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DOCKET NO. NRC-2018-0052

REPORT NO. NUREG-2237, "Environmental Impact Statement for the Holtec International's License Application for a Consolidated Interim Storage Facility for Spent Nuclear Fuel and High-Level Waste; Draft Report for Comment" (Nuclear Regulatory Commission, March 2020)

To Whom It May Concern:

The Office of the Nevada Attorney General files this comment on the above-referenced document because within that document NRC Staff itself has pre-judged the outcome of the still-pending Yucca Mountain repository adjudicatory proceeding, which is both illegal and improper for the reasons addressed below.

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Background

On March 20, 2020, the Staff of the Nuclear Regulatory Commission (NRC Staff) caused to be published in the Federal Register a draft environmental impact statement (DEIS), referred to as NUREG-2237, for Holtec International's license application for a consolidated interim storage facility (CISF) for spent nuclear fuel (SNF) and high-level radioactive waste (HLRW). *See* 85 Fed. Reg. 20,205 (Mar. 20, 2020). On April 27, 2020, the NRC Staff caused to be published in the Federal Register a notice that public comments on NUREG-2237 would be accepted if filed no later than July 22, 2020. *See* 85 Fed. Reg. 23,382 (Apr. 27, 2020). The commenting deadline was further extended by NRC Staff until September 22, 2020. *See* 85 Fed. Reg. 36,964 (June 24, 2020). This comment on NUREG-2237 is being submitted by the Office of the Nevada Attorney General ("Commenter").

Comment

Commenter specifically challenges the sentence contained in NUREG-2237 that is highlighted below.

Additionally, the SNF stored at the proposed CISF project would eventually need to be transported to an offsite geologic repository, in accordance with the national policy for SNF management established in the Nuclear Waste Policy Act of 1982, as amended (NWPA). The NWPA requires that DOE submit an application for a repository at Yucca Mountain, Nevada. ***Unless and until Congress amends the statutory requirement, NRC assumes that the transportation of SNF from the CISF to a repository will be to a repository at Yucca Mountain, Nevada.***

NUREG-2237 at 3-12 (emphasis added). As explained in detail below, the highlighted sentence contains an erroneous assumption that is contrary to law and unfounded; and, therefore, the sentence should be deleted from the DEIS.

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Subtitle A of the Nuclear Waste Policy Act of 1982, as amended (NWPA), clearly establishes a national policy for management of SNF and HLRW. *See* NWPA Sec. 111(b)(2), 42 U.S.C. § 10131(b)(2). The policy specifically includes, *inter alia*, the disposal of SNF in repositories. *See id.* at (b)(1). The NWPA defines a “repository” to mean a system used for permanent deep geologic disposal of SNF, and defines “spent nuclear fuel” to mean fuel withdrawn from a nuclear reactor. *See* NWPA Secs. 2(18) and 2(23); 42 U.S.C. § 10101(18) & (23). When the NWPA was amended in 1987, Subtitle H was added to address the transportation of SNF to the geologic repositories that are mandated under Subtitle A. *See* Pub. L. 100–203, § 5061, 101 Stat. 1330 (1987); NWPA Sec. 180; 42 U.S.C. § 10175. From the foregoing, it is clear that Federal policy now requires any SNF located anywhere in the United States to be transported to and disposed of at a geologic repository.

Subtitle E was also added to the NWPA in 1987, and therein the Secretary of the Department of Energy (DOE) was directed to no longer consider geologic repositories other than the candidate site located at Yucca Mountain, Nevada. *See* Pub. L. 100–203, § 5011, 101 Stat. 1330 (1987); NWPA Sec. 160(a); 42 U.S.C. 10172(a). However, NWPA Sec. 160(a) did *not* mandate that the geologic repository be located at Yucca Mountain—rather, it stated that only the Yucca Mountain “candidate site” shall be evaluated as a geologic repository. *See generally*, NWPA Secs. 113 and 114(a); 42 U.S.C. §§ 10133 and 10134(a). Subsequently, DOE completed its evaluation of Yucca Mountain as a possible geologic repository and, on June 3, 2008, DOE submitted to NRC an application for a license to authorize the construction of a geologic repository at Yucca Mountain. *See* NWPA Sec. 114(b); 42 U.S.C. 10134(b). The Yucca Mountain license application has been pending before NRC since then—the adjudicatory proceeding has been suspended since September 2011.

