

No. 21-9593

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF NEW MEXICO, *ex rel.* HECTOR H. BALDERAS, Attorney General
and the NEW MEXICO ENVIRONMENT DEPARTMENT,
Petitioners,

v.

NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of Action by the
Nuclear Regulatory Commission

RESPONDENTS' MOTION TO DISMISS

TODD KIM
Assistant Attorney General
JUSTIN D. HEMINGER
Attorney
Environment and Natural Resources
Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
justin.heminger@usdoj.gov
(202) 514-5442

ANDREW P. AVERBACH
Solicitor
Office of the General Counsel
U.S. Nuclear Regulatory
Commission
11555 Rockville Pike
Rockville, MD 20852
andrew.averbach@nrc.gov
(301) 415-1956

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
GLOSSARY	vi
INTRODUCTION	1
BACKGROUND	2
I. Statutory and regulatory framework	2
A. The role of the NRC in licensing facilities	2
B. Avenues for participation in NRC’s licensing proceedings.....	4
II. Factual Background.....	6
A. Interim Storage Partners’ application for a license.....	6
B. New Mexico’s failure to participate in the adjudicatory proceedings.....	9
ARGUMENT	11
I. Dismissal of New Mexico’s Petition for Review is required because New Mexico was never a “party” before the NRC.	11
II. New Mexico’s comments on the Environmental Impact Statement did not make it a “party” to the agency proceeding.....	15
III. New Mexico’s challenge does not arise under the Nuclear Waste Policy Act, and its judicial review provisions are therefore inapplicable.	19
CONCLUSION	22
CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 27(D)	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Judicial Decisions

<i>ACA Int’l v. FCC</i> , 885 F.3d 687 (D.C. Cir. 2018).....	12, 15, 16, 17
<i>Boivin v. U.S. Airways, Inc.</i> , 446 F.3d 148 (D.C. Cir. 2006)	19
<i>Bullcreek v. NRC</i> , 359 F.3d 536 (D.C. Cir. 2004).....	4, 13, 20, 21
<i>In re Chicago, Milwaukee, St. Paul & Pac. R.R.</i> , 799 F.2d 317 (7th Cir. 1986)	12
<i>Fleming v. U.S. Dep’t of Agric.</i> , 987 F.3d 1093 (D.C. Cir. 2021).....	14, 15
<i>Franks v. Nimmo</i> , 683 F.2d 1290 (10th Cir. 1982)	19
<i>Gage v. AEC</i> , 479 F.2d 1214 (D.C. Cir. 1973).....	13, 15, 17
<i>Leedom v. Kyne</i> , 358 U.S. 184 (1958).....	21
<i>McGee v. United States</i> , 402 U.S. 479 (1971).....	19
<i>NRDC v. NRC</i> , 823 F.3d 641 (D.C. Cir. 2016).....	18
<i>Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n</i> , 461 U.S. 190, 207 (1983)	3
<i>Prof’l Reactor Operator Soc’y v. NRC</i> , 939 F.2d 1047 (D.C. Cir. 1991).....	13

Quivira Mining v. EPA,
728 F.2d 477 (10th Cir. 1984)12, 13, 14

Reyblatt v. NRC,
105 F.3d 715 (D.C. Cir. 1997).....17

Skull Valley Band of Goshute Indians v. Nielson,
376 F.3d 1223 (10th Cir. 2004)13, 20, 21

Simmons v. ICC,
716 F.2d 40 (D.C. Cir. 1983).....12

Texas v. United States,
749 F.2d 1144 (5th Cir. 1985)14

Union of Concerned Scientists v. NRC,
735 F.2d 1437 (D.C. Cir. 1984).....5

Vermont Dep’t of Pub. S. v. United States,
684 F.3d 149 (D.C. Cir. 2012).....14, 19

Wales Transp., Inc. v. ICC,
728 F.2d 774 (5th Cir. 1984)12

Water Transp. Ass’n v. ICC,
819 F.2d 1189 (D.C. Cir. 1987).....16, 17

Statutes

28 U.S.C. § 23421, 5, 11, 12

28 U.S.C. § 23435

28 U.S.C. § 23441, 12, 22

42 U.S.C. § 22391, 4, 5, 12, 21

42 U.S.C. § 22418

42 U.S.C. § 58412, 11

42 U.S.C. § 10134.....3, 4
42 U.S.C. § 101414
42 U.S.C. § 10139.....19, 21

Regulations

10 C.F.R. Part 2.....4
10 C.F.R. § 2.30216
10 C.F.R. § 2.3094, 5, 7, 17, 18
10 C.F.R. § 2.31118
10 C.F.R. § 2.315.....4, 9
10 C.F.R. Part 72.....3, 20

Federal Register

Interim Storage Partners, LLC; WCS Consolidated Interim Storage Facility;
Issuance of Materials License and Record of Decision,
86 Fed. Reg. 51,926 (Sept. 17, 2021).....6

Interim Storage Partners Waste Control Specialists Consolidated Interim Storage
Facility,
83 Fed. Reg. 44,070 (Aug. 29, 2018), *corrected*,
83 Fed. Reg. 44,680 (Aug. 31, 2018).....7, 18

Adjudicatory Decisions of Nuclear Regulatory Commission

Commission Decisions

Interim Storage Partners LLC,
CLI-20-13 (Dec. 4, 2020)8

Interim Storage Partners LLC,
CLI-20-14 (Dec. 17, 2020)8

Interim Storage Partners LLC,
CLI-20-15 (Dec. 17, 2020)8

Interim Storage Partners LLC,
CLI-21-09 (June 22, 2021)8

Licensing Board Decisions

Interim Storage Partners LLC,
LBP-19-07 (Aug. 23, 2019)8

Interim Storage Partners LLC,
LBP-19-09 (Nov. 18, 2019)8

Interim Storage Partners LLC,
LBP-19-11 (Dec. 13, 2019)8

Interim Storage Partners LLC,
LBP-21-02 (Jan. 29, 2021)8

GLOSSARY

AEA	Atomic Energy Act of 1954
ISP	Interim Storage Partners, L.L.C.
NEPA	National Environmental Policy Act
NMED	New Mexico Environment Department
NRC	Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act

The U.S. Nuclear Regulatory Commission (“NRC” or “Commission”¹) and the United States of America (together, “Respondents”) jointly move to dismiss the Petition for Review filed by Petitioners State of New Mexico and New Mexico Environment Department (“NMED”) (together, “New Mexico”). Counsel for Respondents have contacted all parties to this action concerning this motion. New Mexico opposes this motion and will file a response.

INTRODUCTION

Pursuant to the Atomic Energy Act of 1954 (“AEA”) and the Hobbs Act (formally titled the Administrative Orders Review Act), only a “party aggrieved” by a final order entered in a proceeding described in AEA § 189 may obtain judicial review of the issuance of an NRC license. *See* 42 U.S.C. § 2239(a)(1)(A), (b)(1); 28 U.S.C. §§ 2342(4), 2344. The courts of appeals have consistently held that the “party aggrieved” requirement means that to obtain judicial review under the Hobbs Act, a petitioner must have been a party to the underlying agency proceeding or at least have sought to become a party to the proceeding.

New Mexico’s Petition for Review challenges the NRC’s final order in a licensing proceeding conducted under the AEA, and that order is subject to the

¹ We use the term “NRC” to refer to the agency as a whole, and the term “Commission” to refer to the collegial body that oversees the agency.

AEA's and Hobbs Act's judicial review provisions. Yet New Mexico was never a "party," and it never sought to become a "party," to the NRC proceeding that led to the final order issuing the license. Instead of seeking an administrative hearing on the application for a license—which it was entitled to seek under the AEA and the NRC's implementing procedural regulations—New Mexico submitted comments on the draft and final versions of the Environmental Impact Statement for the facility. Under the NRC's comprehensive rules of adjudicatory procedure and applicable case law, these submissions did not make New Mexico a "party" to the licensing proceeding or constitute a request for a hearing. Thus, the Court should dismiss the Petition for Review, either for lack of jurisdiction or for failure to exhaust a mandatory statutory requirement.

BACKGROUND

I. Statutory and regulatory framework

A. The role of the NRC in licensing facilities

The NRC is an independent regulatory commission created by Congress. *See* Energy Reorganization Act of 1974, 42 U.S.C. § 5841. In accordance with the AEA, 42 U.S.C. §§ 2011-2297h-13, the agency licenses and regulates civilian use of radioactive materials.

Along with regulating the construction and operation of nuclear power plants, the NRC licenses and regulates the storage of high-level nuclear waste and,

in particular, spent nuclear fuel (i.e., fuel that is still radioactive but is no longer useful in the production of electricity) before its ultimate disposal. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983); *see also Bullcreek v. NRC*, 359 F.3d 536, 538-39 (D.C. Cir. 1984) (“[I]t has long been recognized that the AEA confers on the NRC authority to license and regulate the storage and disposal of such fuel.”). The NRC’s regulations provide for the issuance of licenses for facilities, located either at the sites of nuclear power plants or at separate locations, for the storage of spent fuel. 10 C.F.R. Part 72; *see generally* NUREG-2157, Final Report, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, at G-1 to G-2 (Sept. 2014) (explaining the regulatory framework governing the issuance of licenses to operate both on-site and off-site spent fuel storage facilities), *available at* <https://www.nrc.gov/docs/ML1419/ML14196A105.pdf>.

