

February 15, 2022

Office of Spent Fuel and Waste Disposition
Office of Nuclear Energy
U.S. Department of Energy
By email to: consentbasedsiting@hq.doe.gov

SUBJECT: *Request to Withdraw, Revise and Re-Publish Request for Information on Using a Consent-Based Siting Process to Identify Federal Interim Storage Facilities, 86 Fed. Reg. 68,244 (Dec. 1, 2021)*

To Whom it May Concern:

On behalf of itself and 50 Native American non-governmental organizations (“NGOs”) and environmental organizations and individuals (listed and described in Section III below), Beyond Nuclear, Inc. (“Beyond Nuclear”) requests the U.S. Department of Energy to withdraw its *Request for Information on Using a Consent-Based Siting Process to Identify Federal Interim Storage Facilities, 86 Fed. Reg. 68,244 (Dec. 1, 2021)* (“*2021 Request for Information*”).

I. INTRODUCTION AND SUMMARY OF REQUEST FOR RELIEF

As discussed below in Section IV, the *2021 Request for Information* fails to comply with basic tenets of fair administrative decision-making, and violates the principles of transparency and inclusivity set forth in the 2012 President’s Blue Ribbon Commission Report on America’s Nuclear Future.¹ *See id.* at ix (“Transparency, flexibility, patience, responsiveness, and a heavy emphasis on consultation and cooperation will all be necessary – *indeed, these are attributes that should apply not just to siting but to every aspect of program implementation.*”) (emphasis added).

Contrary to these goals and principles, the *2021 Request for Information* is fatally incomplete, unfocused, and unclear in its purpose, because DOE has failed to do the basic work of analyzing and responding to the two rounds of public comments and multiple stakeholder meetings it held between 2015 and 2017. Affected communities have no way of knowing whether DOE agreed with their previous input on the subject of consent-based siting, or what DOE still wants to know. Furthermore, the *2021 Request for Information* is misleading, because it conveys the inaccurate impression that federal interim storage of spent reactor fuel and high-level waste has received Congressional approval, and therefore is a *fait accompli*.

Finally, DOE made only a weak attempt at soliciting participation in the commenting process, thereby defeating its own stated purpose of engaging a wide variety of stakeholders, including “groups that have historically not been well-represented in these discussions.” 86 Fed. Reg. at 68,244.

¹ (https://www.energy.gov/sites/prod/files/2013/04/f0/brc_finalreport_jan2012.pdf).

As DOE notes in the 2021 *Request for Information*, “demonstrating a consent-based approach to siting” will “build trust and confidence with stakeholders.” 86 Fed. Reg. at 68,245. Ironically, DOE has served up a commenting process that is so incomplete and unfocused as to undermine that trust and confidence. This is exactly the type of government conduct that was identified as needing reform by the BRC. BRC Report at viii (noting the “erosion of trust in the federal government’s nuclear waste management program”).

To rectify these significant deficiencies in a manner consistent with the BRC Report and DOE’s own goals for a well-informed and fair consent-based siting process, DOE should withdraw the 2021 *Request for Information*, and do the work of analyzing and responding to previous public comments on the issue of consent-based siting.

If, after completing that process, DOE believes it is still necessary to circulate a *Request for Information*, DOE should ensure that the *Request for Information* has the following features:

- A clear explanation of DOE’s current views on the appropriate elements of a consent-based siting process, and specific identification of any information that is still missing and on which DOE seeks a response;
- Correct and complete citations to all relevant documents in the history of the consent-based siting proceedings;
- An accurate description of current federal law regarding spent fuel storage and disposal, making it clear that federal interim storage has not been approved by Congress and therefore it is not a *fait accompli*;
- At least a 90-day period for written responses, and opportunities to provide input through interviews and public meetings; and
- A demonstration that the *Request for Information* has been circulated to affected communities via multiple means of communication, including direct correspondence and solicitations of oral input.

II. DESCRIPTION OF BEYOND NUCLEAR AND OTHER ORGANIZATIONS AND INDIVIDUALS SPONSORING THIS REQUEST

A. Beyond Nuclear

Beyond Nuclear is a nonprofit, nonpartisan membership organization that aims to educate and activate the public about the connections between nuclear power and nuclear weapons and the need to abolish both to protect public health and safety, prevent environmental harms, and safeguard our future. For the past fifteen years, Beyond Nuclear has advocated for an end to the production of nuclear waste and for securing the existing reactor waste in hardened on-site storage until it can be permanently disposed of in a safe, sound, and suitable underground repository.

