



SOUTHWEST RESEARCH AND INFORMATION CENTER

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March 4, 2022

Office of Spent Fuel and Waste Disposition
Office of Nuclear Energy
U.S. Department of Energy (DOE)
Washington, DC 20585

Via email: consentbasedsiting@hq.doe.gov

RE: Request for Information (RFI) 86 *Federal Register* 68244-246 (December 1, 2021)

Dear People:

Southwest Research and Information Center (SRIC) provides these comments on the RFI on Using a Consent-Based Siting Process to Identify Federal Interim Storage Facilities. SRIC has a 40-year history of involvement in the DOE nuclear waste programs under the Nuclear Waste Policy Act (NWPA) and an even longer history regarding the Waste Isolation Pilot Plant (WIPP). In its previous consent-based siting process in 2015-2017, DOE recognized that experience by issuing a speaking invitation to the May 24, 2016 Public Meeting in Denver, CO¹ and to be an expert participant in the May 31-June 1, 2016 Consent-Based Siting Project Design Workshop in Boston, MA.² On January 27, 2017, SRIC also submitted written comments on the RFI on Private Initiatives to Develop Consolidated Interim Storage Facilities.³

SRIC was one of more than 50 organizations signing the February 15, 2022 letter from Diane Curran regarding this present RFI.⁴ SRIC submits these additional comments, while strongly objecting to the deadline to submit the comments now, because the RFI should be withdrawn.

1. DOE should not proceed with the proposed consent-based siting process for “interim storage facilities”.

The RFI states: “Responses to the RFI will inform development of a consent-based siting process, overall strategy for an integrated waste management system, and possibly a funding opportunity.” 86 *Federal Register* 68244. DOE should not conduct any process for “interim storage facilities.” If the department takes action, it should be a rulemaking process to develop a consent-based repository siting process, amending its existing repository guidelines – 10 CFR 960 – which do not include consent-based siting or environmental justice criteria.

¹ http://sric.org/nuclear/docs/20160524_Denver_Hancock_Transcript.pdf

² <http://sric.org/nuclear/docs/DH060116final.pdf>

³ http://sric.org/nuclear/docs/012717_SRIC_comments.pdf

⁴ http://sric.org/nuclear/docs/20220215_NGO-ltr-to-DOE-re-Request-for-Information-2.pdf

As SRIC has stated in its previous comments on DOE's consent-based process (as have many other organizations), DOE is to develop geologic repositories, and is not allowed by the NWPA to support "interim storage facilities." The law states:

The generators and owners of high-level radioactive waste and spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of such waste and spent fuel until such waste and spent fuel is accepted by the Secretary of Energy in accordance with the provisions of this Act [42 U.S.C. 10101 et seq.] 42 U.S.C. § 10131(a)(5).

That law further states: DOE shall "take title" to spent fuel only "following commencement of operation of a repository." 42 U.S.C. § 10222(a)(5)(A).

See also Final Interpretation of Nuclear Waste Acceptance Issues, 60 Fed. Reg. 21793, 21795 (May 3, 1995) (concluding that "the mandate to dispose and the duty to take title must be read together.")

Thus, the NWPA gives DOE responsibility for developing and operating geologic repositories, but does not allow the Department to take title to commercial spent nuclear fuel until a repository is operating. There is no possibility of an operating spent fuel repository for at least several decades, so there is no reason or legal authority for DOE now to pursue "interim storage."

However, the RFI misleadingly states: "In the Consolidated Appropriations Act, 2021, Congress appropriated funds to the Department for interim storage activities." 86 *Federal Register* 68245. That language could mislead some members of the public to think that Congress amended the NWPA in the 2021 law. Congress did no such thing.

The actual language of PL 116-260 is:

For Department of Energy expenses necessary for nuclear waste disposal activities to carry out the purposes of the Nuclear Waste Policy Act of 1982, Public Law 97-425, as amended, including interim storage activities, \$27,500,000, to remain available until expended, of which \$7,500,000 shall be derived from the Nuclear Waste Fund. 134 STAT. 1366.

Thus, Congress expressly did not amend the NWPA, as all of the appropriated funds are for the "purposes of the NWPA," including the \$20 million not from the Nuclear Waste Fund. The RFI is misleading by not so stating.

The RFI further states:

This [interim storage] will allow for removal of spent nuclear fuel from reactor sites, provide useful research opportunities, and build trust and confidence with stakeholders and the public by demonstrating a consent-based approach to siting. 86 *Federal Register* 68245.

