

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, DON'T WASTE	)	
MICHIGAN, CITIZENS'	)	
ENVIRONMENTAL COALITION,	)	
CITIZENS FOR ALTERNATIVES	)	
TO CHEMICAL CONTAMINA-	)	
TION, NUCLEAR ENERGY	)	
INFORMATION SERVICE,	)	
PUBLIC CITIZEN, INC., SAN	)	
LUIS OBISPO MOTHERS FOR	)	
PEACE, SUSTAINABLE ENERGY	)	
AND ECONOMIC DEVELOP-	)	
MENT COALITION,	)	
	)	
Petitioners,	)	No. 21-1229
	)	
vs.	)	
	)	PETITION FOR JUDICIAL
UNITED STATES NUCLEAR	)	REVIEW
COMMISSION and UNITED	)	
STATES OF AMERICA,	)	
	)	
Respondent.	)	

Pursuant to 28 U.S.C. § 2344, 5 U.S.C. § 702, Federal Rule of Appellate Procedure 15(a), and D.C. Circuit Rule 15(a), Petitioners, through undersigned counsel, hereby petition for review of the following actions of the United States Nuclear Regulatory Commission (NRC):

- Issuance of the Final Environmental Impact Statement (FEIS) in July, 2021, for the Interim Storage Partners (ISP) proposed nuclear waste storage facility in Andrews County, Texas, found at

<https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?>

[AccessionNumber=ML21209A955](#) ; and

- Issuance of a Record of Decision (ROD) on September 13, 2021, for the FEIS referred to above. The ROD is hereto attached as Exhibit A.

Petitioners seek review of the above-described actions of the NRC on the basis that they violate the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq. and regulations and caselaw interpreting NEPA. The violations of NEPA include, but are not limited to:

1. The purpose and need statement in the EIS states that the ISP facility is to provide an option for storing nuclear waste until a permanent repository is established. But the purpose and need statement acknowledges that a permanent repository has been delayed indefinitely. In other words, there may never be a permanent repository so the ISP facility may be a de facto permanent repository. The purpose and need statement does not address this fact. This is significant because the purpose and need statement dictates the range of reasonable alternatives. The EIS never addresses the possibility that the ISP facility may become a de facto permanent repository without the protections of a permanent repository.

2. The description of the proposed action is confusing and contradictory. First of all, the ultimate proposal by ISP is to bring 40,000

metric tons of waste to the facility over an 8-year period. But the EIS claims that the proposed action covered by the EIS is a 40-year license for just the first phase with an initial shipment of 5,000 tons. So, apparently, there would be 8 40-year licenses, one for each of the anticipated shipments of waste over an 8-year period.

Then the EIS states that ISP anticipates obtaining a 20-year license extension so the facility can operate for 60 years. But there is no assurance that the license extensions would be granted. If they are not granted, the EIS must evaluate that possibility and the impact of thousands of tons of stranded radioactive waste.

The law is clear that the “hard look” required by NEPA includes a discussion and analysis of all foreseeable direct and indirect impacts. *N. Alaska Env. Ctr. v. Kempthorne*, 457 F.3d 869 (9<sup>th</sup> Cir. 2006).

3. Constructing and operating a consolidated interim storage (CIS) facility in the absence of a designated permanent repository is illegal under the Nuclear Waste Policy Act (NWPA). Furthermore, the NWPA states that only the Department of Energy (DOE) can own and operate a CIS facility, not a private entity like ISP. The EIS does not discuss these issues, even though the ISP proposal is to have either DOE or private reactor owners hold title to the waste.

Even if private reactor owners retain title to the waste, the proposal is still illegal under the Atomic Energy Act (AEA). The AEA, 42 U.S.C. § 2133, authorizes the NRC to license only utilization or production facilities, not nuclear waste storage facilities. That is why the NWPA was passed. The EIS does not discuss this issue, either.

4. The allegation in the EIS that there are no health or safety issues relies primarily on the pretense that the canisters containing the radioactive waste will not leak and cause radiation exposure. But, according to the Safety Analysis Report submitted by ISP, the container systems are only licensed for 20 years. The anticipated relicensing period of 60 years is longer than that. The EIS does not address this issue.

5. An integral aspect of the ISP proposal is transporting the radioactive waste from reactors all over the country to the ISP facility in Texas. The EIS admits that the environment affected by transportation includes populations living along the transportation routes. But the EIS does not identify the routes the waste will take in being transported to the ISP facility. Without knowing the routes, the impact cannot be accurately determined.

Also, separating analysis of the transportation phase of the project from storage results in segmentation, which results in an unintegrated project which cannot be logically understood. Segmentation circumvents NEPA by

breaking up one project into smaller projects and not studying the overall impacts of the single overall project.