Beyond Nuclear’s current work on safe storage and disposal of nuclear waste includes intervening in U.S. Nuclear Regulatory Commission (“NRC”) licensing proceedings for the proposed Holtec International and Interim Storage Partners, L.L.C. (“ISP”) consolidated interim

storage facilities. In *Don't Waste Michigan, et al. v. NRC*, No. 21-1048, Beyond Nuclear appealed NRC's issuance of the ISP license to the U.S. Court of Appeals for the D.C. Circuit, on the ground that NRC's decision to license a private facility for storage of federally-owned spent reactor fuel violated the Nuclear Waste Policy Act. The case is pending.

B. Other Organizations

Cape Downwinders is a New England organization working to raise awareness and educate our local communities about the ongoing public health and safety issues posed by decommissioning of the Pilgrim nuclear power station and storage of the reactor's nuclear waste.

Citizens Awareness Network is a grassroots environmental organization working to end the production of unaffordable and dangerous nuclear waste and power, and replace it with sustainable, reliable, and affordable energy generation. We are therefore committed to a democratically led, environmentally just, and scientifically sound solution for nuclear waste.

Founded in 1978 by Hispanic activists and community members from SE New Mexico, *Citizens for Alternatives to Radioactive Dumping* works to protect the people and land of New Mexico from radioactive contamination, including halting the widespread practice of dumping toxic and radioactive waste along the US/Mexico border.

Citizens Resistance at Fermi Two is an Indigenous-led, grassroots organization in Michigan dedicated to environmental justice and the well-being of the earth. The intergenerational, multi-racial, cross-cultural team is committed to halting nuclear destruction, promoting renewable energy, and embodying sound principles in the process.

Coalition for a Nuclear-Free Great Lakes works to protect the North American Great Lakes from radioactive contamination caused by nuclear reactors, nuclear weapons production, nuclear waste, and transportation of radioactive material.

Based in New Mexico, *Concerned Citizens for Nuclear Safety* works to protect all living beings and the environment from the effects of radioactive and other hazardous materials now and in the future.

The *Council on Intelligent Energy & Conservation Policy* advocates for safe, clean energy and conservation.

Don't Waste Arizona is a non-profit environmental organization created for the protection, conservation, and preservation of the human and natural environment in and around Phoenix, and the State of Arizona.

Don't Waste Michigan works to shut down aging, dangerous nuclear power plants, stop the construction of new nuclear power plants, educate the public about the dangers of nuclear power and nuclear waste, and stop the burial of nuclear waste in dumps.

Earthkeeper Health Resources is a national technology, education and advocacy organization established to protect people who live, work or study near oil and gas infrastructure from toxic air emissions.

Honor Our Pueblo Existence (H.O.P.E) is a nonprofit organization based at Santa Clara Pueblo New Mexico. H.O.P.E. focuses on environmental health issues as well as cultural preservation and reclamation projects.

Hudson River Sloop Clearwater works to preserve and protect the Hudson River, its tributaries and related bodies of water.

Indigenous Environmental Network (IEN) was formed in 1990 by grassroots Indigenous peoples and individuals to address environmental and economic justice issues. IEN's activities include building the capacity of Indigenous communities and tribal governments to develop mechanisms to protect our sacred sites, land, water, air, natural resources, health of both our people and all living things, and to build economically sustainable communities. IEN accomplishes this by maintaining an informational clearinghouse, organizing campaigns, direct actions and public awareness, building the capacity of community and tribes to address EJ issues, development of initiatives to impact policy, and building alliances among Indigenous communities, tribes, inter-tribal and Indigenous organizations, people-of-color/ethnic organizations, faith-based and women groups, youth, labor, environmental organizations and others. IEN convenes local, regional and national meetings on environmental and economic justice issues, and provides support, resources and referral to Indigenous communities and youth throughout primarily North America – and in recent years – globally.