Such language is at best aspirational, but SRIC believes it is inaccurate and misleading. Interim storage at reactor sites has been occurring for decades since the first commercial reactor refueled to have on-site spent fuel storage and will continue as long as any nuclear plant is operating and for years thereafter. The purpose of such interim storage is to allow the spent fuel to cool and radioactive decay to safely occur. It is not for “research,” though SRIC does not object to DOE conducting research on such on-site storage, including in dry casks, for fuel degradation, integrity of storage containers, and other similar activities. That such interim storage has built trust and confidence is aspirational and has not been demonstrated, as at numerous locations, some utility executives, government officials, and members of the public have questioned the long-term safety of such storage. Further, such storage has not been accomplished through a true free, prior, and informed consent process.

Interim storage could be done by utilities, as proposed by Private Fuel Storage and licensed by the Nuclear Regulatory Commission in 2006. But it is premature to research such consolidated storage, since there is no operating site.

Further, the NWSA currently does not require “consent-based siting.” SRIC again believes that the RFI is misleading by not so stating.

2. DOE should propose revisions to its 10 CFR 960 Siting Guidelines for Nuclear Waste Repository to include a consent-based siting process.

Insofar as DOE believes that future repository siting should include “consent-based siting,” it should so demonstrate by initiating a rulemaking to revise its General Guidelines for the Preliminary Screening of Potential Sites for a Nuclear Waste Repository – 10 CFR 960. Those guidelines are required by Section 112(a) of the NWSA. The law expressly allows the guidelines to be revised. 42 U.S.C. 10132.

Such a rulemaking could provide a robust public process, subject to judicial review, to engage stakeholders in detailed discussion and analysis of “consent-based siting,” which could be far superior to the flawed process that DOE used in 2015-2017 and started with the current RFI.

SRIC specifically notes that those guidelines do not currently include “consent-based siting,” nor do they include environmental justice criteria. If DOE is serious about involving people, communities, and groups that have historically not been well-represented in nuclear waste discussions, as stated in the RFI, it should provide funding for such groups, including for hiring independent consultants, to participate in the rulemaking.

3. DOE-NNSA and EM should propose consent-based siting and technical standards for Defense TRU Waste Repositories.

DOE also is responsible for defense transuranic (TRU) waste repositories, of which WIPP currently is the only one, having first received waste on March 26, 1999. Since WIPP was first authorized in PL 96-164, Section 213, it has been clear that other repositories are necessary. The WIPP Law Withdrawal Act of 1992 (PL 102-579) specifically limited the amount of defense

TRU waste to 6.2 million cubic feet. Sec. 7(a). At that time, that was the amount of waste for which WIPP was designed and had already been generated.⁵

During the House floor debate, Rep. Peter Kostmayer, one of the bill's sponsors, stated:

Whether we are going to generate more nuclear waste is not the question. The question is we have got to get rid of the material we have. This facility will take only 20 percent of all the waste that we have. Still 80 percent will remain unburied. We have to deal with that. *Congressional Record* October 5, 1992 at 32552 (c. 2).

DOE's WIPP Record of Decision (ROD) of June 22, 1990 stated:

The WIPP is designed to dispose of 6.2 million cubic feet (ft³) of contact-handled (CH) TRU waste and 250,000 ft³ of remote-handled (RH) TRU waste in the mined repository over a 25-year operational life. 55 Federal Register 25690.

It is well past time for DOE to initiate a process to site another defense TRU waste repository. If DOE is serious about a free, prior, informed consent process, it should so demonstrate in siting of the next TRU repository.

To start that process, DOE should develop initiate a public process to develop technical standards and a consent-based siting process for such a repository.

4. SRIC's specific comment on the RFI's 16 questions.

Area 1: Consent-Based Siting Process

1. How should the Department build considerations of social equity and environmental justice into a consent-based siting process?

SRIC Response: DOE should not conduct any process for "interim storage facilities." A free, prior, informed consent process should exclude communities that have been targeted for toxic waste sites and Native American land as an environmental justice criterion.

2. What role should Tribal, State, and local governments and officials play in determining consent for a community to host a federal interim storage facility?

SRIC Response: DOE should not conduct any process for "interim storage facilities." A free, prior, informed consent process should exclude Native American land as an environmental justice criterion.