The Nuclear Waste Policy Act of 1982 (“NWPA”) establishes the federal government’s policy to permanently dispose of high-level radioactive waste in a deep geologic repository. *See* 42 U.S.C. §§ 10101-10270. Under the NWPA, Congress designated the Department of Energy (“DOE”) as the agency responsible for designing, constructing, operating, and decommissioning a repository, *id.* § 10134(b); the Environmental Protection Agency (“EPA”) as the agency responsible for developing radiation protection standards for the repository, *id.*

§ 10141(a); and the NRC as the agency responsible for developing regulations to implement EPA's standards and for licensing and overseeing construction, operation, and closure of the repository, *id.* §§ 10134(c)-(d), 10141(b).

Importantly, in passing the NWPA, "Congress did not intend to repeal or supersede the NRC's authority under the AEA to license and regulate private use of private away-from-reactor spent fuel storage facilities." *Bullcreek*, 359 F.3d at 542.

B. Avenues for participation in NRC's licensing proceedings

In the AEA, Congress provided interested persons with an opportunity to intervene in NRC licensing proceedings and to object to the issuance of a license. Specifically, AEA § 189 enables a person to request a hearing before the agency to contest the legal or factual basis for the agency's licensing decision. *See* 42 U.S.C. § 2239(a)(1).

Hearings are governed by the NRC's regulations. *See* 10 C.F.R. Part 2. To be "admitted" as a party to a licensing proceeding, an intervenor must, among other things, establish administrative standing and submit at least one "contention" setting forth an issue of law or fact to be controverted. *See* 10 C.F.R. § 2.309(d), (f)(1). Even if a state or local government does not separately seek admission as a party, it is afforded by regulation a reasonable opportunity to participate in a hearing initiated by another intervenor. *Id.* § 2.315(c).

A hearing is available with respect to issues that are material to the agency's licensing decision. *See Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 144 (D.C. Cir. 1984). This includes compliance not only with the AEA and the NRC's regulations, but also other statutes governing the agency's issuance of a license. Thus, intervenors may challenge the NRC's compliance with the National Environmental Policy Act ("NEPA") by filing contentions relating to the sufficiency of the analysis in the environmental report that a license applicant must prepare or the environmental impact statement (or in some cases, environmental assessment) that the agency prepares. *See* 10 C.F.R. § 2.309(f)(2). If an intervenor does not obtain the relief that it requests through the hearing process, the AEA provides that the party can seek judicial review of the agency's final order in the United States Court of Appeals for the circuit in which the petitioner is located or in the United States Court of Appeals for the District of Columbia Circuit. 42 U.S.C. § 2239(b) (specifying that the courts of appeals must review the agency's decision in accordance with the Administrative Procedure Act and the Hobbs Act); 28 U.S.C. 2342(4) (providing jurisdiction in the courts of appeals under the Hobbs Act); *see also id.* § 2343 (establishing venue for Hobbs Act cases).

II. Factual Background

A. Interim Storage Partners' application for a license

The agency action that is the subject of this Petition for Review is the NRC's issuance of a license on September 13, 2021, pursuant to the AEA. The license authorizes Interim Storage Partners, L.L.C. ("ISP") to operate a facility, known as a consolidated interim storage facility, to store spent nuclear fuel in Andrews County, Texas, close to the New Mexico border. *See* Interim Storage Partners, LLC; WCS Consolidated Interim Storage Facility; Issuance of Materials License and Record of Decision, 86 Fed. Reg. 51,926 (Sept. 17, 2021) (issuing Materials License No. SNM-2515). New Mexico's Petition for Review references not only the license, but also documents issued by the agency contemporaneously with the license, including the NRC Staff's Final Safety Evaluation Report, which documents the agency's conclusions related to the safety of the proposed facility; and the agency's Record of Decision, which documents the agency's environmental analysis under NEPA and its preparation of an Environmental Impact Statement for the facility.

The NRC's issuance of a license to ISP was the last step in a process that spanned several years and included numerous adjudicatory challenges by parties other than New Mexico. In July 2018, ISP filed a license application with the NRC. *See generally* Interim Storage Partners Waste Control Specialists

Consolidated Interim Storage Facility, 83 Fed. Reg. 44,070 (Aug. 29, 2018), *corrected*, 83 Fed. Reg. 44,680 (Aug. 31, 2018). The NRC provided public notice of the license application in the Federal Register and expressly noted that interested persons had the opportunity to request a hearing and petition for leave to intervene as a party to the proceedings in accordance with the AEA. *See id.* at 44,070. The notice invoked the intervention requirements found in 10 C.F.R. § 2.309(d) (“[T]he petition should specifically explain the reasons why intervention should be permitted with particular reference to . . . the nature of the petitioner's right under the Act to be made a party to the proceeding”) and 10 C.F.R. § 2.309(f) (“[T]he petition must also set forth the specific contentions which the petitioner seeks to have litigated in the proceeding.”). 83 Fed. Reg. at 44,071. The notice further explained that “[t]hose permitted to intervene become parties to the proceeding.” *Id.* Finally, the notice specifically invited governmental units to participate as parties to the proceeding: “A State, local governmental body, Federally-recognized Indian Tribe, or agency thereof, may submit a petition to the Commission to participate as a party under 10 [C.F.R. §] 2.309(h)(1).” *Id.*

Four different groups filed hearing requests seeking to intervene in the licensing proceedings. These requests, which raised arguments under the AEA, NEPA, and NWPA, were referred to the Commission’s Atomic Safety and

Licensing Board (“Licensing Board”).² This administrative process led to four decisions by the Licensing Board resolving contentions and motions to submit amended contentions, and seven separate appeals to the Commission.³ The Commission issued four orders resolving those appeals and denying the putative intervenors party status.⁴ The putative intervenors have filed in the D.C. Circuit a total of eight petitions for review of the Commission’s orders denying intervention, the issuance of the license, and the Record of Decision.⁵ The D.C. Circuit has

² The Licensing Board is a panel of administrative judges, appointed by the Commission, that is authorized by Section 191 of the AEA to conduct hearings. 42 U.S.C. § 2241.

³ *Interim Storage Partners LLC*, LBP-19-07 (Aug. 23, 2019); *Interim Storage Partners LLC*, LBP-19-09 (Nov. 18, 2019); *Interim Storage Partners LLC*, LBP-19-11 (Dec. 13, 2019); *Interim Storage Partners LLC*, LBP-21-02 (Jan. 29, 2021). Decisions of the NRC’s Licensing Board are available at <https://www.nrc.gov/reading-rm/doc-collections/aslbp/orders/>.

⁴ *Interim Storage Partners LLC*, CLI-20-13 (Dec. 4, 2020); *Interim Storage Partners LLC*, CLI-20-14 (Dec. 17, 2020); *Interim Storage Partners LLC*, CLI-20-15 (Dec. 17, 2020); *Interim Storage Partners LLC*, CLI-21-09 (June 22, 2021). Decisions of the Commission are available at <https://www.nrc.gov/reading-rm/doc-collections/commission/orders/>.

⁵ *Don’t Waste Michigan v. NRC*, D.C. Cir. No. 21-1048 (consolidated with *Sierra Club v. NRC*, D.C. Cir. No. 21-1055; *Beyond Nuclear v. NRC*, D.C. Cir. No. 21-1056; *Fasken Land and Minerals, Ltd. v. NRC*, D.C. Cir. No. 21-1179; *Sierra Club v. NRC*, D.C. Cir. No. 21-1227; *Sierra Club v. NRC*, D.C. Cir. No. 21-1229; *Beyond Nuclear v. NRC*, D.C. Cir. No. 21-1230; and *Don’t Waste Michigan v. NRC*, D.C. Cir. No. 21-1231).

consolidated seven of the petitions (and Respondents have moved to consolidate the eighth), and the court has issued a briefing schedule and format with briefing to take place during the first half of 2022.⁶

B. New Mexico’s failure to participate in the adjudicatory proceedings

Unlike the petitioners litigating issues concerning the ISP licensing proceedings in the D.C. Circuit, New Mexico did not attempt to obtain party status by requesting a hearing on any contention. Nor did it seek to as an interested governmental unit in the adjudicatory proceedings initiated by others. *See* 10 C.F.R. 2.315(c).

Outside the agency’s adjudicatory process, however, New Mexico did make its views known to the agency. Both the State, by letter from its Governor, and

⁶ In addition to the proceedings before the D.C. Circuit, the State of Texas and affiliated parties filed a petition for review challenging the license in the United States Court of Appeals for the Fifth Circuit. *Texas v. NRC*, 5th Cir. No. 21-60743. One of the groups of petitioners (led by Fasken Land and Minerals, Ltd.) that filed a petition for review in the D.C. Circuit of the Commission’s decisions denying them party status also filed a petition for review challenging the license in the Fifth Circuit, which consolidated the petition with the one filed by Texas. The NRC and the United States moved to dismiss Texas’s petition on the same grounds raised in this motion, but the court decided to “carry” the motion with the case. Federal Respondents have also moved to dismiss (or, in the alternative to transfer to the D.C. Circuit) Fasken’s petition; that motion is still pending. Briefing on the merits of those petitions is likewise expected to be completed during the first half of 2022.

NMED, by letter from its Cabinet Secretary, submitted comments on the draft Environmental Impact Statement (“EIS”) that the NRC prepared. Exhibits. 1, 2.⁷

The State asserted that the draft EIS was “significantly flawed and d[id] not adequately address significant threats to the health and safety of New Mexicans, impacts to [its] economy, and protection of [its] environment.” Exhibit 1 at 1.

NMED likewise asserted that the draft EIS was inadequate and contained numerous deficiencies. See Exhibit 2. The NRC responded to comments about the draft EIS in the final EIS.⁸

In addition to providing comments on the EIS, New Mexico also filed, on March 29, 2021, a complaint in district court in New Mexico against the NRC, which it subsequently amended, seeking a declaration that the NRC lacks authority to issue a license for the ISP facility. *Balderas v. NRC*, (D.N.M. No. 1:21-cv-

⁷ The NRC did not solicit comments on the Final EIS. However, both the State (through the Attorney General) and NMED submitted comments on the final EIS. Exhibits 3, 4. These comments were submitted on September 13, 2021 (the day the license was issued), and September 14, 2021, respectively.