Multicultural Alliance for a Safe Environment is a group of southwestern U.S. communities impacted by the uranium mining and milling industry, that works to restore and protect the natural and cultural environment through respectfully promoting intercultural engagement among communities and institutions for the benefit of all life and future generations. Member organizations include:

- ***Eastern Navajo Diné Against Uranium Mining,***
- ***Red Water Pond Road Community Association,***
- ***Laguna-Acoma Coalition for a Safe Environment,***
- ***Post-71 Uranium Workers Committee, and***
- ***Bluewater Downstream Valley Alliance.***

The ***Native Community Action Council*** works to preserve traditional histories, rights and benefits for Native Americans of the Great Basin pursuant to tribal customs by understanding, educating and managing nuclear risks.

National Nuclear Workers for Justice advocates for occupational safety and just compensation for nuclear factory workers.

The ***Natural Resources Defense Council*** (NRDC) is a national non-profit membership environmental organization with a nationwide membership of over one million combined members and activists. NRDC's activities include maintaining and enhancing environmental quality and monitoring federal agency actions to ensure that federal statutes enacted to protect human health and the environment are fully and properly implemented. Since its inception in 1970, NRDC has sought to improve the environmental, health, and safety conditions at the nuclear facilities operated by DOE and the civil nuclear facilities licensed by the NRC and their predecessor agencies.

New England Coalition on Nuclear Pollution investigates the safety, suitability, and environmental effects of nuclear power plants, participates in government hearings; and informs the public and government agencies of the hazards and risks of nuclear power.

Based in Minnesota, ***North American Water Office*** (NAWO) works to phase in modern renewable energy and energy efficiency systems and technologies, to phase out destructive electrical generation technologies and obsolete, abusive energy management practices, and to empower those who are disproportionately affected to utilize mitigation and remediation strategies. In 1995, the Coalition of Native Americans honored NAWO for its work against a federal proposal to store nuclear waste on tribal lands.

Northeastern New Mexicans United Against Nuclear Waste is a coalition of ranchers, farmers, and ag businesses that was formed to oppose the DOE's proposed plan to bury high level nuclear waste in bore holes in Quay County in 2017.

Based in northern Canada, ***Northwatch*** is an environmental non-governmental organization based in northern Ontario, Canada. Northwatch has decades of experience engaging in processes related to the siting and development of variously proposed deep geological repositories for radioactive waste and other waste "disposal" projects, and has lived experience with three different siting exercises, including one currently underway with respect to nuclear fuel waste.

Nuclear Energy Information Service is an Illinois-based non-profit organization committed to ending nuclear power and advocating for sustainable ecologically sound and socially just energy solutions. To accomplish this end, NEIS educates, activates and organizes the public on energy issues, builds and mobilizes grass roots power and nonviolent opposition to nuclear power, and advocates sustainable and ecologically sound energy alternatives.

The ***Nuclear Free World Committee of the Dallas Peace and Justice Center*** works to educate and advocate for a nuclear free world in our lifetime, including opposition to uranium mining, milling and processing; nuclear power; nuclear weapons; and unsafe radioactive waste disposal.

Nuclear Information and Resource Service (NIRS) is the national information and networking center for citizens and environmental activists concerned about nuclear power, radioactive waste, radiation and sustainable energy issues. NIRS initiates large-scale organizing and public education campaigns on specific issues, such as preventing construction of new reactors, radioactive waste transportation, deregulation of radioactive materials, and more.

The ***Nuclear Issues Study Group*** is a multi-racial, multi-generational, and women-led volunteer organization that works to protect New Mexico from all things nuclear through education, art, and activism.

Based in Atlanta, ***Nuclear Watch South*** is a grassroots direct-action group dedicated to raising public awareness of nuclear power, nuclear waste, and nuclear weapons.

Nukewatch is a Wisconsin-based environmental and peace action group, dedicated to the abolition of nuclear power, weapons and continued radioactive waste production. Nukewatch publishes a newsletter that regularly reports on these issues and specifically the nonconsensual attempts to site waste at Yucca Mountain, and the centralized interim storage proposals of Holtec International in New Mexico and Interim Storage Partners, L.L.C. in Texas.

