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July 29, 2016

**Via First Class Mail and Email ([consentbasedsiting@hq.doe.gov](mailto:consentbasedsiting@hq.doe.gov))**

Mr. Andrew Griffith  
Associate Deputy Assistant Secretary, Fuel Cycle Technologies  
U.S. Department of Energy  
Office of Nuclear Energy  
1000 Independence Ave., SW  
Washington D.C. 20585

**Subject: Response of the Nuclear Energy Institute to DOE Invitation for Public Comment (IPC) to Inform the Design of a Consent-Based Siting Process for Nuclear Waste Storage and Disposal Facilities**

Dear Associate Deputy Assistant Secretary Griffith:

On behalf of the commercial nuclear industry, the Nuclear Energy Institute, Inc. (NEI)<sup>1</sup> is pleased to comment on the U.S. Department of Energy's Invitation for Public Comment (IPC) 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). The Invitation states that the Department "is implementing a consent-based siting process to establish an integrated waste management system to transport, store, and dispose of commercial spent nuclear fuel and high level defense radioactive waste," and that DOE commits to "work with communities, tribal governments and states across the country that express interest in hosting any of the facilities identified as part of an integrated waste management system."

Nuclear energy is an integral part of the country's diversified electricity generation portfolio and is by far the country's largest source of emission-free electricity. Nuclear energy provides a safe, affordable, and reliable electricity resource that currently provides 20% of the nation's

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<sup>1</sup> NEI is responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including regulatory, financial, technical and legislative issues. NEI members include all companies licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel cycle facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

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electricity. With \$40–50 billion in annual electricity sales and over 100,000 personnel involved in production, the nuclear energy industry is an engine for job creation and America's economic growth.

In its Invitation, DOE notes that although commercial nuclear energy has been generated for over half a century, the United States does not have a permanent disposal solution for spent nuclear fuel (SNF) and high-level waste (HLW), and that previous attempts to develop long-term solutions for storage and disposal of this waste “have resulted in controversy, litigation, protracted delays, and ultimately a failure to address the problem.” Notably, the Invitation does not allude to DOE's role in creating that controversy, litigation, delay and failure to resolve the radioactive waste disposal problem, or mention that the Nuclear Waste Policy Act (“NWPA”) continues to require DOE to develop a disposal facility at Yucca Mountain.

Although the Invitation implies that DOE plans to implement a consent-based siting process, we respectfully suggest that the Department must follow current law, under which the proposed Yucca Mountain project remains the only SNF and HLW repository authorized to date. DOE should therefore request money from Congress to support the efforts of the U.S. Nuclear Regulatory Commission to complete the Yucca Mountain licensing review. If DOE does proceed with a consent-based siting approach, we emphasize that this would not, and legally cannot, substitute for compliance with the NWPA.

Moreover, any new DOE siting process should be used only in instances where the Department is establishing a *new* facility. Such a process is not appropriate, nor should it be imposed, for projects where siting assent has already been obtained or is currently being negotiated, as is the case for the interim storage projects proposed for Andrews County, Texas and southeast New Mexico.

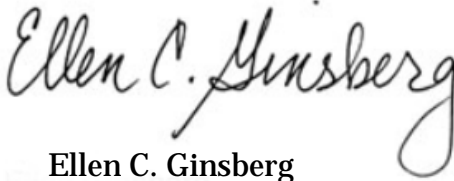
In addition, DOE has an obligation to nuclear utilities and their customers, as well as other stakeholders, not to divert money from the Nuclear Waste Fund (NWF) for programs not authorized by the Nuclear Waste Policy Act. Because Congress has not approved a new nuclear waste disposal program, NWF money should not be used to explore the siting of a new radioactive waste disposal facility. In this regard, we distinguish siting a new nuclear waste disposal facility from funding benefits for the Yucca Mountain project, as the latter is authorized under the NWPA.

NEI's comments also discuss a number of domestic and international nuclear waste storage and disposal projects that could provide useful insights as DOE considers a consent-based siting process. With regard to the examples of unsuccessful siting, we urge the Department to explore the reasons for the failures that occurred and apply those lessons-learned to DOE's future siting efforts.

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We thank the Department in advance for its consideration of NEI's comments.

Sincerely,

A handwritten signature in black ink that reads "Ellen C. Ginsberg". The signature is written in a cursive style with a large, looping "G" at the end.