⁸ The final EIS is available at <https://www.nrc.gov/docs/ML2120/ML21209A955.pdf>. The responses to comments are forth in Appendix D. Governor Lujan is designated as commenter 81. NMED Secretary Kenney is designated as commenter 155. NMED is also designated as commenter 60-22 with respect to comments it presented at a public meeting.

00284-JB-JFR). The NRC has moved to dismiss the amended complaint, asserting that under the judicial review provisions in the AEA and Hobbs Act, review of NRC licensing decisions must be brought in the courts of appeals and, in any event, that a prerequisite to judicial review is participation in the agency's adjudicatory proceedings. That motion has been fully briefed and is currently pending.

ARGUMENT

I. Dismissal of New Mexico's Petition for Review is required because New Mexico was never a "party" before the NRC.

In its Petition for Review, New Mexico invokes the Court's jurisdiction under the Hobbs Act, 28 U.S.C. § 2342(4). Petition for Review at 3. But its failure to seek a hearing before the NRC necessitates dismissal.

The Hobbs Act vests exclusive jurisdiction in the federal courts of appeals to review and determine the validity of certain agency actions. 28 U.S.C. § 2342.

With respect to the NRC,⁹ this includes all "final orders" that are made reviewable by Section 189 of the AEA, including final orders for the "granting, suspending,

⁹ The Hobbs Act still refers to final orders of the "Atomic Energy Commission," the NRC's predecessor. The Energy Reorganization Act of 1974 abolished the Atomic Energy Commission and transferred all licensing and related regulatory functions to the newly created NRC. 42 U.S.C. § 5841(a), (f).

revoking or amending of any license.” *Id.* § 2342(4); 42 U.S.C. § 2239(a)(1)(A), (b)(1). The Hobbs Act provides that any “party aggrieved” by such an order—and only such a party—may file a petition for review in the federal courts of appeals within 60 days of entry of the final order. *See* 28 U.S.C. § 2344; *see also Quivira Mining v. EPA*, 728 F.2d 477, 481 (10th Cir. 1984) (recognizing that channeling judicial review directly to the court of appeals, in accordance with the “coherent plan for the development and regulation of nuclear energy” that Congress implemented in the AEA, enables “prompt implementation of national nuclear policy”).

The courts of appeals have “consistently held” that the “party aggrieved” language in the Hobbs Act, 28 U.S.C. § 2344, “requires that petitioners have been parties to the underlying agency proceedings.” *ACA Int’l v. FCC*, 885 F.3d 687, 711 (D.C. Cir. 2018) (citing *Simmons v. Interstate Commerce Comm’n*, 716 F.2d 40 (D.C. Cir. 1983)); *Wales Transp., Inc. v. ICC*, 728 F.2d 774, 776 n.1 (5th Cir. 1984). The Hobbs Act “limits review to petitions filed by parties, and that is that.” *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d 317, 334-35 (7th Cir. 1986).

In the context of the AEA, “participating in the appropriate and available administrative procedure” is the “statutorily prescribed prerequisite” to invocation of the Court’s jurisdiction, and petitioners that were never “parties” (or that never

sought to become “parties”) to the underlying AEA proceeding cannot obtain judicial review under the Hobbs Act. *Gage v. AEC*, 479 F.2d 1214, 1217-18 (D.C. Cir. 1973); *see also Bullcreek v. NRC*, 359 F.3d 536, 540 (D.C. Cir. 2004) (“The Hobbs Act requires that a party participate in the underlying agency proceeding”); *Prof’l Reactor Operator Soc. v. NRC*, 939 F.2d 1047, 1049 n.1 (D.C. Cir. 1991) (petitioners who did not participate in NRC rulemaking proceeding were not “parties aggrieved”). *Cf. Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1228 (10th Cir. 2004) (observing that “Utah officials intervened in the NRC proceedings, arguing that the NRC lacked authority to license the proposed facility” and that after the NRC rejected that argument, the officials “appealed that ruling, and the D.C. Circuit has recently affirmed the NRC’s decision”). The judicial “review mechanism chosen by Congress enables prompt implementation of national nuclear policy by avoiding the delays of multiple litigation and the risk of inconsistent district court decisions.” *Quivira Mining*, 728 F.2d at 482 (citation omitted).

New Mexico was never a “party” to the licensing proceeding and never sought to become a “party” under the NRC’s rules of adjudicatory procedure, and thus it is jurisdictionally barred from challenging the NRC’s final order challenging the license. Indeed, ruling otherwise would upend the “coherent plan” that Congress designed in the AEA—including through its creation of a hearing

opportunity to challenge NRC licensing decisions—for the “prompt implementation of national nuclear policy.” *Quivira Mining*, 728 F.2d at 482. Allowing New Mexico to seek review of the NRC’s final order outside the requirements set by the Hobbs Act and AEA would also disrupt and circumvent an “integral part of this plan”—the “speedy and final review of agency actions and regulations pursuant to the [AEA].” *Id.*

And even if this Court were to determine that dismissal of the Petition for Review is not required as a matter of its jurisdiction,¹⁰ the same result is nonetheless required as a matter of “non-jurisdictional, mandatory exhaustion.” The recent decision in *Fleming v. U.S. Department of Agriculture*, 987 F.3d 1093 (D.C. Cir. 2021), explained the difference between “jurisdictional exhaustion,” which a court must enforce regardless of whether it is raised by a party, and “non-

¹⁰ In *Vermont Department of Public Service v. United States*, 684 F.3d 149, 156 (D.C. Cir. 2012), the D.C. Circuit stated that the language of the Hobbs Act does not impose a jurisdictional exhaustion requirement, albeit in a different context—issue exhaustion. The court held that, although the Hobbs Act did not state in “clear, unequivocal terms” that consideration of the new claim was statutorily barred, the discretionary doctrine of “non-jurisdictional exhaustion” nonetheless warranted denial of the petition for review. *Id.* at 157-60. *Cf. Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985) (observing that the Hobbs Act “provides that a party aggrieved . . . must file a petition for judicial review within sixty days” and observing that this “limitation is jurisdictional and cannot be judicially altered or expanded”).

jurisdictional, mandatory exhaustion,” which constitutes an affirmative defense that, once raised by the government, must be enforced. *Id.* at 1098-99 (citing *Ross v. Blake*, 136 S. Ct. 1859, 1857 (2016); *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng’rs*, 558 U.S. 67, 82 (2009); and *Jones v. Bock*, 549 U.S. 199, 212 (2007)).

Even if the requirement is not jurisdictional, participation as a “party” in the underlying agency proceedings is a statutory prerequisite to judicial review under the Hobbs Act; *ACA Int’l*, 885 F.3d at 711; *Gage*, 479 F.2d at 1217, so the Court must dismiss this Petition for Review to the extent it arises under the Hobbs Act, given that Federal Respondents have raised this mandatory requirement at the earliest possible stage. *Fleming*, 987 F.3d at 1099.

II. New Mexico’s comments on the Environmental Impact Statement did not make it a “party” to the agency proceeding.

Nor can it reasonably be asserted that New Mexico’s comments on the draft EIS conferred upon it “party” status or constituted a request for “party” status.

With respect to the issuance of licenses, the NRC’s regulations are clear—anyone “whose interest may be affected by a proceeding *and who desires to participate as a party* must file a written request for hearing” that satisfies the NRC’s admissibility requirements. 10 C.F.R. § 2.309(a) (emphasis added). There is no dispute that neither New Mexico nor NMED filed such a request.

To be sure, the New Mexico Petitioners did correspond with the Commission by providing comments on the draft and final EIS. But the NRC did not treat these forms of correspondence as a request for an AEA Section 189 hearing, and for good reason. The comments made no mention of such a hearing request, made no reference to the admissibility requirements in 10 C.F.R. § 2.309, and was not submitted through the NRC’s E-Filing system for adjudicatory hearings (*see* 10 C.F.R. § 2.302). The NRC treated the communications for what they were: comments its on environmental analysis, not hearing requests filed under the NRC’s rules of procedure. And New Mexico never suggested otherwise before the agency.

In other contexts, merely “submitting comments” or otherwise making a “full presentation of views to the agency” may be enough to confer “party aggrieved” status on litigants seeking review of agency action under the Hobbs Act. *See, e.g., ACA Int’l*, 885 F.3d at 711 (commenting in support of a petition filed by another party is sufficient to obtain “party aggrieved” status). But “[t]he degree of participation necessary to achieve party status varies according to the formality with which the proceeding was conducted.” *Water Transport Ass’n v. ICC*, 819 F.2d 1189, 1192 (D.C. Cir. 1987). As a result, a less formal administrative process—where merely providing comments or correspondence to the agency is sufficient to confer party status for purposes of judicial review—is

reserved for “agency proceedings that do *not* require intervention as a prerequisite to participation.” *ACA Int’l*, 885 F.3d at 711 (emphasis added).¹¹ And in AEA Section 189 proceedings for the issuance of a license (where, as here, an opportunity for a hearing in accordance with the procedures set forth in 10 C.F.R. Part 2 is available), “participating in the appropriate and available administrative procedure”—that is, submitting a request for a hearing—is a “statutorily prescribed prerequisite.” *Gage*, 479 F.2d at 1217; *see also Water Transp. Ass’n v. ICC*, 819 F.2d 1189, 1192 (D.C. Cir. 1987) (judicial review of the outcome of agency proceeding will be denied to those who did not seek to intervene when intervention “is prerequisite to participation”). Because the ISP licensing proceeding is an AEA § 189 proceeding, New Mexico’s correspondence outside the adjudicatory process was insufficient to give it status as a party aggrieved.

