018-0052

Dear NRC Staff,

The [NRC Staff has a glaring internal contradiction](#): it is willing to overlook this proposed Holtec/ELEA CISF's violation of the Nuclear Waste Policy Act of 1982, as Amended (which prohibits the U.S. Department of Energy (DOE) from taking ownership of commercial irradiated nuclear fuel at an interim site in the absence of an open permanent repository), while citing in the DEIS that the lack of a legally-binding decision by DOE and Congress re: highly radioactive Greater-Than-Class-C "low-level" radioactive waste, means NRC will choose to refrain from reviewing that aspect of the proposal any further at this time. NRC is talking out both sides of its mouth, to the benefit of license applicant Holtec, and to the disadvantage of the public interest! And the double standard re: rule of law is also outrageous NRC behavior. NRC must obey, and not violate, all federal laws, including the Nuclear Waste Policy Act of 1982, as Amended. To violate that law is itself a violation of the Administrative Procedure Act.

Mindy Goldstein and Diane Curran, Beyond Nuclear's legal counsel in its opposition to the Holtec International consolidated interim storage facility for highly radioactive irradiated nuclear fuel targeted at southeastern New Mexico, have submitted a letter to the U.S. Nuclear Regulatory Commissioners regarding this matter. It addresses NRC Staff internal contradictions, as revealed in the NRC's March 2020 Draft Environmental Impact Statement, as compared to NRC Staff's assertions during the licensing proceeding, upon which the NRC Atomic Safety and Licensing Board relied when it ruled against Beyond Nuclear's intervention on May 7, 2019.

Diane Curran is a Partner at Harmon, Curran, Spielberg + Eisenberg, LLP in Washington, D.C.

Mindy Goldstein Director of the Turner Environmental Law Clinic at Emory University School of Law in Atlanta, Georgia.

The letter, dated April 7, 2020, entitled "Re: Holtec International (HI-STORE Consolidated Interim Storage Facility), Docket No. 72-1051," was sent to all four then serving NRC Commissioners: Commissioner Kristine Svinicki, Chair; Commissioner Jeff Baran; Commissioner Annie Caputo; and Commissioner David A. Wright.

The text of the letter, as contained with brackets below, states:

[On behalf of Beyond Nuclear, Inc., we write to alert you of a recent statement by the U.S. Nuclear Regulatory Commission ("NRC") Staff in the Draft Environmental Impact Statement for the Holtec International's License Application for a Consolidated Interim Storage Facility for Spent Nuclear Fuel and High Level Waste (NUREG-2237, March 2020) ("DEIS"), which bears on the legal issues now before you in this proceeding on appeal of LBP-19-04, 89 NRC __ (May 7, 2019).

In LBP-19-04, the Atomic Safety and Licensing Board ("ASLB") stated:

If Congress decides to amend the [Nuclear Waste Policy Act] to allow [the Department of Energy] to take title to spent nuclear fuel before a national nuclear waste repository becomes operational, the only difference would be that DOE could then lawfully contract with Holtec to store the same spent fuel that presently belongs to the nuclear power plant owners. *The NRC Staff assures us that it is reviewing Holtec's application in light of both possibilities: '[T]he Staff bases its safety and environmental reviews on the application as presented, which seeks a license on the basis that either DOE or private entities may hold title to the waste.'*

Id., slip op. at 34 (emphasis added) (cited in Beyond Nuclear's Brief on Appeal of LBP-19-04 at 6 (June 3, 2019)). In the DEIS, however, the NRC Staff refuses to provide "a detailed evaluation" of the environmental impacts of an action related to the storage of spent fuel at the proposed Holtec facility, i.e., disposal of Greater-Than-Class-C ("GTCC") waste at the Waste Control Specialist ("WCS") Low Level Radioactive Waste disposal facility in Andrews, Texas, on the ground that it is not "feasible" until Congress passes legislation:

[B]ecause disposal of GTCC at WCS would require completion of [an NRC rulemaking] *and actions by DOE and Congress*, a detailed evaluation of this reasonably foreseeable future action is *not feasible at this time* but is included here for completeness.