The ***Oak Ridge Environmental Peace Alliance*** is a nonprofit organization working to stop nuclear weapons production at the Y12 Nuclear Weapons Complex in Oak Ridge, Tennessee, and protecting the environment threatened by legacy and ongoing activities at the Oak Ridge Nuclear Reservation.

With a focus on Ohio and Lake Erie, the ***Ohio Nuclear Free Network*** serves as a networking and information center for people and organizations concerned about nuclear power, nuclear weapons, radioactive waste and the radioactive contamination of air, water and soil.

On Behalf of Planet Earth is a grassroots group of individuals, organizations, and spiritual communities working to end nuclear power.

As a neighbor to the Pantex nuclear weapons factory in Texas, the ***Peace Farm*** bears witness to the dangers of nuclear weapons assembled there, and works for the abolition of all nuclear weapons.

Portsmouth/Piketon Residents for Environmental Safety and Security works to educate, organize and empower residents and workers affected by the Piketon, Ohio uranium enrichment site, and to represent their interest in economic vitality, environmental quality, health, justice and expanded job opportunities.

Safe Energy Rights Group works to protect communities in the Northeast from unsafe energy development and infrastructure, with a focus on assisting those impacted by harmful fossil fuel projects in exercising their rights to safe, sustainable energy.

San Luis Obispo Mothers for Peace is a California-based non-profit organization concerned with the risks and hazards connected with the Diablo Canyon Nuclear Power Plant, and with the dangers of nuclear power, weapons and waste on national and global levels.

The ***Snake River Alliance*** serves as Idaho's nuclear watchdog and clean energy champion, working to free Idaho from the threat of nuclear waste and contamination, and to build healthy, strong, and prosperous communities through reliance on clean and renewable energy.

Southwest Research and Information Center works with New Mexico citizen groups, tribes, and state governments involved in the implementation of the Nuclear Waste Policy Act.

Based in Texas, the ***Sustainable Energy and Economic Development (SEED) Coalition*** works for clean air and clean energy. We support affordable energy efficiency and renewable energy solutions to meet our energy needs.

Vermont Yankee Decommissioning Alliance works to ensure the safe decommissioning of the Vermont Yankee nuclear power plant and to keep the nuclear waste in Vermont until scientifically sound and safe storage and environmentally just placement is identified.

C. Individuals:

Lee Blackburn (Ohio)

Stephanie Bilenko (Illinois)

Carolyn Croom (Texas)

Alice M. Evans, Ph.D. (Vermont)

Bridget Houston Hyde (Texas)

David Rosen, Certified Petroleum Geologist (Texas)

Kathleen Russell (Michigan)

III. BACKGROUND INFORMATION

A. Nuclear Waste Policy Act and 2021 Appropriations Act

In the 1982 Nuclear Waste Policy Act, 42 U.S.C. § 10101, *et seq.* (“NWPA”), Congress established a national goal of siting and licensing a federal repository for permanent disposal of high-level radioactive waste and spent reactor fuel. As part of the NWPA’s statutory scheme, DOE was prohibited from assuming ownership of spent reactor fuel for any purpose, including interim storage, unless and until a repository was licensed and operating.

In 1987, Congress amended the Nuclear Waste Policy Act to designate Yucca Mountain as the site of the first repository to be licensed under the Act. But Congress did not otherwise change the statute.

In the 2021 Appropriations Act, Congress designated \$27,500,000 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.”

Thus, any “interim storage activities” carried out by DOE with these funds must serve the “purposes of the Nuclear Waste Policy Act.”

B. BRC Report

In 2012, the BRC Report confirmed Congress’ conclusion that the *only* acceptable means for separating this dangerous material from the environment for the long-term is disposal, not interim storage. *Id.* at xi (“The conclusion that disposal is needed and that deep geologic disposal is the scientifically preferred approach has been reached by every expert panel that has looked at the issue and by every other country that is pursuing a nuclear waste management program.”).

Recognizing that the siting process for a repository had failed, the BRC proposed a new and “integrated” program for spent fuel disposal that would include consolidated interim storage. *Id.* at vii. Among the critical features of such an integrated program were that (a) it must be “consent-based -- in the sense that affected communities have an opportunity to decide whether to accept facility siting decisions and retain significant local control” and (b) that it must be “transparent – in the sense that all stakeholders have an opportunity to understand key decisions and engage the process in a meaningful way.” *Id.* at 47.