¹¹ Thus, submission of comments is sufficient to confer “party aggrieved” status in an NRC *rulemaking* proceeding that is reviewable under the Hobbs Act. *Reytblatt v. NRC*, 105 F.3d 715, 720 (D.C. Cir. 1997). Submission of comments, rather than formal intervention, is the means by which members of the public participate in informal rulemaking. This is distinguishable from a licensing proceeding in which an adjudicatory hearing is available and NRC regulations specify the mechanism through which outsiders can obtain “party” status. *See* 10 C.F.R. § 2.309(a) (“Any person whose interest may be affected by a proceeding *and who desires to participate as a party* must file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing.” (emphasis added)).

Nor can New Mexico reasonably claim ignorance of the intervention requirement. The NRC informed the public at large in no uncertain terms that the way to intervene in the ISP licensing proceeding—and to become a “party” capable of seeking judicial review of the agency’s licensing decision—was to submit a request for a hearing. *See, e.g.*, 83 Fed. Reg. at 44,071 (explaining that intervenors seeking to participate should submit a hearing request containing admissible contentions and that “[t]hose permitted to intervene become parties to the proceeding.”). If New Mexico was concerned with the consistency of the license application with the AEA or other applicable law or with the scope of the NRC’s environmental review under NEPA, it could have sought a hearing on those bases. *See* 10 C.F.R. § 2.309(f)(2). And had New Mexico sought a hearing, as did the four other groups of petitioners who are litigating ISP-related issues before the D.C. Circuit, then it could have sought judicial review of the “final order” concluding that proceeding in this Court or in the D.C. Circuit.¹²

¹² Even if New Mexico were denied a hearing request (e.g., failure to propose an admissible contention), such a denial would have been appealable to the Commission (10 C.F.R. § 2.311(c)), and that outcome would be judicially reviewable under the Hobbs Act. *See, e.g., NRDC v. NRC*, 823 F.3d 641 (D.C. Cir. 2016) (reviewing the NRC’s denial of a hearing request).

But New Mexico did not follow the path that Congress forged and that the D.C. Circuit petitioners travelled. Instead, it has brought a judicial challenge to the NRC's issuance of the ISP license without establishing the prerequisite agency adjudicatory record through the Atomic Safety and Licensing Board or the Commission. This is not what Congress envisioned when it channeled judicial review of NRC licensing decisions through the adjudicatory opportunity it provided via Section 189 of the AEA. This Court should not countenance an attempt to "sidestep the administrative process," *McGee v. United States*, 402 U.S. 479, 483 (1971); *Franks v. Nimmo*, 683 F.2d 1290 (10th Cir. 1982), or encourage the "flouting" or "disregard" of agency procedures by litigants who voluntarily bypass or choose not to exhaust mandatory administrative remedies, *see Boivin v. U.S. Airways, Inc.*, 446 F.3d 148, 155 (D.C. Cir. 2006); *Vermont Dep't of Pub. Serv.*, 684 F.3d at 157-58. New Mexico's failure to seek a hearing under the NRC's rules of procedure in 10 C.F.R. Part 2 necessitates dismissal of the Petition for Review.

III. New Mexico's challenge does not arise under the Nuclear Waste Policy Act, and its judicial review provisions are therefore inapplicable.

In addition to raising a claim under the Hobbs Act, New Mexico purports to invoke this Court's jurisdiction under the NWPA. Petition for Review at 3 (referencing 42 U.S.C. § 10139). It is mistaken.

The NRC issued the license at issue in this case pursuant to its authority under the Atomic Energy Act and, specifically, its authority to issue licenses for the possession of spent nuclear fuel pursuant to 10 C.F.R. Part 72. *See* Exhibit 5 (“Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974 (Public Law 93-438), and Title 10, Code of Federal Regulations, Chapter 1, Part 72, and in reliance on statements and representations heretofore made by the licensee, a license is hereby issued . . .”). And it is well-settled that the Commission has authority under the AEA (not the NWPA) to license and regulate the storage and disposal of such fuel. *Bullcreek*, 359 F.3d at 538-39 (D.C. Cir. 1984); *see also id.* at 542 (in enacting NWPA, “Congress did not intend to repeal or supersede the NRC's authority under the AEA to license and regulate private use of private away-from-reactor spent fuel storage facilities.”); *Skull Valley Band of Goshute Indians*, 376 F.3d at 1232 (observing that the D.C. Circuit in *Bullcreek* held that the AEA “authorizes the NRC to license privately-owned, away-from-reactor storage facilities” and, because this Court was “persuaded by the D.C. Circuit’s opinion,” declining to “revisit the issues”).¹³

¹³ This authority to issue licenses for the storage of spent fuel invalidates any argument that New Mexico may raise suggesting that the NRC is acting *ultra vires*, or that, as a result of the agency’s allegedly *ultra vires* actions, New Mexico is not

Although the NWPA has a judicial review provision, 42 U.S.C. § 10139, that provision plainly relates to judicial review of agency action taken pursuant to the NWPA and, specifically, agency action related to the issuance of a license *to the Department of Energy* to construct and operate a spent fuel storage or disposal facility. *Cf. Skull Valley Band of Goshute Indians*, 376 F.3d at 1232 (agreeing with the D.C. Circuit’s distinction in *Bullcreek* between the AEA, which authorized the NRC to license “*privately-owned, away-from-reactor storage facilities*” and the NWPA (emphasis added)).¹⁴ The license at issue in this case was issued to a private party, not to DOE, pursuant to the Atomic Energy Act, and it is the judicial review provisions of that statute (i.e., AEA § 189(b), 42 U.S.C. § 2239(b), invoking review under the Hobbs Act) that govern the questions that New Mexico has raised.

required to exhaust its administrative remedies. *See Leedom v. Kyne*, 358 U.S. 184 (1958). In any event, we note that, unlike its action filed in district court, New Mexico’s Petition for Review does not raise the assertion that the NRC’s issuance of a license to ISP was *ultra vires*. Instead, it asserts solely that the license was issued in violation of NEPA.

¹⁴ Section 10139 refers to judicial review of actions of the President, DOE, or NRC taken under “this part,” which is a reference to actions undertaken pursuant to U.S. Code Title 42, Chapter 108, Subchapter 1, Part A, 42 U.S.C. §§ 10131-10145. The licensing action that New Mexico challenges in its Petition for Review was not undertaken pursuant to any of these provisions, or any provision of the NWPA.

CONCLUSION

New Mexico is not a “party aggrieved” within the meaning of 28 U.S.C. § 2344 because it failed to seek a hearing before the NRC prior to filing the Petition for Review in this Court, and there is no basis for the Court to review the license under the judicial review provisions of the Nuclear Waste Policy Act. Accordingly, Respondents respectfully request that this Court dismiss the Petition for Review, either for lack of jurisdiction or for failure to exhaust a mandatory statutory requirement.

Respectfully submitted,

/s/ Justin D. Heminger
TODD KIM
Assistant Attorney General
JUSTIN D. HEMINGER
Attorney
Environment and Natural Resources
Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
justin.heminger@usdoj.gov
(202) 514-5442

/s/ Andrew P. Averbach
ANDREW P. AVERBACH
Solicitor
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852
andrew.averbach@nrc.gov
(301) 415-1956

December 8, 2021

**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 27(D)**

I certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this filing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5,149 words, excluding the parts of the of the filing exempted under Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/ Andrew P. Averbach

Andrew P. Averbach

Counsel for Respondent

U.S. Nuclear Regulatory Commission

CERTIFICATE OF SERVICE

I certify that on December 8, 2021, I served a copy of RESPONDENTS' MOTION TO DISMISS upon counsel for the parties in this action by filing the document electronically through the CM/ECF system. This method of service is calculated to serve counsel at the following e-mail addresses:

Bruce C. Baizel

bruce.baizel@state.nm.us

William Gregory Grantham

wgrantham@nmag.gov, swright@nmag.gov

Justin Heminger

justin.heminger@usdoj.gov; efile_app.enrd@usdoj.gov

P. Cholla Khoury

ckhoury@nmag.gov

Zachary E. Ogaz

zogaz@nmag.gov

/s/ Andrew P. Averbach

Andrew P. Averbach

Counsel for Respondent

U.S. Nuclear Regulatory Commission

EXHIBIT 1

From: Kerster, Courtney, GOV <Courtney.Kerster@state.nm.us>
Sent: Wednesday, November 4, 2020 10:10 AM
To: WCS_CISFEIS Resource
Subject: [External_Sender] RE: Comments from Gov Lujan Grisham
Attachments: CISF ISP Letter MLG.pdf

Apologies, here is the correct format.

From: Kerster, Courtney, GOV
Sent: Wednesday, November 4, 2020 10:09 AM
To: WCS_CISF_EIS@nrc.gov
Subject: Comments from Gov Lujan Grisham

Please see the attached letter from Governor Michelle Lujan Grisham.