Id. at 5-5 (emphasis added). This statement in the DEIS runs counter to the NRC Staff's assurances, relied upon by the ASLB in LBP-19-04, that the NRC Staff can ably assess the environmental and safety impacts of DOE ownership of spent nuclear fuel at the proposed Holtec facility, when such ownership would also require actions by both DOE and Congress (i.e. amending the Nuclear Waste Policy Act).]

The following press release, contained within brackets below, published by Beyond Nuclear on April 27, 2020, contains additional information about the NRC's violation of the Nuclear Waste Policy Act of 1982, as Amended, as well as the Administrative Procedure Act, vis-a-vis the Holtec/ELEA CISF:

[U.S. Nuclear Regulatory Commission announces it will proceed with licensing of proposed high-level radioactive waste dump in New Mexico despite illegal license term

In violation of Nuclear Waste Policy Act, license applicant Holtec International contemplates federal ownership of 173,000 metric tons of highly radioactive spent reactor fuel to be stored at New Mexico site

Beyond Nuclear vows to challenge NRC and Holtec in federal court

WASHINGTON, D.C. and SOUTHEASTERN NM -- In an astounding ruling on April 23, 2020, the four-member U.S. Nuclear Regulatory Commission (NRC) acknowledged that an application by Holtec International/Eddy-Lea [Counties] Energy Alliance to store a massive quantity of highly radioactive irradiated nuclear fuel in southeastern New Mexico violates federal law – and yet ruled that the unlawful provisions of the license application could be ignored and would not bar approval.

Beyond Nuclear has challenged the NRC's authority to approve Holtec's license application because it contemplates that the U.S. Department of Energy (DOE) may become the owner of the irradiated reactor fuel. The federal Nuclear Waste Policy Act (NWPA) prohibits federal ownership of spent fuel, however, unless and until a federal repository for permanent disposal is operating.

The NRC Commissioners acknowledged that Federal law prohibits federally-sponsored storage of irradiated reactor fuel unless and until a repository for permanent disposal is in operation. Nevertheless the NRC threw out Beyond Nuclear's legal challenge to the project on the ground that Holtec could be

depended on not to implement the unlawful provision if the license were granted.

[The Commissioners' decision](#) affirms [an earlier ruling by the NRC's Atomic Safety and Licensing Board](#) that the storage facility may be licensed despite the illegal license terms contemplating federal ownership of the irradiated fuel. The Licensing Board accepted arguments by Holtec and the NRC's technical staff that the license containing illegal provisions could be approved as long as it also contained a provision that would allow private ownership of the spent fuel.

Mindy Goldstein, a lawyer for Beyond Nuclear, stated, "the NRC's decision flagrantly violates the federal Administrative Procedure Act (APA), which prohibits an agency from acting contrary to the law as issued by Congress and signed by the President." Goldstein also stated that "the Commission lacks a legal or logical basis for its rationale that the illegal provisions could be ignored in favor of other provisions that are legal, or that an illegal license could be issued in 'hopes' that the law might change in the future. The APA gives the NRC no excuse to ignore the mandates of federal law."

Diane Curran, also a lawyer for Beyond Nuclear, said the group will pursue a federal court appeal of the NRC decision. "Our claim is simple," she declared. "The NRC is not above the law."

Kevin Kamps, radioactive waste specialist for Beyond Nuclear, called the federal Nuclear Waste Policy Act "the public's best protection against an interim storage facility becoming a *de facto* permanent, national radioactive waste dump at the surface of the Earth." According to Kamps, "Congress knew, in passing the NWPA, that the only safe long-term strategy for care of irradiated reactor fuel is to place it in a permanent repository for deep geologic isolation.

Congress acted wisely in refusing to allow nuclear reactor licensees to transfer ownership of their irradiated reactor fuel to the DOE until a repository was up and running. The carefully crafted Nuclear Waste Policy Act thus protects a state like New Mexico from being railroaded by the powerful nuclear industry, its friends in the federal government, and other states looking to off-load their mountain of forever deadly high-level radioactive waste."

Kamps added: "A deep geologic repository for permanent disposal should meet a long list of stringent criteria. These include legality, environmental justice, consent-based siting, scientific suitability, mitigation of transport risks, regional equity, intergenerational equity, and non-proliferation, including a ban on reprocessing. This is why a coalition of more than a thousand environmental, environmental justice, and public interest organizations, representing all 50 states, have opposed the Yucca Mountain dump targeted at Western Shoshone Indian land in Nevada for 33 years."