3. What benefits or opportunities could encourage local, State, and Tribal governments to consider engaging with the Department as it works to identify federal interim storage sites?

SRIC Response: DOE should not conduct any process for "interim storage facilities." A free, prior, informed consent process should exclude communities that have been targeted for toxic waste sites and for Native American land as an environmental justice criterion.

⁵ Final Environmental Impact Statement Waste Isolation Pilot Plant, DOE/EIS-0026, October 1980, Vol. 1 at 2-17.

4. What are barriers or impediments to successful siting of federal interim storage facilities using a consent-based process and how could they be addressed?

SRIC Response: DOE should not conduct any process for “interim storage facilities.” A free, prior, informed consent process should exclude communities that have been targeted for toxic waste sites and Native American land as an environmental justice criterion. DOE’s history of not seeking consent for its facilities and long-standing concerns of states and tribes about such sites is a severe impediment to anyone trusting DOE to fully implement a robust free, prior, informed consent process.

5. How should the Department work with local communities to establish reasonable expectations and plans concerning the duration of storage at federal interim storage facilities?

SRIC Response: DOE should not conduct any process for “interim storage facilities.” No community can reasonably expect that any duration other than forever would apply to any “interim” storage facility until and unless there is such an operating repository that is designed, licensed, and has binding agreements to accept all of the waste at an “interim” facility.

6. What organizations or communities should the Department consider partnering with to develop a consent-based approach to siting?

SRIC Response: DOE should not conduct any process for “interim storage facilities.” For a geologic repository, Congress must enact legislation – or there should be a constitutional amendment – that requires a free, prior, informed consent process, and provides for non-consent, that includes community, state, and tribal entities receiving funding to hire their own independent expert consultants and to develop their own mechanisms to establish consent and non-consent. In addition, federal environmental laws must be amended to allow state regulation and citizen-suit provisions for any site.

7. What other issues, including those raised in the Draft Consent-Based Siting Process ([www.energy.gov/sites/prod/files/2017/01/f34/Draft Consent-Based Siting Process and Siting Considerations.pdf](http://www.energy.gov/sites/prod/files/2017/01/f34/Draft%20Consent-Based%20Siting%20Process%20and%20Siting%20Considerations.pdf)), should the Department consider in implementing a consent-based siting process?

SRIC Response: DOE should not conduct any process for “interim storage facilities.” DOE should publish a detailed response to all comments received on the 2017 process and accept comments as to the accuracy of its responses. That lack of response to public comments is the antithesis of what a consent-based process requires.

Area 2: Removing Barriers to Meaningful Participation

1. What barriers might prevent meaningful participation in a consent-based siting process and how could those barriers be mitigated or removed?

SRIC Response: DOE should not conduct any process for “interim storage facilities.” The Department’s historic practices of not allowing consent, opposing state regulation of radionuclides, and breaking the Consultation & Cooperation Agreement with the State of New Mexico regarding WIPP, means that it has no credibility. Thus, the Blue Ribbon Commission on America’s Nuclear Future stated that a new agency, not DOE, should carry out a consent-based siting process.⁶ A free, prior, informed consent process should exclude communities that have

⁶ Blue Ribbon Commission on America’s Nuclear Future - Report to the Secretary of Energy, January 2012, Executive Summary at x; Chapter 7.

been targeted for toxic waste sites and Native American land as an environmental justice criterion.

Additionally, DOE has no history of communicating well with Spanish-speaking people, which is a significant part of the U.S. population. While the RFI is posted on the DOE consent-siting webpage in nine languages, which is a welcome practice, other related materials are not posted in languages other than English. While the RFI states that people can visit the webpage “for assistance in languages other than English,” there is no indication that written comments are welcome in other languages. This lack of language competency by DOE is a serious barrier to providing for meaningful public participation.

2. What resources might be needed to ensure potentially interested communities have adequate opportunities for information sharing, expert assistance, and meaningful participation in the consent-based siting process?

SRIC Response: DOE should not conduct any process for “interim storage facilities.” A free, prior, informed consent process requires financial resources so that local communities, states, and tribes can hire independent expert consultants. In addition, federal environmental laws must be amended so that states and tribes have regulatory authority over any waste facilities.

3. How could the Department maximize opportunities for mutual learning and collaboration with potentially interested communities?

SRIC Response: DOE should not conduct any process for “interim storage facilities.” A free, prior, informed consent process requires financial resources so that local communities, states, and tribes can hire independent expert consultants, including obtaining information from, and collaborating with, other communities, states, and tribes.