Importantly, the BRC cautioned that “a robust repository program . . . will be as important to the success of a consolidated storage program as the consolidated storage program will be to the success of a disposal program.” *Id.* And the BRC also recognized that federal legislation would be needed before construction of a federal consolidated storage facility could begin. *Id.* at 41.

The BRC Report was based on significant public input, including taking public comments and holding more than two dozen meetings to hear testimony from a “wide variety of organizations, interest groups, and individuals.” *Id.*, Preamble.

C. DOE Proceedings for Public Comment on Consent-Based Siting

2015. In 2015, DOE embarked on the first in a series of proceedings to take public comment on repository and interim storage siting issues, including the concepts of consent and transparency. First, in 2015, DOE published *Invitation for Public Comment to Inform the Design of a Consent-Based Siting Process for Nuclear Waste Storage and Disposal Facilities*, 80 Fed. Reg. 79,872 (Dec. 23, 2015) (“*2015 Invitation for Public Comment*”). DOE posed the following questions:

- (1) How can the Department of Energy ensure that the process for selecting a site is fair?
- (2) What models and experience should the Department of Energy use in designing the process?
- (3) Who should be involved in the process for selecting a site, and what is their role?
- (4) What information and resources do you think would facilitate your participation?
- (5) What else should be considered?

80 Fed. Reg. at 79,873. While the notice set a comment deadline of June 15, 2016, the deadline was later extended to July 31, 2016. 81 Fed. Reg. 15,295 (Mar. 22, 2016). The extension gave the public a total of seven months to comment.

2016. During the comment period, DOE conducted multiple public meetings with stakeholders, including tribal governments and organizations, environmental and civic organizations, and private individuals. DOE “solicited and received” hundreds of public comments and heard input from a “wide range of individuals, communities, states, Tribes, and stakeholders,” through the “multiple avenues” of public meetings and commenting opportunities. *Consent-Based Siting: Designing a Consent-Based Siting Process, Summary of Public Input* at 7 (Dec. 29, 2016) (“*2016 Public Input Summary*”). at 7. Several of the organizations and individuals sponsoring this letter participated in that process of written comments and public meetings, including Beyond Nuclear, Council on Intelligent Energy and Conservation Policy, Nuclear Energy Information Service, Nuclear Information and Resource Service, Nukewatch, SEED Coalition, Southwest Research and Information Center, Stephanie Bilenko, and David Rosen.

Public feedback was summarized in the *2016 Public Input Summary*, but not analyzed. *Id.*

2017. In 2017, DOE published a Federal Register notice seeking public comment on a report entitled *Draft Consent-Based Siting Process for Consolidated Storage and Disposal Facilities for Spent Nuclear Fuel and High-Level Radioactive Waste* (Jan. 12, 2017) (“*2017 Draft Report*”). 82 Fed. Reg. 4,333 (Jan. 14, 2017). Based on the comments DOE had received in the 2015 process, as well as input from “expert groups” like the BRC, the *2017 Draft Report* described “DOE’s current thinking regarding specific steps and broader design principles for implementing a consent-based siting process.” *Id.* at 2. The report listed eleven design principles for a consent-based siting process:

- Prioritization of Safety;
- Environmental Responsibility;
- Regulatory Requirements;
- Trust Relationship with Indian Tribes;
- Environmental Justice;
- Informed Participation;
- Equal Treatment and Full Consideration of Impacts;
- Community Well-Being;
- Voluntariness/Right to Withdraw;
- Transparency; and
- Stepwise and Collaborative Decision-Making that is Objective and Science-Base

Id. at 6. DOE provided a 90-day comment period.

In response, DOE received thirty “unique” pieces of correspondence from organizations and individuals, including Beyond Nuclear and Southwest Research and Information Center. Again,

public feedback was not analyzed. Instead, it was summarized in *Summary of 2017 Public Comments on the Draft Consent-Based Siting Process for Consolidated Storage and Disposal Facilities for Spent Nuclear Fuel and High-Level Waste* (undated) (“*Summary of 2017 Public Comments*”),

<https://www.energy.gov/sites/default/files/2021-12/ne-summary-public-comments-2017-draft-consent-based-siting-process.pdf>.