The EIS ignores a 2019 report by the DOE's Nuclear Waste Technical Review Board. That report said that the high burnup fuel now used in reactors and being loaded into larger containers for shipping would require a longer time to cool to meet transportation requirements. The report concludes that if the waste would be repackaged in smaller containers it could be shipped by 2070. But if it is not repackaged, it could not be shipped until 2100. Either of these dates would be beyond the 40-year licensing period for the ISP facility. The EIS ignores this fact.

6. NEPA requires that an EIS examine all reasonable alternatives. One reasonable alternative is Hardened Onsite Storage Systems (HOSS). HOSS has been well-described at least since 2003. But the EIS claims this alternative was rejected because it is a generalized concept and that the NRC has not reviewed detailed plans. On the contrary, HOSS has been described in detail and the NRC has had plenty of time to review it.

The EIS also claims that HOSS would not satisfy the purpose and need for the project. In other words, only a CIS will satisfy the purpose and need. But the purpose and need cannot be defined so narrowly that only one

alternative will satisfy it. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991).

There further is no FEIS discussion of several “mitigation” alternatives, including (1) the alternatives of an interim storage facility with a dry transfer storage (DTS) capability to unload and reload storage canisters or casks; (2) an interim storage facility with a modified emergency response plan to include preparations for emissions mitigation; (3) CISF design modifications to prevent “malevolent” acts; and (4) a CISF facility under Federal Government control.

7. The ISP project will have an impact on geology and groundwater that is not adequately examined or analyzed in the EIS. Geology and groundwater are interconnected. Dr. Patricia Bobeck, a geologist who formerly worked for the Texas Department of Environmental Quality, identified numerous errors and deficiencies in ISP’s environmental report (ER). This is significant because the EIS relies on the ER for the site-specific geology and groundwater information.

8. Earthquakes would have a devastating impact on the ISP facility. The discussion of earthquake potential in the EIS relies on records from 1975 to January 2015. This use of historic data misses the impact of earthquake activity more recently caused by fracking for oil and gas. A 2016

study by scientists at the University of Texas and Southern Methodist University documented the increase in earthquakes induced by fossil fuel extraction. Sierra Club provided to the NRC maps showing the intense drilling for oil and gas in the area. More recently, a 2018 Stanford University study documented the existence of numerous faults in the area in and around the ISP site. The EIS makes no mention of these studies.

In discussing the seismic impacts of the project, the EIS states that the operation of the ISP facility would not cause seismic impacts. That is not the point. The issue is the likelihood of earthquakes causing impacts to the ISP facility.

9. All federal agencies are required to incorporate environmental justice considerations into their actions. There two omission by the NRC tp address environmental justice concerns in this case. In the vicinity of the proposed facility, the EIS uses census block groups to determine the extent of minority and low-income populations in the relevant area. Out of 109 block groups, 72 have minority populations that meet environmental justice criteria and 6 block groups meet the criteria for low-income groups. But that is only one of six principles set out in CEQ guidance on environmental justice. There is no indication in the EIS that the NRC considered relevant public health and industry data; recognized the interrelated cultural, physical,

social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects on vulnerable populations; developed effective public participation strategies; assured meaningful community representation in the process; or sought tribal representation.

Environmental justice must be considered in the site selection process for a facility. There is no indication in the EIS that there was such a consideration in this case. The site selected was a site already owned by one of ISP's constituent companies, WCS. No other site was seriously considered. With respect to environmental justice concerns, Andrews County, Texas, is 52.1% minority population.

The second environmental justice omission involves the delivery of spent nuclear fuel and greater than Class C nuclear waste from nuclear reactors to the ISP facility. This complicated campaign will take 20 years and include at least 3,000 separate shipments transported over hundreds of thousands of miles from nuclear reactor sites in Texas. Nearly all of the shipments will be by rail, but some cargoes of waste will cross bodies of water, and some will take place via truck.

For transportation of radioactive material from a nuclear power plant site, the affected environment includes all rural, suburban, and urban populations living along the transportation routes within range of exposure to

radiation emitted from the packaged material during normal transportation activities or that could be exposed in the unlikely event of a severe accident involving a release of radioactive material. The affected environment also includes people in vehicles on the same transportation route, as well as people at truck stops and workers who are involved with the transportation activities. Major trunk rail lines classically pass through or near downtown and center city areas populated by poor, racial minorities and other marginalized people.