4. How might the Department more effectively engage with local, State, and Tribal governments on consent-based siting of federal interim storage facilities?

SRIC Response: DOE should not conduct any process for “interim storage facilities.” For DOE defense TRU repositories, a free, prior, informed consent process requires financial resources so that local communities, states, and tribes can hire independent expert consultants, including obtaining information from, and collaborating with, other communities, states, and tribes. In addition, Congress must enact laws so that states and tribes have regulatory authority over waste facilities. Congress must also provide authority for consent-based siting (or pass a constitutional amendment to be sent to states for ratification for such purpose).

5. What information do communities, governments, or other stakeholders need to engage with the Department on consent-based siting of federal interim storage facilities?

SRIC Response: DOE should not conduct any process for “interim storage facilities.” For DOE defense TRU repositories, a free, prior, informed consent process requires truthful information from DOE regarding all aspects of the facility, including types and amounts of waste, for what duration, with what regulatory requirements. Congress must support such a process with adequate financial resources so that local communities, states, and tribes can hire independent expert consultants, including obtaining information from, and collaborating with, other communities, states, and tribes. In addition, Congress must change the laws so that states and tribes have regulatory authority over waste facilities.

Area 3: Interim Storage as Part of a Waste Management System

1. How can the Department ensure considerations of social equity and environmental justice are addressed in developing the nation's waste management system?

SRIC Response: DOE should not conduct any process for "interim storage facilities." A free, prior, informed consent process should exclude communities that have been targeted for toxic waste sites and Native American land as an environmental justice criterion. DOE's history of not seeking consent for its facilities and long-standing concerns of states and tribes about such sites is a severe impediment to anyone trusting and engaging with DOE.

2. What are possible benefits or drawbacks to co-locating multiple facilities within the waste management system or co-locating waste management facilities with manufacturing facilities, research and development infrastructure, or clean energy technologies?

SRIC Response: DOE should not conduct any process for "interim storage facilities." Before considering co-locating a repository at an existing DOE site, DOE should focus its efforts on consent-based siting of technically sound, publicly accepted geologic repositories, including additional defense TRU repositories. An initial step is for Congress to amend federal environmental laws to provide state and tribal regulatory authority regarding spent nuclear fuel and other radioactive waste.

Insofar as the question encourages a co-located storage/reprocessing facility, that is totally unacceptable and should not be considered. Reprocessing is a dangerous, environmentally damaging, proliferation, and enormously costly process that should not be done again in this country. Reprocessing for nuclear weapons at Hanford and Savannah River Site is the source of hundreds of billions of dollars of DOE cleanup costs at those sites, in addition to the worker public health problems, soil and water contamination problems. Commercial reprocessing at West Valley, NY was an environmental and economic disaster that remains a burden on New York and the nation.

3. To what extent should development of an interim storage facility relate to progress on establishing a permanent repository?

SRIC Response: DOE should not conduct any process for "interim storage facilities." Any "interim" facility will result in delay or deferral of a repository, which was the reason that the NWSA required an operating repository for DOE to take title to the waste. 42 U.S.C. § 10222(a)(5)(A).

4. What other issues should the Department consider in developing a waste management system?

SRIC Response: DOE should not conduct any process for "interim storage facilities." DOE should focus its efforts on consent-based siting of technically sound, publicly accepted geologic repositories, including additional defense TRU repositories. Two essential first steps are (1) initiating a rulemaking to revise its General Guidelines for the Preliminary Screening of Potential Sites for a Nuclear Waste Repository – 10 CFR 960. Those guidelines are required by Section 112(a) of the NWSA. The law expressly allows the guidelines to be revised. 42 U.S.C. 10132, and (2) developing technical standards and a consent-based siting process for defense TRU waste repositories. DOE should also inform Congress that adequate funding must be provided for states, tribes, and local communities to participate in the siting process additional defense TRU repositories.

Thank you very much for your careful consideration of, and your response to, these comments and to all of the other comments that are submitted.

Sincerely,

A handwritten signature in black ink, appearing to read "Don Hancock". The signature is fluid and cursive, with the first name "Don" being more prominent than the last name "Hancock".

Don Hancock

cc: Senators Martin Heinrich and Ben Ray Lujan, Representatives Melanie Stansbury, Teresa Leger Fernandez, and Yvette Harrell
William "Ike" White/DOE-EM