2021. On December 1, 2021, DOE published the *2021 Request for Information* in the Federal Register, with a 90-day comment period. The Federal Register notice did not explain why, at this point in time, DOE was collecting more feedback on consent-based siting -- although a press release issued at the same time called it a “restart.” (“U.S. Department of Energy Restarts Consent-Based Siting Program for Spent Nuclear Fuel, Requests Input on Interim Storage Process”) (Nov. 30, 2021).

In the Federal Register notice, DOE stated that it intended to use anticipated responses to the *2021 Request for Information*, together with comments on the *2017 Draft Report*, to “help develop a consent-based siting process for use in siting federal interim storage facilities, the overall strategy for development and operation of an integrated waste management system, and possibly a funding opportunity.” 86 Fed. Reg. at 68,245. DOE also posed a total of sixteen questions in three “Areas:”

Area 1: Consent-Based Siting Process

Area 2: Removing Barriers to Meaningful Participation

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

Id. at 68,245-46. The background information provided by the Federal Register notice was dismally incomplete and inaccurate:

- While DOE stated that it intended to rely on public comments regarding the *2017 Draft Report*, the Federal Register notice provided no link to those comments.
- DOE failed to provide a link to public comments on the *2015 Invitation for Public Comment*. Instead, the notice contained only a link to DOE’s own summary, the *2016 Public Input Summary* (and that link was broken and thus unusable).
- While the Federal Register notice provided three separate (and redundant) links to the *2017 Draft Report*, all of those links were broken and thus unusable.
- While DOE’s website regarding consent-based siting, [energy.gov/consentbasedsiting](https://www.energy.gov/consentbasedsiting), has a significant set of resources relating to DOE’s multi-year process for considering consent-based siting, no information about those resources is provided in the Background section of the Federal Register notice. The only mention of the website address that can be found in the notice is a statement in the “Disclaimer and Important Note” section that readers should go to the website “if you need assistance in a language other than English.”
- The Federal Register notice made no mention of a Q&A webinar that DOE had scheduled for December 7, 2021.

DOE did send out a Press Release on November 30, but it contained no information about the webinar. And while DOE mentioned the webinar in a November 30 email that was received by some of the organizations sponsoring this letter, the email provided a very inadequate notice period of seven days. Organizations that received the e-mail circulated it rapidly and widely.

Despite the lack of notice in the Federal Register or the Press Release, and despite the short notice given by DOE's email, more than 300 people listened to the 54-minute webinar by Dr. Kathryn Huff, Principal Deputy Assistant Secretary for Nuclear Energy, and submitted written questions.²

On December 27, 2021, DOE published a correction to the malfunctioning links to the *2017 Draft Report*. 86 Fed. Reg. 73,269. Although almost an entire month had lapsed since publication of the *2021 Request for Information*, DOE added no time to the comment period.

On January 27, 2022, DOE sent two reminder emails about the *2021 Request for Information* to an unknown list of recipients that included some of the sponsors of this letter. The first email continued to propagate an incorrect link to the *2017 Draft Report*, and the second email corrected the broken link.

IV. FATAL DEFICIENCIES IN 2021 REQUEST FOR INFORMATION

The *2021 Request for Information* is fatally incomplete, unfocused, and unclear in its purpose, because DOE has failed to do the basic work of analyzing and responding to the two rounds of public comments and multiple stakeholder meetings it held between 2015 and 2017. Affected communities have no way of knowing whether DOE agreed with their previous input on the subject of consent-based siting, or what DOE still wants to know. Furthermore, the *2021 Request for Information* is misleading, because it conveys the false impression that federal interim storage of spent reactor fuel and high-level waste has received Congressional approval, and therefore is a *fait accompli*.

A. The 2021 Request for Information is Unfocused and Unclear Because DOE Has Never Analyzed or Responded to the Comments it Already Received on Consent-Based Siting.

The *2021 Request for Information* is unfocused and unclear because, as demonstrated above, DOE has never analyzed or responded to the significant public feedback it *already has* on the issue of consent-based siting. DOE has provided summaries and digests of the written and oral comments it received in response to the *2015 Invitation for Public Comment*, and the written comments it received in response to the *2017 Draft Report*, but it has never analyzed them. Instead, in the *2021 Request for Information*, DOE asks another set of questions that are largely repetitive of questions it asked in the prior proceedings.