The NRC stated in the FEIS that since there is no storage facility approval, the exact locations of SNF shipment origins, and the transport routes have not been determined, so specific route details remain unknown. FEIS p. 3-9. Environmental Justice populations along the dozens of different, inevitable routes are not identified in the FEIS. The EIS fails to ascertain whether Environmental Justice populations may be disproportionately affected by shipments of SNF and GTCC waste. The EIS fails to disclose the most efficient and least harmful route alternatives; contains no plan to determine the status of rail infrastructure and need for upgrades on anticipated routes; and fails to assess in all but a vague and general way the risks to public health and property by those who will be asked to assume the potential burdens of leaking, damaged or sabotaged SNF cargoes.

The NRC's failure to disclose all likely rail line and other routes comprises unlawful segmentation under NEPA, where the project is broken up into smaller projects to circumvent the aims of NEPA to investigate and analyze the overall impacts of the single overall project. It violates the EJ Executive Order and the NRC's enunciated policies.

10. While the ultimate location of a permanent, deep geological repository has not been established, it is highly likely that the U.S. Department of Energy ("DOE") as its operator will require the use of a uniform transport, aging and disposal canister ("TAD") for SNF transport to, and disposal at, the repository. The DOE will require all SNF to be transported to the repository via TADs, which means that either at reactor sites, or at WCS, the SNF from existing and future transport containers must be repackaged.

WCS will have no dry storage system ("DTS") capability to perform the repackaging function for the first 100 years of its operations. Repackaging means that the canisters from which the SNF was removed become low-level radioactive waste. An unknown but large number of canisters used for transport of SNF to WCS will become low-level radioactive waste ("LLRW") and that volume is not discussed in the EIS. There are no DTS facilities anywhere in North America, it is unclear where

mandatory repackaging will take place. Depending on where it takes place, it could require as many as 8,000 transports of SNF to WCS, could affect operational schedules at the utility sites or at WCS. A total of 8,000 SNF transports, 5,000 more than WCS has estimated, may be required if the repackaging takes place at reactor sites. The addition of thousands more transports of SNF across hundreds of thousands of rail. Regardless of where the repackaging takes place, the expense and physical burdens of repackaging would dramatically change. Repackaging involves dangerous and untested technology and procedures to open SNF storage devices and removing the SNF into new canisters. The lack of notation and analysis of the coming standardization of canisters for repository disposal in the EIS represent major shortfalls in NEPA compliance.

Therefore, Petitioners respectfully request this Court to review the issuance of the FEIS in this case and declare that it violates NEPA, reverse the decision by the NRC to issue the ROD in this case, and grant such other and further relief as may be warranted, at law and in equity.

This Petition is timely because it is filed within the 60-day period established by the Hobbs Act, 28 U.S.C. § 2344, for bringing a petition for judicial review of an agency action. The ROD was issued on September 13, 2021.

Further, venue is appropriate within the D.C. Circuit pursuant to 28  
U.S.C. § 2343.

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## RECORD OF DECISION

**U.S. NUCLEAR REGULATORY COMMISSION  
RECORD OF DECISION  
INTERIM STORAGE PARTNERS LLC LICENSE APPLICATION FOR  
A CONSOLIDATED INTERIM STORAGE FACILITY, ANDREWS COUNTY, TEXAS**

Introduction

The U.S. Nuclear Regulatory Commission (NRC) staff prepared this record of decision (ROD) for the proposed Interim Storage Partners LLC (ISP) consolidated interim storage facility (CISF) in Andrews County, Texas. This ROD satisfies Section 51.102(a) of Title 10 of the *Code of Federal Regulations* (10 CFR), which states that “[a] Commission decision on any action for which a final environmental impact statement has been prepared shall be accompanied by or include a concise public record of decision.”

In July 2021, the NRC staff issued a final Environmental Impact Statement (FEIS) (NRC, 2021b) for ISP’s license application to construct and operate a proposed Waste Control Specialists (WCS) CISF (ISP, 2018a, 2018b, 2020a, 2020b, and 2021). In the FEIS, the NRC staff, in accordance with 10 CFR 51.91(d), sets forth its recommendation, pursuant to the National Environmental Policy Act of 1969, as amended (NEPA), regarding the proposed action. The NRC staff recommended that, subject to the determinations in the staff’s safety review of the application, the proposed license be issued to ISP to construct and operate a CISF at the proposed location to temporarily store up to 5,000 metric tons of uranium (MTUs) [5,500 short tons] of spent nuclear fuel (SNF) for a licensing period of 40 years (NRC, 2021b). The NRC staff has prepared this ROD in accordance with NRC regulations at 10 CFR Sections 51.102(b) and 51.103(a)(1)-(4). In addition, in accordance with 10 CFR Section 51.103(c), this ROD incorporates by reference the materials contained in the FEIS (NRC, 2021b).