"On behalf of our members and supporters in New Mexico, and across the country along the road, rail, and waterway routes in most states, that would be used to haul the high risk, high-level radioactive waste out West, we will appeal the NRC Commissioners' bad ruling to the federal court," Kamps added.]

And this press release, contained in brackets below, published on June 4, 2020, by Beyond Nuclear, sheds more light on NRC's violation of the Nuclear Waste Policy Act of 1982, as Amended, and the Administrative Procedure Act:

[BEYOND NUCLEAR FILES FEDERAL LAWSUIT CHALLENGING HIGH-LEVEL RADIOACTIVE WASTE DUMP FOR ENTIRE INVENTORY OF U.S. "SPENT" REACTOR FUEL

Petitioner charges the Nuclear Regulatory Commission knowingly violated U.S. Nuclear Waste Policy Act and up-ended settled law prohibiting transfer of ownership of spent fuel to the federal government until a permanent underground repository is ready to receive it

[WASHINGTON, DC – June 4, 2020] -- Today the non-profit organization [Beyond Nuclear](#) filed an appeal with the

U.S. Court of Appeals for the District of Columbia Circuit requesting review of an April 23, 2020 [order](#) and an October 29, 2018 [order](#) by the U.S. Nuclear Regulatory Commission (NRC), rejecting challenges to Holtec International/Eddy-Lea Energy Alliance's application to build a massive "consolidated interim storage facility" (CISF) for nuclear waste in southeastern New Mexico. Holtec proposes to store as much as 173,000 metric tons of highly radioactive irradiated or "spent" nuclear fuel – more than twice the amount of spent fuel currently stored at U.S. nuclear power reactors – in shallowly buried containers on the site.

But according to Beyond Nuclear's petition, the NRC's orders "violated the Nuclear Waste Policy Act and the Administrative Procedure Act by refusing to dismiss an administrative proceeding that contemplated issuance of a license permitting federal ownership of used reactor fuel at a commercial fuel storage facility."

Since it contemplates that the federal government would become the owner of the spent fuel during transportation to and storage at its CISF, Holtec's license application should have been dismissed at the outset, Beyond Nuclear's appeal argues. Holtec has made no secret of the fact that it expects the federal government will take title to the waste, which would clear the way for it to be stored at its CISF, and this is indeed the point of building the facility. But that would directly violate the 1982 Nuclear Waste Policy Act (NWPA), which prohibits federal government ownership of spent fuel unless and until a permanent underground repository is up and running. No such repository has been licensed in the U.S. The U.S. Department of Energy's (DOE) most recent estimate for the opening of a geologic repository is the year 2048 at the earliest.

In its April 23 decision, in which the NRC rejected challenges to the license application, the four NRC Commissioners admitted that the NWPA would indeed be violated if title to spent fuel were transferred to the federal government so it could be stored at the Holtec facility. But they refused to remove the license provision in the application which contemplates federal ownership of the spent fuel. Instead, they ruled that approving Holtec's application in itself would not involve NRC in a violation of federal law, and that therefore they could go forward with approving the application, despite its illegal provision. According to the NRC's decision, "the license itself would not violate the NWPA by transferring the title to the fuel, nor would it authorize Holtec or [the U.S. Department of Energy] to enter into storage contracts." (page 7). The NRC Commissioners also noted with approval that "Holtec hopes that Congress will amend the law in the future." (page 7).

"This NRC decision flagrantly violates the federal Administrative Procedure Act (APA), which prohibits an agency from acting contrary to the law as issued by Congress and signed by the President," said Mindy Goldstein, an attorney for Beyond Nuclear. "The Commission lacks a legal or logical basis for its rationale that it may issue a license with an illegal provision, in the hopes that Holtec or the Department of Energy won't complete the illegal activity it authorized. The buck must stop with the NRC."

"Our claim is simple," said attorney Diane Curran, another member of Beyond Nuclear's legal team. "The NRC is not above the law, nor does it stand apart from it."