Ellen C. Ginsberg

Attachment

cc: The Honorable Ernest Moniz, Secretary, U.S. Department of Energy  
Stephen Croley, Esq., General Counsel, Department of Energy  
Margaret Doane, Esq., General Counsel, U.S. Nuclear Regulatory Commission

# NEI RESPONSE TO DOE INVITATION FOR PUBLIC COMMENT TO INFORM THE DESIGN OF A CONSENT-BASED SITING PROCESS FOR NUCLEAR WASTE STORAGE AND DISPOSAL FACILITIES

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On behalf of the commercial nuclear industry, the Nuclear Energy Institute, Inc. (“NEI”)<sup>1</sup> is pleased to comment on the U.S. Department of Energy’s “Invitation for Public Comment (IPC) 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).<sup>2</sup> NEI’s responses to the questions posed by the Department of Energy (“DOE” or “the Department”) are set forth below.

*IPC Question 1: How can the Department of Energy ensure that the process for selecting a site is fair? Consent-based siting seeks to ensure fairness in the distribution of costs, benefits, risks and responsibilities now and in future generations. How, in your view, can fairness be best assured by the process for selecting a site?*

## **I. NEI Response to IPC Question 1**

### **A. Introduction and Overview**

We commend DOE for recognizing that developing and presenting to the public a fair consent-based waste storage or disposal facility siting process is critically important to its ultimate success. According to Merriam-Webster, “fair” is defined as “in accordance with the rules or standards; legitimate.” Synonyms include just, equitable, honest, upright and trustworthy. By including specific steps and features that convey DOE’s commitment to fairness, to a just, equitable and honest process, DOE can instill in the public, confidence in that process.

By adhering to those steps and satisfying all of its obligations, including those under the Nuclear Waste Policy Act (“NWPA”)<sup>3</sup> and any future nuclear storage and disposal

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<sup>1</sup> NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including regulatory, financial, technical and legislative issues. NEI members include all companies licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel cycle facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

<sup>2</sup> The Department of Energy plans to conduct a consent-based siting process in multiple phases. During this first phase, DOE will seek public input regarding the most important elements to consider in a consent-based siting process. The second phase will focus on “designing a consent-based siting process to serve as a framework for collaborating with potentially interested host communities.” In later phases, DOE will use the resulting process to work with interested communities. As the Department recognizes, many key questions relating to a consent-based siting process have yet to be resolved. See U.S. Dep’t. of Energy, *Integrated Waste Management-Consent-Based Siting* (2016), pp. 9, 11-12. <http://energy.gov/ne/downloads/integrated-waste-management-and-consent-based-siting-booklet> (“DOE Consent-Based Siting Briefing”).

<sup>3</sup> See Nuclear Waste Policy Act of 1982, H.R. 3809, 97th Cong. Pub. L. 97-425 (1982) (“NWPA”).

programs, DOE can give the public confidence that the U.S. government will be a trustworthy partner as a proposed project proceeds. This is not to say, however, that even after a fair siting process is put into place and followed, there will not be dissenters who oppose the project. Rather, a fair siting process sponsored by a trustworthy partner (be it the government or a private developer) should be capable of withstanding public and legal scrutiny, and is more likely to lead to durable consent.

A fair siting process can take many forms but all share certain common features including, as a minimum, the following:

- Opportunity for interested parties to express their views
- Availability of sufficient resources to evaluate differing views
- Flexibility in the terms of the siting framework and the form of consent
- Transparency and a rational decision-making process
- A defined and expeditious schedule for milestones and decision-making
- Compliance with the obligations of the decision made.<sup>4</sup>

Properly implementing each of those features will maximize the likelihood of obtaining consent to the siting of a nuclear waste storage or disposal facility. Collectively, these attributes should engender trust in the siting process and in those responsible for implementing it. Without that trust, in our view, no siting process will lead to durable consent.

Although DOE seeks to construct a fair consent-based siting process, the Department undermines its own potential for success by its continuing failure to comply with the Nuclear Waste Policy Act.<sup>5</sup> DOE's noncompliance suggests that obligations arising under future siting decisions may remain unsatisfied *even if those decisions are reflected in federal law*. DOE's unilateral termination of the nuclear waste repository project at Yucca Mountain is unfair to the nuclear electric customers and utilities that

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<sup>4</sup> These attributes are consistent with those identified by the 2012 Blue Ribbon Commission Report. See U.S. Dept. Energy, *Report to the Secretary of Energy from the Blue Ribbon Commission on America's Nuclear Future* (January 2012) ("Blue Ribbon Commission"); DOE Consent Based Siting Briefing, p. 10.