Thank you,
Courtney

Courtney Kerster
Director of Federal Affairs
Office of Governor Michelle Lujan Grisham
444 North Capitol St NW, Suite 411
Washington DC 20001
Office: 202-624-3667
Cell: 505-690-7964
courtney.kerster@state.nm.us

Federal Register Notice: 85FR27447
Comment Number: 10392

Mail Envelope Properties (e199eeef6dca4142be9f1a436f2ab71e)

Subject: [External_Sender] RE: Comments from Gov Lujan Grisham
Sent Date: 11/4/2020 10:10:09 AM
Received Date: 11/4/2020 10:10:19 AM
From: Kerster, Courtney, GOV

Created By: Courtney.Kerster@state.nm.us

Recipients:

Post Office: MBXCAS002.nmes.lcl

Files	Size	Date & Time
MESSAGE	558	11/4/2020 10:10:19 AM
CISF ISP Letter MLG.pdf	65065	

Options
Priority: Standard
Return Notification: No
Reply Requested: No
Sensitivity: Normal
Expiration Date:
Recipients Received:



State of New Mexico

Michelle Lujan Grisham
Governor

November 3, 2020

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

Submitted by email to: WCS_CISF_EIS@nrc.gov

Dear Sir or Madam,

As the Governor of the State of New Mexico, I write to express my opposition to the proposed action to issue a license in response to the Interim Storage Partners (ISP) LLC's License Application for a Consolidated Interim Storage Facility (CISF) for Spent Nuclear Fuel (SNF) in Andrews County, Texas. The May 2020 draft Environmental Impact Statement (EIS) is significantly flawed and does not adequately address significant threats to the health and safety of New Mexicans, impacts to our economy, and protection of our environment.

The U.S. Nuclear Regulatory Commission (NRC) proposed approval of the ISP license application to construct and operate a CISF for SNF and Greater-Than-Class C waste and spent mixed oxide fuel at the existing Waste Control Specialists (WCS) site in Andrews County, Texas. If licensed, the facility could store up to 5,000 metric tons of uranium (MTUs) for a license period of 40 years. ISP has indicated that they will seek amendments and extensions of the license to store an additional 5,000 MTUs for each of seven expansion phases over 20 years, resulting in an expanded facility with total storage of up to 40,000 MTUs of spent nuclear fuel.

New Mexicans have a vested interest in this proposed action due to the proximity of the site to the Texas-New Mexico border; the facility is located just .37 miles east of the border and five miles east of Eunice, New Mexico. Additionally, the New Mexico side of the border is more densely populated, meaning that the proposed action would disproportionately impact New Mexicans in the immediate area.

The draft EIS does not adequately address the many safety concerns that siting a CISF in Andrews County, Texas raises. With no active planning for a permanent repository for SNF underway, there is significant risk that this and other facilities proposed as interim storage

facilities become de facto permanent repositories. Over time, it is likely that the casks storing spent nuclear fuel and high-level waste will lose integrity and will require repackaging. Any repackaging of spent nuclear fuel and high-level waste increases the risk of accidents and radiological health risks. The consequences of a release of radiation due to accidental events (such as fire, flood, earthquakes, ruptures of fuel rods, explosion, lightning, extreme temperatures and more), potential acts of terrorism or sabotage, and the risks associated with aging spent nuclear fuel canisters all pose unacceptable health, safety, and environmental risks that the draft EIS fails to address.

Further, the ISP project would place unfunded safety mandates on local communities. Transporting spent nuclear fuel across the nation is complex and extremely dangerous. Safe 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. New Mexico residents cannot afford and should not be expected to bear the costs associated with transporting material to the proposed CISF or responding to an accident on transport routes or near the facility.

The proposed CISF also poses unacceptable economic risk to New Mexicans, who look to southeastern New Mexico as a driver of economic growth in our state. 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 Counties, adjacent to the West Texas site. Further, the 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 approximately \$2 billion 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 be catastrophic to New Mexico, and even taking steps toward siting a CISF in the area could cause a decrease in investment in two of our state's biggest industries.

Recognizing the risks outlined above, 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 CISF in this region poses to Texas residents.

The ISP proposal poses unacceptable risk to New Mexico's citizens, communities, and economy, and I urge you to deny the ISP license application.

Sincerely,



Michelle Lujan Grisham
Governor

EXHIBIT 2

From: McDill, Teresa, NMENV <Teresa.McDill@state.nm.us>
Sent: Tuesday, November 3, 2020 4:10 PM
To: WCS_CISFEIS Resource
Subject: [External_Sender] Comments on Docket ID NRC-2016-0231
Attachments: 2020-11-03 - OOTS NEPA Review Interim Storage Partners (Final).pdf

Good Afternoon,

Please see New Mexico Environment Department's attached comments on draft Environmental Impact Statement for Interim Storage Partners' application for a license to construct and operate a consolidated spent nuclear fuel storage facility in Andrews County, Texas.

Thank you,
Terry

Teresa L. McDill, Manager
Office of Strategic Initiatives
New Mexico Environment Department
1190 S St Francis Drive, Suite N-4050
Santa Fe, NM 87505
Phone: 505-827-2892, Cell: 505-469-0732
Teresa.McDill@state.nm.us
www.env.nm.gov
Twitter @NMEnvDep #IamNMED

Science | Innovation | Collaboration | Compliance

Federal Register Notice: 85FR27447
Comment Number: 10322

Mail Envelope Properties (5b873c80a9dc4cb19d9b3d6a7321f8a2)

Subject: [External_Sender] Comments on Docket ID NRC-2016-0231
Sent Date: 11/3/2020 4:10:18 PM
Received Date: 11/3/2020 4:10:44 PM
From: McDill, Teresa, NMENV

Created By: Teresa.McDill@state.nm.us

Recipients:

Post Office: MBXCAS003.nmes.lcl

Files	Size	Date & Time	
MESSAGE	706	11/3/2020 4:10:44 PM	
2020-11-03 - OOTS NEPA Review Interim Storage Partners (Final).pdf			406720

Options
Priority: Standard
Return Notification: No
Reply Requested: No
Sensitivity: Normal
Expiration Date:
Recipients Received:



Michelle Lujan Grisham
Governor

Howie C. Morales
Lt. Governor

**NEW MEXICO
ENVIRONMENT DEPARTMENT**

Harold Runnels Building
1190 Saint Francis Drive, PO Box 5469
Santa Fe, NM 87502-5469
Telephone (505) 827-2855
www.env.nm.gov



James C. Kenney
Cabinet Secretary

Jennifer J. Pruett
Deputy Secretary

November 3, 2020

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

Submitted by email to: [WCS CISF EIS@nrc.gov](mailto:WCS_CISF_EIS@nrc.gov)


Dear Sir or Madam,

On behalf of the New Mexico Environment Department (NMED), attached please find comments on the May 2020 draft Environmental Impact Statement (EIS) for the Interim Storage Partners LLC's (ISP's) License Application for a Consolidated Interim Storage Facility for Spent Nuclear Fuel in Andrews County, Texas.

As discussed in our attached technical comments, the ISP site is on the New Mexico-Texas border, and NMED is very concerned that contaminants released to air and water at the site will migrate into New Mexico and create threats to human health and the environment.

Please do not hesitate to contact me to discuss further.

Sincerely,

 Digitally signed by James Kenney
Date: 2020.11.03 10:59:08 -07'00'

James C. Kenney
Cabinet Secretary
Environment Department

Attachment (1)

cc: Courtney Kerster, Director of Federal Affairs, Office of Governor Michelle Lujan Grisham
Sara Cottrell Propst, Cabinet Secretary, Energy Minerals and Natural Resources Department
Sandra Ely, Director, NMED Environmental Protection Division
Rebecca Roose, Director, NMED Water Protection Division
Stephane Stringer, Director, NMED Resource Protection Division

Comments

Introduction

The U.S. Nuclear Regulatory Commission (NRC) proposes approval of the Interim Storage Partners, LLC (ISP) license application to construct and operate a consolidated interim storage facility (CISF) for spent nuclear fuel (SNF) and Greater-Than-Class C waste and spent mixed oxide fuel at the existing Waste Control Specialists (WCS) site in Andrews County, Texas, very close to the New Mexico state line. The NRC proffers a draft environmental impact statement (EIS)¹ to support the proposed action, which would authorize storage of up to 5,000 metric tons of uranium (MTUs) for a license period of 40 years. The ISP admits it will seek amendments and extensions of the license to store an additional 5,000 MTUs for each of seven expansion phases over 20 years, resulting in an expanded facility with total storage of up to 40,000 MTUs of SNF. New Mexico opposes the proposed action as the EIS is significantly flawed, and the proposed action presents threats to the health and environment of New Mexico and its citizens.

The New Mexico Environment Department (NMED) has considerable experience and interaction with the WCS facility, due to its location along the Texas-New Mexico border, and is familiar with the operations and environmental issues of this site. Furthermore, prevailing wind direction is generally from the proposed site towards New Mexico, groundwater flow beneath the existing waste cells at the site is predominantly to the southwest towards New Mexico, and surface water flow from the site is directed through outfalls that flow directly into New Mexico.

Contaminants released to air and water at the ISP site, therefore, have the potential to migrate into New Mexico and create threats to human health and the environment. As a result of the potential for existing operations at the WCS site to affect groundwater quality in New Mexico, NMED required WCS to obtain a Groundwater Discharge Permit (DP-1817) for WCS's waste disposal operations in Texas. WCS submits groundwater monitoring reports to NMED as required by DP-1817 and is currently in compliance with DP-1817.

Overall, the technical analysis in the draft EIS is inadequate and does not support the proposed alternative. The EIS fails to properly characterize the site, which is geologically unsuitable. Similarly, the numerous technical site deficiencies preclude thorough evaluation of the site or the proposed project. Furthermore, the draft EIS lacks all applicable state regulatory oversight and environmental impact controls. Additionally, the draft EIS omits a full assessment of environmental justice concerns or analysis of the effects of the proposed project. These deficiencies all contribute to a draft EIS that fails to meet the requirements of Section 102(2)(c) of the National Environmental Policy Act (NEPA). New Mexico disagrees strongly with the recommended action of approving the Interim Storage Partners LLC's License and recommends the No Action Alternative.