At this time, NRC only has the DOE license application for a construction authorization at Yucca Mountain under consideration, and no final decision has yet been made by NRC either approving or disapproving the issuance of a construction authorization for a geologic repository at

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Yucca Mountain. *See* NWSA Sec. 114(d); 42 U.S.C. § 10,134(d). The NRC adjudicatory proceeding for the Yucca Mountain license application is currently suspended, and there is no date or criteria for its resumption. However, nowhere within the NWSA is there any statutory requirement, or even an implication or presumption, that NRC ***must*** issue a decision approving the Yucca Mountain license application (or must issue a decision denying the Yucca Mountain license application) at any particular time. Rather, the decision is up to NRC and its decision has not yet been made.

In light of the foregoing, the NRC Staff statement contained in NUREG-2237 and highlighted above is clearly erroneous. Such a statement—“NRC assumes that the transportation of SNF from the CISF to a repository will be to a repository at Yucca Mountain, Nevada”—erroneously assumes (a) that an authorization to construct a geologic repository at Yucca Mountain will be issued by NRC, (b) that Yucca Mountain will be constructed by DOE in accordance with that authorization, and (c) that NRC will issue an additional license authorizing DOE to receive and possess SNF at the Yucca Mountain site. The erroneous assumption is even more objectionable because it was made by NRC Staff (supposedly an impartial regulator) notwithstanding that (x) NRC is still considering the Yucca Mountain license application and (y) NRC has not yet made a decision to grant (or deny) that application. While NRC Staff is arguably free to assume in NUREG-2237 that SNF at the Holtec CISF will be transported to a geologic repository, at some point in the future, it cannot assume that Yucca Mountain ***will be*** that geologic repository.

Moreover, the NRC Staffs’ erroneous assumption is not consistent with the NRC’s existing regulations. Under 10 C.F.R. § 51.80(b)(1), the DEIS for the Holtec CISF must incorporate NUREG-2157, which is the NRC’s generic environmental impact statement (GEIS) on extended SNF storage. In the GEIS NRC found it most likely that “a repository” will be available, but not that a repository at Yucca Mountain will be available. *See* 79 Fed. Reg. 56,238, 56,254 (Sept. 19, 2014).

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Further, the predicate in the highlighted sentence in NUREG-2237 regarding a possible Congressional amendment of the statutory provisions within the NWPA is misleading. The NWPA currently does not make the assumption that the geologic repository will be at Yucca Mountain. The predicate suggests that unless and until there is an amendment to the NWPA the repository will be at Yucca Mountain when in fact that decision has not yet been made. Yucca Mountain will not be the repository unless NRC approves the license application (and they could just as easily disapprove the application).

Accordingly, SNF cannot be transported from the proposed Holtec CISF to Yucca Mountain unless and until the NRC grants both a construction authorization and a license to possess the SNF on the Yucca Mountain site. See 10 C.F.R. § 63.3. As a result, the NRC Staff cannot assume in NUREG-2237 that either a construction authorization for Yucca Mountain or a license to possess SNF at Yucca Mountain will be issued without pre-judging the outcome of the still-pending and highly contested construction authorization proceeding required by Section 114(d) of the NWPA, 42 U.S.C. § 10134(d), and Section 189a the Atomic Energy Act, as amended, 42 U.S.C. § 2239(a).

Accordingly, the subject sentence on page 3–12 of NUREG-2237, highlighted above, is contrary to law and unfounded, and the sentence should be deleted from the DEIS.

Respectfully submitted,

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