<sup>5</sup> In enacting the NWP, Congress developed, and the President signed into law, a carefully-crafted process that provided an unparalleled opportunity for state, local, and tribal participation in the siting process, including the right to a state siting veto. More than seven years have passed since the Department unilaterally determined that Yucca Mountain was "not a workable option," terminated the program, and tried to withdraw its license application. *NARUC v. DOE*, 680 F.3d 819, 821 (D.C. Cir. 2012). That notwithstanding, Section 160 of the NWP designates Yucca Mountain, Nevada as the sole site to be characterized for a spent nuclear fuel and high level waste repository. 42 U.S.C. § 10172. The NWP requires the Secretary to conduct "an orderly phase-out of site specific activities at all candidate sites other than the Yucca Mountain site" and "and terminate all site specific activities . . . at all candidate sites other than the Yucca Mountain site . . ." 42 U.S.C. § 10172(a)(1)-(2). In addition, Section 161(a) of the NWP prohibits the Secretary from "conduct[ing] site-specific activities with respect to a second repository unless Congress has specifically authorized and appropriated funds for such activities." 42 U.S.C. § 10172(a).

have paid more than \$20 billion into the Nuclear Waste Fund (“NWF”),<sup>6</sup> to the utilities with decommissioned nuclear plants who wish to allow their sites to be returned to potentially unrestricted uses, to the local jurisdictions that supported (and continue to support) the Yucca Mountain project, and to the nation’s taxpayers who must now pay for DOE’s inaction. DOE’s credibility—and the public confidence it seeks to engender as it attempts to construct a fair consent-based siting process—will continue to be undercut as long as the unlawful termination of the Yucca Mountain program continues.

DOE can begin to remedy negative perceptions regarding its credibility and willingness to meet its statutory responsibilities by supporting the efforts of the U.S. Nuclear Regulatory Commission (“NRC”) to complete the review of the Department’s Yucca Mountain repository license application. The Department’s efforts to develop a consent-based siting program for *future projects* are more likely to be taken seriously by the public and stakeholders if, in parallel, DOE meets its legal obligation to continue the Yucca Mountain program. However, we emphasize that action on a consent-based siting program does not and legally cannot substitute for compliance with the Nuclear Waste Policy Act, which remains in force.

Another overarching point: if DOE does go forward with a consent-based siting process, it would be unfair and likely counterproductive to impose such a new process on existing, *i.e.*, relatively advanced, projects. Where local jurisdictions and states have voluntarily engaged in negotiations with potential interim storage facility developers, DOE should allow those interactions to proceed without intervention.<sup>7</sup> This point has very practical implications, as at least two projects to develop consolidated interim SNF storage facilities in the United States are well underway. In April of this year, Waste Control Specialists (“WCS”) filed its application for an NRC license for a facility to be located in Andrews County, Texas. A second interim storage facility is being planned by Holtec International (“Holtec”) in southeastern New Mexico; Holtec is expected to file the NRC license application for that site later this year. Both WCS and Holtec have expended considerable effort to gain the consent of their respective host states and communities. The Department should not interfere with the WCS and Holtec efforts (and perhaps others that may be in the offing in the near term) by imposing on them any consent-based siting process DOE ultimately develops. Nor should DOE require the WCS and Holtec projects to be stayed or delayed while DOE determines whether there are other communities that also might be interested in hosting storage or disposal facilities. Grafting a new siting process onto ongoing projects would be particularly unfair and provide no measureable benefit. Effectively or actually mandating a new siting process retroactively would create delay and/or burden for the project sponsors,

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<sup>6</sup> U.S. Dep’t of Energy, Office of the Inspector General and Office of Audits and Inspection, “*Audit Report: Department of Energy Nuclear Waste Fund’s Fiscal year 2015 Financial Statement Audit*,” OAI-FS-16-03, p. 15 (2015); The Nuclear Waste Fund is established in the NWPA, § 302(c), 42 U.S.C. 10222(c).