1. Moving SNF multiple times creates unnecessary risks to public health, safety, and the environment.

The NRC stated in its Waste Confidence Decision² that SNF can be stored safely beyond the operating life of a power reactor, at current locations, until a national repository for SNF is established. Moreover, states and regional groups have consistently supported moving fuel only once – from current locations to a national repository. As this project proposes a temporary solution

1 EIS download: <https://www.nrc.gov/docs/ML2012/ML20122A220.pdf>.

2 SECY-14-0072: Final Rule: Continued Storage of Spent Nuclear Fuel (RIN 3150-AJ20)
<https://www.nrc.gov/docs/ML1417/ML14177A474.pdf>.

to a permanent problem, the SNF of concern may need to be moved multiple times until a permanent solution is established. Ultimately, moving SNF multiple times increases the likelihood of accidents within the State of New Mexico and elsewhere.

2. The proposed ISP CISF site is geologically unsuitable.

Given that a permanent repository for high-level radioactive waste does not exist in the United States and there is no existing plan to build one, any "interim" storage facility will be an indefinite storage facility, including ISP's CISF. The license life for the application ISP submitted to the NRC is for forty (40) years, and the license life can be extended at every license renewal date. The design life for the storage facility and cask, canisters, and assemblies is for eighty (80) years. The service life for the SNF storage site is one hundred and twenty (120) years. At this time, the NRC cannot guarantee that a permanent repository for SNF in the United States will be developed in 40, 80, or 120 years, or that the proposed ISP CISF facility will not become a permanent repository. Even 80 years of storage at the ISP CISF amounts to impacts beyond the lifetimes of everyone involved in this environmental review and licensing decision.

As early as the 1950s, the National Academy of Sciences recommended disposal of long-lived radioactive wastes in deep, geologically stable formations.³ ISP, however, proposes to store highly radioactive and toxic SNF at the surface in an area that is underlain by shallow groundwater. ISP's proposed CISF site does not provide deep geologic isolation for indefinite SNF storage, and the proposed site is unsuitable for SNF storage over a period of decades. Therefore, the No Action Alternative is recommended.

3. The draft EIS contains numerous technical deficiencies that preclude a thorough evaluation of the radiological and non-radiological environmental impacts of the proposed ISP facility.

Resolving technical deficiencies in the draft EIS and properly evaluating, with all available data, the description of the affected environment, waste transportation, waste characterization, potential contaminant release mechanisms and exposure pathways, potential risks from aging SNF canisters, and site monitoring will further support the No Action Alternative.

a. Deficiencies Related to Hydrogeologic Characterization

The draft EIS does not contain a comprehensive and internally consistent hydrologic conceptual site model that includes precipitation, recharge, surface water, groundwater and springs. Moreover, the draft EIS fails to identify and characterize all groundwater zones that underlie the site with regard to background water and sediment quality, potentiometric surfaces, and directions of groundwater flow. Of particular concern is that the draft EIS does not identify the source of water in Baker Springs in New Mexico, and whether these springs could be affected by contaminant discharges at the proposed ISP site.

These deficiencies preclude the complete and thorough evaluation of contaminant release scenarios, the resulting migration and exposure pathways, and the resulting risks to human and ecological health.

³ National Research Council. 1957. The Disposal of Radioactive Waste on Land. Washington, DC: The National Academies Press. Available at <https://doi.org/10.17226/10294>.

b. Deficient Evaluation of Potential Contaminant Release Scenarios and Exposure Pathways

Prevailing wind direction is generally from the proposed site towards New Mexico. Groundwater flow beneath the existing waste cells at the site is predominantly to the southwest towards New Mexico. Surface water flow from the site is directed through outfalls that flow directly into New Mexico. The draft EIS fails to evaluate how contaminant releases to these pathways could directly migrate into, and impact public health and the environment in, New Mexico.

i. The draft EIS fails to evaluate the impacts of a radiological release from a proximal facility.

ISP's Environmental Report, in a section titled Proximity of Hazardous Operations/High-Risk Facilities, erroneously states "*there are no facilities handling large quantities of hazardous materials, chemicals, or other material in proximity to the site.*" (See § 2.3.4, Criterion 13, page 2-27). Numerous radiological materials operations are currently occurring in the vicinity of the CISF and are likely to continue or expand in the future. These operations include the Federal Facilities Waste Disposal site, the Compact States Waste Disposal Facility, the By-Products Waste Disposal Facility, and the uranium enrichment occurring at URENCO. A radiological release from one of these proximal facilities could render the ISP CISF unmanageable, at loss of capability to function safely, and at risk for accidents and release of contaminants to the environment.

ii. The draft EIS fails to evaluate the potential impacts of a hydrogen sulfide release from a proposed oil-field waste disposal facility near the site.

ISP's Environmental Report, in a section titled Land Use, erroneously states that "there are no other know current, future, or proposed land use plans, including staged plans, for the proposed CISF or immediate vicinity." (See § 3.1, page 3-3). CK Disposal, however, has proposed to construct an oil field waste disposal facility near the ISP site. The draft EIS does not evaluate how releases of hydrogen sulfide from the CK Disposal facility could render the ISP CISF unmanageable, at loss of capability to function safely, and at risk for accidents and release of contaminants to the environment.

iii. The draft EIS fails to evaluate the potential impacts of numerous boreholes on the ISP property that could act as pathways for contaminants to reach groundwater.

Some 600 boreholes are known to be on the WCS property, and the draft EIS does not provide information on how many boreholes have been improperly abandoned. Improperly plugged or cased boreholes could cause a migratory pathway for contaminant migration to groundwater.

c. Seismicity not Adequately Addressed

The draft EIS asserts that operation of the proposed CISF project would not be expected to impact or be impacted by seismic events. The draft EIS provides general information about the history of earthquakes in the region, including earthquakes caused by fluid injection by the oil and gas industry, and asserts that CISF infrastructure will be designed to withstand seismic events, but does not provide specific information about these safeguards. On March 26, 2020, a

magnitude 5.0 earthquake struck West Texas near the New Mexico border.⁴ Since earthquakes of magnitude 5 or greater have already occurred in this area, there is the possibility that more powerful earthquakes may occur, and the ISP facility must be designed to withstand these more powerful seismic events.

d. Deficient Waste Characterization

The draft EIS fails to provide details of the radionuclides and activities in the spent fuel rods, and only references metric tons of uranium (MTU) in the fuel rods that were originally placed in the nuclear reactors. Spent fuel rods can be much more radioactive than the original fuel rods due to the presence of a mixture of byproducts from uranium fission. Radionuclide activities in spent fuel rods can depend on age, uranium burnup and decay, and the type of reactor that was used.

Furthermore, the draft EIS does not adequately address the differences in SNF storage (pool storage, dry storage or both) at the commercial reactor sites. These differences are important as they may present challenges for SNF processing and storage at the proposed ISP facility.

The draft EIS fails to discuss non-radiological contaminants that may potentially be discharged to soil, water and air during operation of the site.

e. Deficiencies Regarding Cannisters and CISF Infrastructure

i. SNF cannisters

Some of the SNF cannisters that would be shipped to the proposed ISP facility have already been stored for decades. As fuel rods age they are subject to corrosion, damage or cladding, and the potential for explosive levels of hydrogen to build up inside the cannisters. The draft EIS does not adequately address these issues.

The SNF cannisters will be stored on concrete pads on the ground surface exposed to the elements. The draft EIS does not address the temperature rating of the SNF cannisters and if maximum summer temperatures at the site are within this temperature rating.

ii. SNF Concrete Pad

The draft EIS does not discuss how the concrete pads used to store SNF cannisters will be protected or repaired from cracking and spalling due to exposure to the elements of the arid Southwest.

4. The draft EIS is significantly incomplete without inclusion of all applicable state regulatory oversight and environmental impact controls.

The draft EIS fails to identify New Mexico water quality regulatory requirements that apply to the proposed ISP facility. As discussed above, contaminants discharged by existing WCS operations, as well as by proposed ISP operations, have the potential to affect water quality in New Mexico. Discharges onto or below the ground surface at the site, and surface water emanating from the site that flows toward New Mexico, have the potential to infiltrate into the subsurface and into groundwater. Consequently, NMED required WCS to obtain a Groundwater Discharge Permit (DP-1817) for WCS's waste disposal operations. WCS submits groundwater monitoring reports to NMED as required by DP-1817 and is currently in compliance with DP-1817.

The existing Texas Pollutant Discharge Elimination System (TPDES) Permit, and monitoring conducted pursuant to that permit, is not an adequate substitute for New Mexico's groundwater permitting and monitoring requirements. Therefore, ISP must submit a Notice of Intent to Discharge

⁴ <https://www.usgs.gov/news/m50-earthquake-hits-west-texas-new-mexico-border>.

to NMED in accordance with 20.6.2.1201 New Mexico Administrative Code (NMAC) for proposed CISF operations. The final EIS, and specifically Table 1.6-1, must identify DP-1817, and ISP's requirement to submit a Notice of Intent to Discharge.

Since surface water discharges from the proposed ISP site in Texas may affect surface water quality in New Mexico, the final EIS should include a requirement that the Texas Commission on Environmental Quality consults with NMED as a downstream state during the TPDES Permit process.

The draft EIS fails to commit the NRC to a comprehensive environmental oversight role during operation of the CISF. The final EIS must address possible licensing conditions and the NRC's obligation to evaluate and respond to adverse impacts to environmental media, e.g., soil, surface water, groundwater.

5. 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. The Proposed Action must comply with Executive Order 12898 requiring that all federal agencies achieve environmental justice for vulnerable populations that would be disproportionately affected by programs of the United States.

The proposed action for indefinite storage of commercial SNF joins the ranks of uranium mining and milling, legacy contamination at national laboratories, and disposal of defense waste at the Waste Isolation Pilot Plant (WIPP), all of which have long presented risks to public health and the environment in the State of New Mexico that are disproportionately greater than such risks to the general population of the United States.