The Decision

This ROD documents the NRC staff’s decision to issue a license to ISP for the proposed WCS CISF in Andrews County, Texas (NRC, 2021a). The license authorizes ISP to construct and operate its facility as proposed in its license application and under the conditions in its NRC license.

After weighing the impacts of the proposed action and comparing them to the No-Action alternative, the NRC staff, in accordance with 10 CFR 51.91(d), set forth its NEPA recommendation regarding the proposed action. The NRC staff recommended that, subject to the determinations in the staff’s safety review of the application, the proposed license be issued to ISP to construct and operate a CISF at the proposed location to temporarily store up to 5,000 MTUs [5,500 short tons] of SNF for a licensing period of 40 years. The staff based its conclusion on (i) review of the ISP license application, which includes the Environmental Report (ER) and supplemental documents (ISP, 2018a, 2018b, 2020a, 2020b, and 2021), and ISP’s responses to the NRC staff’s requests for additional information (RAIs) (ISP, 2019a and 2019b); (ii) consultation with Federal, State, tribal, and local agencies and input from other stakeholders, including public comment on the draft EIS; (iii) independent NRC staff review; and (iv) the assessments provided in the FEIS.

In its safety and security review, the NRC staff determined that the application met the applicable NRC regulations in 10 CFR Part 72, “Licensing Requirements for the Independent

Storage of Spent Nuclear Fuel, High-Level Radioactive Waste, and Reactor-Related Greater than Class C Waste.” In issuing a materials license to ISP for the WCS CISF, the NRC determined that there is reasonable assurance that: (i) the activities authorized by the license can be conducted without endangering the health and safety of the public; and (ii) these activities will be conducted in compliance with the applicable regulations of 10 CFR Part 72. The NRC further determined that issuance of the license will not be inimical to the common defense and security.

### Background

In accordance with the NRC’s NEPA-implementing regulations in 10 CFR Part 51, “Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions,” the NRC staff prepares a site-specific EIS for the issuance of a license pursuant to 10 CFR Part 72 for the storage of spent fuel in an independent spent fuel storage installation (ISFSI) at a site not occupied by a nuclear power reactor (10 CFR 51.20(b)(9)). In this instance, the NRC’s major Federal action is to decide whether to issue a license authorizing ISP to construct and operate the WCS CISF for a 40-year license term.

The WCS CISF would store up to 5,000 MTUs [5,500 short tons] of SNF and Greater-Than-Class-C (GTCC) waste, along with a small quantity of mixed oxide (MOX) fuel (collectively referred to as SNF in the FEIS and in this ROD), which would originate from commercial nuclear reactor facilities in the United States, for a 40-year period at the site in Andrews County, Texas. During operation, the WCS CISF would receive SNF from decommissioned and decommissioning reactor sites, as well as from operating reactors prior to decommissioning (NRC, 2021b).

The WCS CISF would be built and operated on an approximately 130-hectare (ha) [320-acre (ac)] project area within a 5,666-ha [14,000-ac] parcel of land that is controlled by ISP joint venture member WCS in Andrews County, Texas. In addition, construction of the rail sidetrack, site access road, and construction laydown area would contribute an additional area of disturbed soil such that the total disturbed area for construction of the WCS CISF would be approximately 133 ha [330 ac]. The project area would be located north of WCS’s existing waste management facilities and controlled by ISP through a long-term lease from WCS (NRC, 2021b).

ISP would store SNF in six existing dual-purpose canister-based dry cask storage systems (DCSS) designed by TN Americas or NAC International. The 6 DCSS (3 from TN Americas and 3 from NAC International) consist of 11 different SNF canisters and 5 different GTCC waste canisters stored in 5 overpacks. SNF is stored horizontally in the TN Americas systems and vertically in the NAC International systems. The TN Americas and NAC International DCSS listed in the FEIS have been previously approved by the NRC for independent storage of SNF, GTCC, and a small amount of MOX fuel, pursuant to requirements in 10 CFR Part 72. In addition, the NRC approved both the TN Americas and NAC International systems for storage of SNF transported in canisters pursuant to the requirements in 10 CFR Part 71, “Packaging and Transportation of Radioactive Material.”