² The webinar is posted on DOE's website at <https://www.energy.gov/ne/consent-based-siting>.

The reiteration of previous questions begs the question, “What information does DOE think is missing at this point?” There is no way to tell, because DOE has provided no analysis of the significant amount of information it has already received. Nor has it explained why the *2017 Draft Report* is still in draft form after four years. And even though the *2021 Request for Information* repeats the same web address for the *2017 Draft Report* three times, DOE does not ask for additional comments on the report, provide the comments it has already received on the *2017 Draft Report*, or meaningfully analyze the responses from the public it has received and published that information to guide any future process.

By failing to provide focus or clarity about the purpose of its questions, in the aftermath of two previous public comment proceedings, DOE wastes the limited time and resources of affected communities. The public’s willingness to participate in serious and well-noticed DOE proceedings is well-established: when DOE sought public input on its *2015 Invitation for Public Comment*, a significant number of organizations and individuals participated and dedicated their time to the process. (While the *2017 Draft Report* had fewer commenters, this may be more attributable to a lack of outreach and associated lack of knowledge rather than unwillingness to participate). Having made a significant contribution to the BRC Report and the 2015-16 commenting process, these communities are entitled to know what information DOE still lacks, and what observation still remains to be described. Yet, the questions posed in the *2021 Request for Information* are elementary, as if DOE is going back to square one. One obvious route DOE might take in the reissuance of any future RFI is clarifying what it’s precisely doing now in the context of this long history. Has DOE, for example, dispensed with the information collected from 2015-17 and is now starting afresh? Or, consistent with particular key observations from those earlier efforts, DOE would like additional information on the following items and points of concern.

Taken together with the erroneous and incomplete character of the *2021 Request for Information*, its lack of focus or clarity gives the impression that DOE is not serious about its *Request for Information*, but is simply asking rhetorical questions for unstated purposes it has not seen fit to share. This misuse of the time and resources of the affected public undermines DOE’s own stated purpose of encouraging public trust and confidence through a consent-based siting process. 86 Fed. Reg. at 68,245. In order to prevent further “erosion” of public trust in DOE (BRC Report at viii), DOE should finalize the *2017 Draft Report* with a thorough set of responses to the comments. Or, in the alternative, DOE should prepare a new draft that clearly identifies the information it still lacks and any areas that need additional clarity, and further explain why the information is needed.

B. The *2021 Request for Information* is Fatally Misleading.

The *2021 Request for Information* is also fatally misleading. The Federal Register notice refers to “Congressional appropriations to move forward with interim storage activities,” as if Congress has authorized DOE to take responsibility for interim storage of spent fuel and high-level waste before a repository has opened. 86 Fed. Reg. at 68,245. And virtually all of the questions posed in the Federal Register notice refer to federal interim storage facilities without acknowledging that currently, such facilities are not lawful. *Id.* at 68,245-46. DOE’s language thus appears

designed to mislead affected communities into thinking that federal interim storage of spent fuel is a *fait accompli* that they must accept.

DOE's misleading language constitutes an abuse of the concept of informed consent. *See* BRC Report at 7 ("In a democracy, informed participation is at the heart of durable solutions to significant policy challenges.") DOE must correct its sleight-of-hand misinformation by acknowledging that (a) it remains Congress' prerogative – not DOE's – whether to allow federal storage of spent fuel before a repository opens; and (b) that Congress has determined that to allow federal storage of spent fuel and high-level waste before opening of a repository could permanently undermine the best strategy for isolating these highly radioactive substances from the affected communities: permanent geologic repositories. Otherwise, DOE can be justly charged with attempting to potentially misinform affected communities into sleeping on their right to participate in the political process to maximize their protection from highly toxic and radioactive materials.

C. The 2021 Request for Information is Fatally Incorrect and Incomplete.

As discussed above at page 10, the *2021 Request for Information* is incorrect and incomplete in significant respects, including citations to broken weblinks, failure to provide links to relevant documents, failure to direct readers to the resources on DOE's website, and failure to mention the December 7, 2021 webinar. While DOE corrected the broken weblink in its December 27, 2021, Federal Register notice, it did not provide any additional time for comments. Nor did DOE correct the multiple omissions of relevant information. These deficiencies render the notice fatally inadequate to inform the public regarding relevant documents and available resources.