<sup>7</sup> As DOE recognizes, “voluntary efforts to site a consolidated waste storage facility have emerged in Texas and New Mexico, where a private waste management company and a consortium of local governments, respectively, have indicated interest in developing such a facility.” See DOE Consent-Based Siting Briefing, p. 8.

the potential host jurisdictions, and the consumers of the storage services to be provided.

## **B. Attributes of a Fair Consent-based Siting Process**

### **1. Opportunity for Interested Parties to Express their Views**

Experience strongly suggests that consent to the siting of a new nuclear waste facility will not be obtained unless the host community, the host state, and the public have a fairly in-depth understanding of any given project. Further, both proponents and opponents should have an opportunity to air their views. And meaningful and constructive interaction can be formal or informal. How early that engagement begins and how frequently it occurs are more important than the specific process that governs the engagement.

For a proposed government-owned storage or disposal facility, it would be reasonable to expect DOE to interact with representatives of the local and host state government, as well as with local community members and other stakeholders. Whether government or private, the project sponsor should interact with elected or appointed officials as well as with local residents. Those interactions may take the form of public meetings in which there is an opportunity for discussion, and/or written comments and responses. Ultimately, the public should be apprised of any agreement related to the project, including information on the contours of the project/process, terms and conditions, and other commitments made by the relevant parties.

Particularly with respect to siting a nuclear waste storage facility, DOE (or the private developer if there is one) should explain to interested members of the public how the facility will fit into an integrated waste disposal program. This information will allow local jurisdictions and the state to examine the program's expected duration, potential monetary and other benefits, and potential costs. Regardless of whether DOE is the project developer or merely the consumer of available storage or disposal capacity, the Department should seek to build lasting and trusting partnerships with communities willing to host the facility.

Existing adjudicatory processes established pursuant to the Atomic Energy Act of 1954 ("AEA") and the National Environmental Policy Act ("NEPA") offer additional opportunities for stakeholders and states and local governments to provide input on and obtain relevant information about a proposed project. For example, in the context of the Yucca Mountain repository licensing process, NRC regulations provide that the Commission "shall permit intervention by the State and local governmental body (county, municipality or other subdivision) in which the geologic repository operations area is located, and by any affected Federally-recognized Indian Tribe." 73 Fed. Reg.

63,029, 63,031 (citing 10 C.F.R. § 2.309(d)(2)(iii)).<sup>8</sup> Commission regulations also “afford an interested State, local governmental body (county, municipality or other subdivision), and Federally-recognized Indian Tribe that has not been admitted as a party . . . a reasonable opportunity to participate in a hearing” on the Yucca Mountain license application. 10 C.F.R. § 2.315(c). The interested governmental entity would have a broad right of participation despite not being a full party to the proceeding. NRC regulations also require that the interested governmental entity “shall be permitted to introduce evidence, interrogate witnesses where cross examination by the parties is permitted, advise the Commission without requiring the representative to take a position with respect to the issue, file proposed findings in those proceedings where findings are permitted, and petition for review by the Commission . . . with respect to the admitted contentions.” 73 Fed. Reg. 63,029, 63,031.

Importantly, the adjudicatory process often leads to resolution of issues through settlement or other actions. It is fairly common for a license applicant to revise its application or negotiate a settlement to resolve issues that are the subject of admitted contentions. By resolving issues of concern, parties can achieve meaningful and lasting consent. For example, during a recent NRC licensing proceeding on the renewal of the Prairie Island Nuclear Generating Plant Independent Spent Fuel Storage Installation (“ISFSI”) license, applicant Northern States Power and intervenor Prairie Island Indian Community settled all of the Community’s contentions,<sup>9</sup> which resulted in termination of the proceeding.

Beyond the adjudicatory process, NRC regulations require detailed safety and environmental reviews of a proposed storage or repository project, both of which allow members of the public to air concerns. When conducting its detailed safety review of an application, the NRC staff generally holds public meetings so that the NRC staff can ask the applicant questions and receive additional (written) input on the application. In performing the environmental review for a storage or disposal site, as required by NEPA and NRC regulations, the NRC staff will engage stakeholders in determining the scope of the review. The agency’s evaluation and conclusions under NEPA are documented in a

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<sup>8</sup> In response to DOE’s 2008 application to construct a geologic repository at Yucca Mountain in Nye County, Nevada, the NRC issued a Notice of Hearing and Opportunity to Petition for Leave to Intervene on the DOE Yucca Mountain Application. 73 Fed. Reg. 63,029 (Oct. 22, 2008).