### Public Comments

On November 14, 2016 (81 FR 79531), the NRC staff published in the *Federal Register* a notice of intent to prepare an EIS and to conduct an environmental scoping process. The NRC staff invited potentially affected Federal, State, tribal, and local governments; organizations; and

members of the public to provide comments in the environmental scoping process and review. The initial scoping period closed on April 28, 2017. During this time, the NRC staff hosted four public scoping meetings, one in Hobbs, New Mexico, on February 13, 2017; a second in Andrews, Texas, on February 15, 2017; and two in Rockville, Maryland, on February 23, 2017 and April 6, 2017. Following a suspension of NRC's review at the applicant's request, ISP submitted a revised license application in June and July 2018 (ISP, 2018a). On September 4, 2018 (83 FR 44922), the NRC staff reopened the scoping period for the ISP license application. The reopened scoping period closed on November 19, 2018. The NRC staff issued a scoping summary report in October 2019 (NRC, 2019).

On May 4, 2020, the NRC staff issued the draft "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" (NRC, 2020).

A 120-day comment period began on May 8, 2020, when the U.S. Environmental Protection Agency (EPA) published a Notice of Availability in the *Federal Register* (85 FR 27412) of the draft EIS to allow members of the public and agencies time to comment on the results of the draft EIS. On July 22, 2020, the NRC staff extended the comment period an additional 60 days to close on November 3, 2020 (85 FR 44330). Additionally, the NRC staff held public meetings on October 1, 6, 8, and 15, 2020, to discuss the preliminary findings in the draft EIS, with transcripts of these meetings available at the NRC public project webpage: <https://www.nrc.gov/waste/spent-fuel-storage/cis/waste-control-specialist.html>.

Responses to all public comments received during the draft EIS comment period are included in Appendix D to the FEIS.

### Alternatives Considered

In its environmental review, the NRC staff evaluated the environmental consequences of the proposed action (i.e., authorizing the construction and operation of the WCS CISF), and the environmental consequences of the No-Action alternative (i.e., not licensing the WCS CISF). FEIS Chapter 2, "Proposed Action and Alternatives," and Chapter 4, "Environmental Impacts," present the NRC staff's evaluation and analysis of the environmental impacts of the proposed action and the No-Action alternative that were considered, as well as those alternatives that were eliminated from detailed study (NRC, 2021b). The NRC staff discusses the reasons for eliminating these alternatives in Section 2.3 of the FEIS. These alternatives included (1) storage of SNF at a government-owned CISF operated by the U.S. Department of Energy (Section 2.3.1); (2) alternative design or storage technologies (Section 2.3.2); and (3) alternative CISF locations (Section 2.3.3).

After weighing the impacts of the Proposed Action, comparing them to the No-Action alternative, and conducting a safety and security review of the Proposed Action, the NRC staff determined that the NRC should issue a license for the proposed WCS CISF project. The NRC staff based its decision on: (i) review of ISP's license application (ISP, 2018a, 2018b, 2020a, 2020b, and 2021), which includes the ER and supplemental documents, and ISP's responses to the NRC staff RAs (ISP, 2019a and 2019b); (ii) consultation with Federal, State, tribal, and local agencies and input from other stakeholders, including public comment on the draft EIS (see Appendix D in the FEIS); (iii) independent NRC staff review; (iv) the assessments in the FEIS (NRC, 2021b); and (v) the NRC staff's assessments in the Final Safety Evaluation Report (NRC, 2021c) for the WCS CISF.

### Mitigation Measures

The NRC has taken all practicable measures within its jurisdiction to avoid or minimize environmental harm from the proposed action (license issuance). The applicant has committed to a number of mitigation measures as described in Table 6.3-1 of the FEIS (NRC, 2021b). As documented in the FEIS, the NRC determined that impacts to most resource areas would be SMALL (i.e., not detectable or minor), with SMALL to MODERATE beneficial impacts for local finance and MODERATE impacts (i.e., sufficient to alter noticeably, but not to destabilize, important attributes of the resource) for vegetation, population growth, and employment (NRC, 2021b). The NRC is not imposing any license conditions in connection with mitigation measures for the licensing of the WCS CISF. ISP is subject to requirements including permits, authorizations, and regulatory orders imposed by other Federal, State, and local agencies governing facility construction and operation. ISP's monitoring programs for the proposed project are described in Chapter 7 of the FEIS (NRC, 2021b).

### References

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10 CFR Part 71. Code of Federal Regulations, Title 10, *Energy*, Part 71, "Packaging and Transportation of Radioactive Material." Washington, DC: U.S. Government Publishing Office.

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NRC. "Materials License SNM-2515, Interim Storage Partners, WCS Consolidated Interim Storage Facility ISFSI." ADAMS Accession No. ML21188A099. September 13, 2021; Washington, DC: U.S. Nuclear Regulatory Commission. 2021a.

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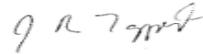
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Dated at Rockville, MD, this 13<sup>th</sup> day of September 2021,

APPROVED BY:



Signed by Tappert, John  
on 09/13/21

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