D. DOE's Extremely Limited Outreach is Insufficient to Meet DOE's and the BRC's Goals of Broad Participation by Affected Communities.

In developing a policy on consent-based siting, we are pleased to note that DOE has recognized the importance of seeking participation by a wide spectrum of the affected public. *See 2021 Request for Information* at 68,244 (acknowledging that "communities; governments at the local, State, and Tribal levels; members of the public; energy and environmental justice groups; organizations or corporations; and other stakeholders may be interested in responding to this Request for Information") *2017 Draft Report* at 8 (defining the scope of the engaged "community" as the "local community," "local and state government," "Congressional delegations," and "any affected Tribal governing body"); *2015 Invitation to Public Comment*, 80 Fed. Reg. at 79,872 (seeking "feedback" from "communities, states, Tribes, and other interested stakeholders"); BRC Report at 8 ("The job of better communicating information and effectively engaging different constituencies must be seen as one of the core missions of a revitalized waste management program.").

Contrary to that wise recognition, in seeking comment on the *2021 Request for Information*, DOE relied principally on an incomplete and inaccurate Federal Register notice, supplemented by an incomplete Federal Register notice and an incomplete email to an unknown list of potential commenters.

The inadequacy of DOE's approach can be seen clearly by comparing DOE's two previous proceedings for taking comments on the concept of informed consent. In its *2015 Invitation to Public Comment*, DOE published a Federal Register notice *and* reached out to affected communities with invitations to public meetings. As a result, DOE received 450 "unique pieces of correspondence." *2016 Public Input Summary* at 7. DOE's *2016 Public Input Summary* was 98 pages in length.

In contrast, DOE's only public notice of the *2017 Draft Report* was to post a request for comment in the Federal Register. In response, DOE received only thirty "unique pieces of correspondence." *Summary of 2017 Public Comments* at 1. And its *Summary of 2017 Public Comments* was only eleven pages in length.

As demonstrated by the fact that several hundred people listened to DOE's December 7 webinar in spite of the extremely limited notice provided, there is great public interest in DOE's consent-based siting process. Many of the groups and individuals sponsoring this letter have participated in previous BRC and DOE proceedings and would do so again if given adequate notice of DOE's specific questions and concerns. Their input is essential to ensuring that DOE obtains the views of the communities that historically have been the most likely hosts for toxic and radioactive industries and storage facilities in the U.S. DOE must do a better job of reaching out to affected communities, including documenting the steps it has taken so that the adequacy of its outreach efforts can be assessed.

V. REQUEST FOR WITHDRAWAL, REVISION AND RE-PUBLICATION

As demonstrated above, the *2021 Request for Information* is fatally incorrect, incomplete, unclear, and misleading. In addition, publication in the Federal Register is demonstrably inadequate to obtain meaningful participation by affected communities, including Native American tribes and organizations.

To rectify these significant defects and deficiencies, in a manner consistent with the BRC Report and DOE's own goals for a well-informed and fair consent-based siting process, DOE should withdraw the *2021 Request for Information*, and do the work of analyzing and responding to previous public comments on the issue of consent-based siting.

If, after completing that process, DOE believes it is still necessary to circulate a *Request for Information*, DOE should ensure that the *Request for Information* has the following features:

- A clear explanation of DOE's current views on the appropriate elements of a consent-based siting process, and specific identification of any information that is still missing and on which DOE seeks a response;
- Correct and complete citations to all relevant documents in the history of the consent-based siting proceedings;

- An accurate description of current federal law regarding spent fuel storage and disposal, making it clear that federal interim storage has not been approved by Congress and therefore it is not a *fait accompli*;
- At least a 90-day period for written responses, and opportunities to provide input through interviews and public meetings; and
- A demonstration that the *Request for Information* has been circulated to affected communities via multiple means of communication, including direct correspondence and solicitations of oral input.

Thank you for your consideration, and we look forward to your response to our concerns.

Sincerely,



Diane Curran