The draft EIS identifies 58.8 percent of the population in Lea County, New Mexico as Hispanic or Latino (Table 1). New Mexico's general percentages of minority (Hispanic or Latino and American Indian) and low-income populations are significantly greater than in the United States' general population (Table 1).

Table 1. New Mexico and United States Demographics.

Demographic	United States ^a	New Mexico ^a	Lea County, NM ^b
Hispanic or Latino	18.3%	49.1%	58.8%
American Indian	1.3%	10.9%	0.7
Persons in poverty	11.8%	19.5%	
Sources:			
^a U.S. Census Bureau QuickFacts: https://www.census.gov/quickfacts/fact/table/US/PST045219			
^b Draft EIS, Table 3.11-2, https://www.nrc.gov/docs/ML2012/ML20122A220.pdf .			

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority and Low-Income Populations, February 11, 1994, stated that "... each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies,

and activities on minority populations and low-income populations of the United States.”⁵ On August 24, 2004, the NRC issued a Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions that stated “NRC believes that an analysis of disproportionately high and adverse impacts needs to be done as part of the agency's NEPA obligations to accurately identify and disclose all significant environmental impacts associated with a proposed action.”⁶

The draft EIS fails to demonstrate that the Proposed Action will achieve environmental justice for the high percentage of minority and low-income populations in the State of New Mexico who have already suffered disproportionately high adverse human health and environmental effects from nuclear energy and weapons programs of the United States. In fact, the draft EIS (pp. 2-28, 2-29) makes repeated, yet unsubstantiated, assertions that the Proposed Action will result in “no disproportionately high and adverse human health and environmental effects.” Environmental justice deficiencies in the draft EIS include:

- a. Failure to identify and evaluate the cumulative history of adverse human health and environmental effects on New Mexico’s vulnerable populations; and
- b. Failure to quantify specific impacts and health consequences to vulnerable populations in New Mexico that might occur from the various accidents and release scenarios considered in the draft EIS.

The environmental justice deficiencies in the draft EIS must be corrected by preparation of a proper risk assessment that evaluates all potential release scenarios and that quantifies incident-specific and cumulative impacts to vulnerable populations in New Mexico. In accordance with Executive Order 12898, with Council on Environment Quality guidance, and with NRC policy, every aspect of the proposed action must provide the highest level of protection to New Mexico citizens, including use of Best Available Technology in these safeguards. Our concerns about disproportionate impacts are another reason why NMED supports the No Action Alternative.

5 <https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf>

6 <https://www.govinfo.gov/app/details/FR-2004-08-24/04-19305>

EXHIBIT 3

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,

A handwritten signature in blue ink, appearing to read "William G. Grantham".

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’t 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 CISF will undeniably rely on New Mexico roads and rails. *See* ISP FEIS at 3-6 (regional access to proposed CISF 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 CISF 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 CISF, 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,

A handwritten signature in black ink that reads "Michelle Lujan Grisham". The signature is written in a cursive, flowing style.

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.



Senator Jeff Steinborn

EXHIBIT 4



MICHELLE LUJAN GRISHAM
GOVERNOR

JAMES C. KENNEY
CABINET SECRETARY

SECRETARY OF THE NEW MEXICO ENVIRONMENT DEPARTMENT JAMES C. KENNEY

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



As the Secretary for the New Mexico Environment Department (NMED), I am responsible for preventing and remediating contaminants released to air, land and water that have the potential to migrate into New Mexico and create threats to human health and the environment. I join the New Mexico' Attorney General's Office in opposing the U.S. Nuclear Regulatory Commission's (NRC) recommendation in its July 29, 2021, final environmental impact statement (EIS) to approve the Interim Storage Partners, LLC (ISP) license application to construct and operate a consolidated interim storage facility (CISF) for spent nuclear fuel (SNF) and Greater-Than-Class C waste, along with a small quantity of spent mixed oxide fuel at the Waste Control Specialists (WCS) site in Andrew County, Texas.

It is my understanding that the NRC's proposed action is the issuance of a license authorizing a CISF 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. The license would allow ISP 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 proposed CISF (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. This is more than the previously proposed Yucca Mountain site.

NMED is familiar with the WCS site due to its location along the Texas-New Mexico border, and because WCS already submits groundwater monitoring reports to NMED as part of its Groundwater Discharge Permit for WCS's waste disposal operations in Texas. NMED has previously submitted comments on the Draft Environmental Impact Statement (DEIS) and they are incorporated by reference herein. In addition, NRC never contacted my office or staff to discuss the DEIS concerns or any other matter. After review, NMED has concerns with the evaluation and findings of the EIS. NMED's concerns are set out below.

1. **Seismic Activity:** The geologic formation (Central Basin Platform) is heavily faulted, and the proposed seismic hazard analysis was deficient. On March 26, 2020, a magnitude 5.0 earthquake struck West Texas near the New Mexico border. More powerful earthquakes may occur and the proposed action fails to account for the potential for geologic activity to impact the proposed facility. See FEIS Section 3.4. The EIS provides general information about the history of earthquakes in the region, including earthquakes caused by fluid injection by the oil and gas industry, and asserts that CISF infrastructure will be designed to withstand seismic events, but

does not provide specific information about these safeguards. Further, the proposed SNF canisters will be stored on concrete pads on the ground surface exposed to the elements directly above shallow groundwater sources in an area with recent seismic activity. Seismic activity could pose a threat to SNF canisters and pads over time, putting New Mexico's groundwater at risk.

2. **Contaminant Migration:** NMED informed the NRC that the draft EIS lacked complete and thorough evaluation of contaminant release scenarios, the resulting migration and exposure pathways, and the resulting risks to human and ecological health, but no changes were made in the final EIS to address these issues. The EIS's limited spatial scale in a region of obvious seismic risk, and the evaluation of cumulative impacts to groundwater resources is inadequate and the existing Texas Pollutant Discharge Elimination System (TPDES) Permit, and monitoring conducted pursuant to that permit, is not an adequate substitute for New Mexico's groundwater permitting and monitoring requirements.

The proposed site is in an area that is underlain by concerns for sinkhole development and shallow groundwater that does not provide deep geologic isolation for indefinite SNF storage. Groundwater flow beneath the existing waste cells at the WCS site is predominantly to the southwest towards New Mexico, and surface water flow from the WCS site is directed through outfalls that flow directly into New Mexico. So, if there is any discharge of SNF at the CISF site, New Mexico's groundwater and surface water will be directly impacted.

Additionally, some 600 boreholes that could cause a migratory pathway for contaminant migration to groundwater are known to be on the WCS property, and the EIS does not provide information on how many boreholes have been improperly abandoned.

3. **Transportation:** Most, if not all, of the SNF that will be stored at the ISP site will be transported to the site by railroads within New Mexico and on New Mexico roads from nuclear reactor sites all over the country, and then transported to a permanent storage site (assuming one is ever created) by the same routes. Moving SNF multiple times through New Mexico only increases the unnecessary risk to public health, safety, and the environment and increases the likelihood of accidents within the State of New Mexico and elsewhere. Moreover, states and regional groups have consistently supported moving spent nuclear fuel only once – from current locations to a national repository.

The transportation of SNF using railways 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. The result is the ISP CISF will rely on New Mexico's limited resources to mitigate any risks of harm from a transportation accident. This avoidable risk was not considered in the no action alternative.

4. **Storage Lifespan:** The lifespan for the storage facility and cask, canisters, and assemblies is for eighty (80) years and the lifespan for the SNF storage site is one hundred and twenty (120) years. However, a permanent repository for high-level radioactive waste does not exist in the United States and there is no existing plan to build one, so the NRC cannot guarantee that a

permanent repository for SNF in the United States will be developed in the foreseeable future, or that the ISP site will not become a permanent repository.

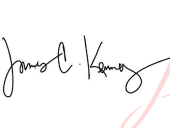
Further, the EIS does not address the temperature rating of the SNF canisters and if maximum summer temperatures at the site are within this temperature rating, and the EIS does not discuss how the concrete pads used to store SNF canisters will be protected or repaired from cracking and spalling due to exposure to the elements of the arid Southwest. New Mexico does not have the luxury of assuming the canisters will be removed or replaced before the canisters have eroded or degraded and contamination is occurring.

In addition, the EIS fails to provide details of the radionuclides and activities in the spent fuel rods, and only references metric tons of uranium (MTU) in the fuel rods that were originally placed in the nuclear reactors. Spent fuel rods can be much more radioactive than the original fuel rods due to the presence of a mixture of byproducts from uranium fission. Radionuclide activities in spent fuel rods can depend on age, uranium burnup and decay, and the type of reactor that was used. As fuel rods age they are subject to corrosion, damage or cladding, and the potential for explosive levels of hydrogen to build up inside the canisters. As the storage lifespan of the canisters and storage site come to an end, the risk to the environment rises dramatically. All issues not discussed in the EIS.

5. **Environmental Justice:** Failure to identify and evaluate the cumulative history of adverse human health and environmental effects on New Mexico's vulnerable populations and failure to quantify specific impacts and health consequences to vulnerable populations in New Mexico that might occur from the various accidents and release scenarios considered in the EIS are two examples of the insufficiency of the NRC's evaluation of environmental justice. New Mexico is already home to contaminated former uranium mining and milling sites on and near tribal lands, 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, NMED disagrees strongly with the recommended action of approving the Interim Storage Partners LLC's License and recommends the No Action Alternative.