According to a 1996 D.C. Circuit Court ruling, the NWPA is Congress' "comprehensive scheme for the interim storage and permanent disposal of high-level radioactive waste generated by civilian nuclear power plants" [*Ind. Mich. Power Co. v. DOE*, 88 F.3d 1272, 1273 (D.C. Cir. 1996)]. The law establishes distinct roles for the federal government vs. the owners of facilities that generate spent fuel with respect to the storage and disposal of spent fuel. The "Federal Government has the responsibility to provide for the permanent disposal of ... spent nuclear fuel" but "the generators and owners of ... spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of ... spent fuel until such ... spent fuel is accepted by the Secretary of Energy" [42 U.S.C. § 10131]. Section 111 of the NWPA specifically provides that the federal government will not take title to spent fuel until it has opened a repository [42 U.S.C. § 10131(a)(5)].

"When Congress passed the Nuclear Waste Policy Act and refused to allow nuclear reactor licensees to transfer ownership of their irradiated reactor fuel to the DOE until a permanent repository was up and running, it acted

wisely,” said Kevin Kamps, radioactive waste specialist for Beyond Nuclear. “It understood that spent fuel remains hazardous for millions of years, and that the only safe long-term strategy for safeguarding irradiated reactor fuel is to place it in a permanent repository for deep geologic isolation from the living environment. Today, the NWPA remains the public’s best protection against a so-called ‘interim’ storage facility becoming a *de facto* permanent, national, surface dump for radioactive waste. But if we ignore it or jettison the law, communities like southeastern New Mexico can be railroaded by the nuclear industry and its friends in government, and forced to accept mountains of forever deadly high-level radioactive waste other states are eager to offload.”

In addition to impacting New Mexico, shipping the waste to the CISF site would also endanger 43 other states plus the District of Columbia, because it would entail hauling 10,000 high risk, high-level radioactive waste shipments on their roads, rails, and waterways, posing risks of radioactive release all along the way.

Besides threatening public health and safety, evading federal law to license CISF facilities would also impact the public financially. Transferring title and liability for spent fuel from the nuclear utilities that generated it to DOE would mean that federal taxpayers would have to pay for its so-called "interim" storage, to the tune of many billions of dollars. That’s on top of the many billions ratepayers and taxpayers have already paid to fund a permanent geologic repository that hasn’t yet materialized.

But that’s not to say that Yucca Mountain would be an acceptable alternative to CISF. “A deep geologic repository for permanent disposal should meet a long list of stringent criteria: legality, environmental justice, consent-based siting, scientific suitability, mitigation of transport risks, regional equity, intergenerational equity, and safeguards against nuclear weapons proliferation, including a ban on spent fuel reprocessing,” Kamps said. “But the Yucca Mountain dump, which is targeted at land owned by the Western Shoshone in Nevada, fails to meet any of those standards. That’s why a coalition of more than a thousand environmental, environmental justice, and public interest organizations, representing all 50 states, has opposed it for 33 years.”

Kamps noted that the U.S. Court of Appeals for the District of Columbia Circuit has upheld the NWPA before, including in the matter of inadequate standards for Yucca Mountain. In its landmark 2004 [decision](#) in *Nuclear Energy Institute v. Environmental Protection Agency*, it wrote, “Having the capacity to outlast human civilization as we know it and the potential to devastate public health and the environment, nuclear waste has vexed scientists, Congress, and regulatory agencies for the last half-century.” The Court found the U.S. Environmental Protection Agency’s insufficient 10,000-year standard for Yucca Mountain violated the NWPA’s requirement that the National Academy of Sciences’ recommendations must be followed, and ordered the EPA back to the drawing board. In 2008, the EPA issued a revised standard, acknowledging a *million-year* hazard associated with irradiated nuclear fuel and high-level radioactive waste. Even that standard falls short, Kamps said, because certain radioactive isotopes in spent fuel remain dangerous for much longer than that. Iodine-129, for example, is hazardous for 157 million years.]

These internal contradictions by NRC Staff, described above, must be corrected in the DEIS. The correction must follow, and be faithful and obedient to, federal law, as described above.

I submit these comments on behalf of our members and supporters in New Mexico, and in all states along the impacted transport routes.

Please acknowledge receipt of these comments. Thank you.

Sincerely,

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

Federal Register Notice: 85FR16150
Comment Number: 2104

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