<sup>9</sup> *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Independent Spent Fuel Storage Installation), Order (Approving Settlement and Dismissal of Contentions 2 through 4), slip op. (Mar. 10, 2015) (unpublished). Applicant Northern States Power and the intervenor, the Prairie Island Indian Community, developed a Cultural Resource Management Plan that the applicant followed when implementing its ISFSI expansion. Pursuant to the Plan, the applicant conducted testing at the proposed ISFSI location pursuant to a joint protocol with the Community; the Community participated in the testing and concurred in the testing report. Additionally, the applicant revised its aging management program on high burnup fuel and agreed to a license condition requiring the submittal to the Community of certain evaluations related to the continued storage of high burnup fuel in the ISFSI. *See Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Independent Spent Fuel Storage Installation), LBP-15-30, 82 N.R.C. \_\_\_, slip op. (Nov. 4, 2015).



draft Environmental Impact Statement (“EIS”); members of the public may comment on the draft EIS and have their views considered.<sup>10</sup>

## **2. Availability of Financial Resources to Evaluate Differing Views about the Project**

Depending on the nuclear waste storage or disposal project being proposed, a consent-based siting process may include the opportunity for local jurisdictions to obtain funds to evaluate the project.<sup>11</sup> In general, fairness dictates that the parties in interest (e.g., the host location and the state) should have sufficient resources to ensure that they can base their opinion on accurate information. In fact, potential host communities and states will likely expect to receive funds for studies and other evaluations. The mechanics of the funding may, for example, take the form of a grant by a federal or state government entity, or a private project sponsor.<sup>12</sup>

DOE’s proposal for consent-based siting implies that a new nuclear waste disposal project other than that at Yucca Mountain may be developed.<sup>13</sup> Because no new nuclear waste disposal program has been approved by Congress, no money from the Nuclear Waste Fund should be used to explore siting a new disposal facility. We distinguish siting a new nuclear waste disposal facility from funding benefits for Yucca Mountain, as those benefits may be funded with money from the NWF.<sup>14</sup> While we support some funding for local investigation and evaluation, we emphasize that without a change in the law, money from the Nuclear Waste Fund may not be diverted to support an alternative nuclear waste disposal program.<sup>15</sup>

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<sup>10</sup> There also may be other Federal agencies (e.g., the U.S. Department of Interior, the U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers, the U.S. Federal Railway Administration) and State agencies with jurisdiction over some aspects of the siting of nuclear waste storage and disposal facilities that may provide additional opportunities for public participation in administrative processes.

<sup>11</sup> See DOE Consent-Based Siting Briefing, p. 11.

<sup>12</sup> Local jurisdictions, in particular Nye County, NV, have long been supportive of the Yucca Mountain project. This may reflect their knowledge of the project’s purpose and the scientific evaluations supporting it, as well as their interactions with officials representing DOE and the nuclear industry. In addition to the avenues previously discussed, the NRC’s Yucca Mountain regulations specifically provide for research and development programs to address safety questions. See 10 C.F.R. §§ 63.21(c)(16), 63.32(b)(4).

<sup>13</sup> See DOE Consent-Based Siting Briefing, pp. 26-29. See also *NARUC v. DOE*, 736 F.3d 517, 519 (D.C. Cir. 2013). See also Yucca Mountain Development Resolution, H.J. Res. 87, 107th Congress, Pub. L. 107-200 (2002).

<sup>14</sup> See Report of the Blue Ribbon Commission, p. 58; NWPA, 42 U.S.C. 10222.

### **3. Flexibility in the Siting Framework and the Form of Consent**

In developing a consent-based siting process, DOE should (and apparently does) recognize that a restrictive, one-size-fits-all definition of and approach to “consent” is likely to be counter-productive.<sup>16</sup> Each potential location for a proposed facility will be different, ranging from somewhat different to vastly different. The host communities may have different local customs, different views on federal, state and local government action, and different views on siting industrial facilities generally as well as nuclear storage or disposal facilities in particular. Those differences are both real and important. They should be carefully considered in any consent-based siting process, as recognizing them is likely to be key to a project developer’s success in obtaining consent. These differences require that the Department develop a somewhat flexible siting framework: the process and the form of consent may need to differ from location to location, from state to state, and among tribal governments. DOE also should anticipate that the conditions that the government or a private developer might be asked to satisfy will vary from site to site.<sup>17</sup>