Dated: September 14, 2021

 Digitally signed
by James Kenney
Date: 2021.09.14
13:16:12 -06'00'

James C. Kenney
Cabinet Secretary

EXHIBIT 5

LICENSE FOR INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974 (Public Law 93-438), and Title 10, Code of Federal Regulations, Chapter 1, Part 72, and in reliance on statements and representations heretofore made by the licensee, a license is hereby issued authorizing the licensee to receive, acquire, and possess the power reactor spent fuel and other radioactive materials associated with spent fuel storage designated below; to use such material for the purpose(s) and at the place(s) designated below; and to deliver or transfer such material to persons authorized to receive it in accordance with the regulations of the applicable Part(s). This license shall be deemed to contain the conditions specified in Section 183 of the Atomic Energy Act of 1954, as amended, and is subject to all applicable rules, regulations, and orders of the Nuclear Regulatory Commission now or hereafter in effect and to any conditions specified herein.

This license is conditioned upon fulfilling the requirements of 10 CFR Part 72, as applicable, the attached Appendix A (Technical Specifications), and the conditions specified below.

Licensee

- | | | | | | |
|----|--|----|---|--------------------|---|
| 1. | Interim Storage Partners LLC (ISP) | 3. | License No. | SNM-2515 | |
| | | | Amendment No. | 0 | |
| 2. | WCS CISF
9998 Highway 176 West
Andrews, Texas, 79714 | 4. | Expiration Date | September 13, 2061 | |
| | | 5. | Docket or Reference No. | 72-1050 | |
| 6. | Byproduct, Source, and/or Special Nuclear Material | 7. | Chemical and/or Physical Form | 8. | Maximum Amount That Licensee May Possess at Any One Time Under This License |
| A. | Spent nuclear fuel elements from commercial nuclear utilities licensed pursuant to 10 CFR Part 50, including those stored under either a Part 50 general license or Part 72 specific license, and associated fuel assembly control components and associated radioactive materials related to the receipt, transfer, and storage of that spent nuclear fuel. | A. | Intact fuel assemblies, damaged fuel assemblies, failed fuel and fuel debris, as allowed by Materials License SNM-2510, Amendment 4; Table 1-1c or Table 1-1j of Certificate of Compliance No. 1004, Amendments 3 through 13; Table 1-1t of Certificate of Compliance No. 1004, Amendments 10 through 13; Section 2.1 of Certificate of Compliance No. 1029, Amendments 0, 1, and 3; Section B 2.1 of Certificate of Compliance No. 1025, Amendments 0 through 6; Section B 2.1.2 of Certificate of Compliance No. 1015, Amendments 0 through 5; Table B 2-1 of Certificate of Compliance No. 1031, Amendments 0 through 3 Revision 1, and 4 through 5, modified as described in Condition 9 below. | A. | 5,000 Metric Tons (MT) total of Uranium and Mixed-Oxide (MOX) in the form of intact spent fuel assemblies, damaged fuel assemblies, failed fuel assemblies, and fuel debris. In addition, the cumulative amount of material received and accepted during the licensed term of the facility may not exceed 5,000 MT of Uranium plus MOX. |
| B. | Greater than Class C Waste, reactor related material generated as a result of plant operations and decommissioning where radionuclide concentration limits of Class C waste in 10 CFR 61.55 are exceeded. | B. | Greater than Class C Waste, as activated and potentially surface contaminated metals comprised of miscellaneous solid waste resulting from segmentation and decommissioning processes. | B. | 231.3 MT (510,000 pounds) of Greater than Class C Waste. |

License No. SNM-2515	Amendment No. 0
Docket or Reference No. 72-1050	

LICENSE FOR INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE
SUPPLEMENTARY SHEET

9. Authorized Use: The material identified in 6.A, 6.B, 7.A and 7.B above is authorized for receipt, possession, storage, and transfer at the WCS Consolidated Interim Storage Facility (WCS CISF), as described in the WCS CISF Final Safety Analysis Report (FSAR) as updated. Storage of fuel is authorized only in canisters referenced in Section 2.1 of the Attachment, Appendix A Technical Specifications and all fuel with assembly average burnup greater than 45 GWd/MTHM shall be canned inside the canister.
10. Authorized Place of Use: The licensed material is to be received, possessed, transferred, and stored at the WCS CISF, geographically located within Andrews County, Texas.
11. The Technical Specifications contained in the Appendix attached hereto are incorporated into the license. The Licensee shall operate the installation in accordance with the Technical Specifications in the Appendix.
12. The licensee shall follow WCS ERP-100, "Consolidated Emergency Response Plan," Revision 02-08-2019, and as it may be further revised in accordance with 10 CFR 72.44(f).
13. The Licensee shall:
 - (1) follow the Physical Protection Plan entitled, "WCS Consolidated Interim Storage Facility (CISF) Physical Security Plan," Revision 5, dated September 18, 2019, as well as changes made in accordance with 10 CFR 72.44(e) and 72.186(b);
 - (2) follow the Training and Qualification Plan entitled, "WCS Consolidated Interim Storage Facility (CISF) Training and Qualification Plan Appendix B to the CISF Physical Security Plan," dated September 18, 2019, as well as changes made in accordance with 10 CFR 72.44(e) and 72.186(b);
 - (3) follow the Safeguards Contingency Plan entitled "WCS Consolidated Interim Storage Facility (CISF) Safeguards Contingency Plan Appendix C to the CISF Physical Security Plan," dated September 18, 2019, as well as changes made in accordance with 10 CFR 72.44(e) and 72.186(b);
 - (4) follow the "Additional Security Measures for the Physical Protection of Dry Independent Spent Fuel Storage Installations," dated September 28, 2007; and
 - (5) follow the "Additional Security Measures for Access Authorization and Fingerprinting at Independent Spent Fuel Storage Installations," dated December 19, 2007.
14. Construction of the WCS CISF shall not commence before funding (equity, revenue, and debt) is fully committed that is adequate to construct a facility with the initial capacity as specified by the Licensee to the NRC. Construction of any additional capacity beyond the initial capacity amount shall commence only after funding is fully committed that is adequate to construct such additional capacity.
15. The Licensee shall, in its contracts with clients:
 - (1) include provisions requiring clients to retain title to the material identified in 6.A, 6.B, 7.A or 7.B, and include provisions allocating legal and financial liability among the Licensee and the client(s);
 - (2) include provisions requiring clients to periodically provide credit information, and, when necessary, additional financial assurances such as guarantees, prepayment, or payment bond(s);
 - (3) include a provision requiring the Licensee not to terminate the license prior to furnishing storage services covered by the contract.
16. The Licensee shall obtain onsite and offsite insurance coverage in the amounts committed to by ISP in the ISP license application.

License No. SNM-2515	Amendment No. 0
Docket or Reference No. 72-1050	

LICENSE FOR INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE

SUPPLEMENTARY SHEET

17. To conform with the requirements of 10 CFR 72.42, the Licensee shall submit a request for license amendment(s) to incorporate any technically applicable provisions of the Aging Management Programs (AMPs) and Time-Limited Aging Analyses (TLAAs) approved in future renewals of NAC Systems CoCs 1015 and 1025 and 1031, for all applicable NAC spent fuel canisters and storage overpacks.

The Licensee shall submit the amendment request(s) within 120 days of the effective date of the applicable CoC approval. In the event that the current CoC holder for CoC 1015 and/or 1025 and/or 1031 does not submit a timely renewal as defined in 10 CFR Part 72.240, the Licensee shall submit a license amendment request, incorporating AMP and TLAA information compliant with 10 CFR 72.42, within one (1) year following the timely renewal deadline defined in 10 CFR 72.240(b) for the applicable CoC.

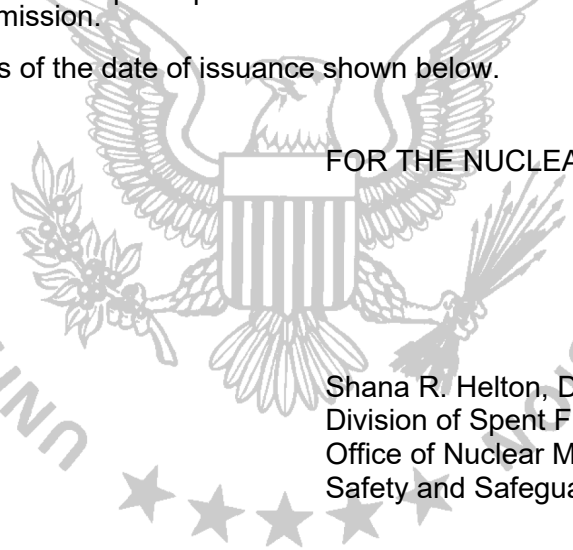
18. The Licensee shall submit a startup plan as described in Chapter 13 of the WCS CISF FSAR, as updated, to the NRC at least 90 days prior to receipt and storage of the material identified in 6.A, 6.B, 7.A or 7.B at the facility.

19. Prior to commencement of operations, the Licensee shall have an executed contract with the U.S. Department of Energy (DOE) or other SNF Title Holder(s) stipulating that the DOE or the other SNF Title Holder(s) is/are responsible for funding operations required for storing the material identified in 6.A, 6.B, 7.A or 7.B at the CISF as licensed by the U.S. Nuclear Regulatory Commission.

20. Prior to receipt of the material identified in 6.A, 6.B, 7.A or 7.B, the Licensee shall have a financial assurance instrument required pursuant to 10 CFR 72.30 acceptable to the U.S. Nuclear Regulatory Commission.

21. This license is effective as of the date of issuance shown below.

FOR THE NUCLEAR REGULATORY COMMISSION



Shana R. Helton, Director
Division of Spent Fuel Management
Office of Nuclear Material
Safety and Safeguards

Date of Issuance September 13, 2021

Attachments: Appendix A –WCS Consolidated Interim Storage Facility Technical Specifications