Similarly, there may be different expressions that meet the objective of consent. Of critical import, however, is ensuring that once an agreement is made, it is durable. A consent-based siting agreement must be able to withstand changes in politics and administrations because project developers (whether the government or a private entity) require sufficient certainty that they can make a reasonable decision based on likelihood of the success of the project. A siting agreement could be embodied in a law passed by a state legislature or Indian tribe council. A contract between a state and developer also could provide the certainty required to encourage investment in siting, licensing and constructing a storage or disposal facility. In sum, the form of the consent may vary, but its essential features must create sufficient certainty to encourage and facilitate investment of time and money.

### **4. Transparency and a Rational Decision-making Process**

We recognize that decisions will be made by the project developer (be it the government or a private entity) and by the state and local jurisdiction that would host the facility. The need for a transparent and rational decision-making process applies to all of these interested parties, although these comments are oriented primarily toward the Department and the project developer.<sup>18</sup> Solid decision-making is more likely to lead to

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<sup>16</sup> See DOE Consent-Based Siting Briefing, pp. 10-12.

<sup>17</sup> We recognize that, at least at this time, it is difficult if not impossible to identify all the ways in which a siting process might be tailored to fit the circumstances of a particular situation, but including some form of the six features suggested in the introduction to question 1 would help provide both the appropriate structure and the needed flexibility.

<sup>18</sup> In its report, the Blue Ribbon Commission addressed the need for transparency in the siting process, defining “transparent” as the opportunity for all stakeholders to understand key decisions and engage in the process in a meaningful way. Similarly, in its Consent-Based Siting Briefing, DOE also recognizes the need to: “establish and maintain the information-sharing and transparency mechanisms that will be

consent if the decision-makers are credible and have gained the trust of the affected community; if they have appropriately considered the information accrued; and if they explain the bases for the choice being made in a timely, objective, and comprehensible manner. Those features should create transparency and lead to a rational decision.

However, following the approach outlined in these comments will not necessarily create unanimity of view in support of a decision to site and operate a nuclear waste storage or disposal facility in a particular community or state. There may be some citizens, legislators or other policymakers who, for whatever reason, simply do not believe it is in their interest for their jurisdiction to host such a facility. That should not, therefore, be the measure of consent.

DOE should recognize that even assuming a fair siting procedure that allows for affected or interested parties to participate, a consent-based siting process does not connote consensus by all of these parties. In fact, an expectation of unanimity simply is unrealistic. Throughout our nation's history, decisions made and implemented have rarely, if ever, received unanimous, or even near-unanimous, approval. As just one example, the Department of Energy Organization Act of 1977, which created the Department, passed both Houses of Congress with large majorities, but was by no means unanimous.<sup>19</sup> Yet it cannot be credibly argued that the Department was created without the consent of the Federal legislature.

### **5. A Defined and Expeditious Schedule for Milestones and Decision-making**

Should DOE obtain the necessary statutory authority for a consent-based siting process, that process, once implemented for any given project, must proceed expeditiously. An expeditious, timely process, one for which the schedule is well communicated and maintained and firm commitments are met, is a necessary component for establishing and maintaining trust. In contrast, to those who are not deeply involved or generally knowledgeable, delay may appear to reflect waning support for the project, a failure to obtain necessary funds to support the siting process or project itself, or a myriad of other problems. Simply stated, delay is likely to engender public distrust and, potentially, hostility.<sup>20</sup>

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needed to build confidence in the process, assure all participants that they are working from the same shared basis of knowledge, and establish trust that future facilities will be sited and operated in a manner that fully protects the public and the environment. DOE has endorsed the proposition that prospective host jurisdictions must be recognized as partners . . . ." Report of the Blue Ribbon Commission at Sec. 6, p. 47; DOE Consent Based Siting Briefing at p. 12.

<sup>19</sup> See <https://www.congress.gov/bill/95th-congress/senate-bill/826/actions> (providing the legislative history of Senate Bill No. 826). Prior to being signed into law as Pub. Law 95-91, S.826 passed the House of Representatives by a vote of 353-57 and the Senate by a vote of 76-14.

<sup>20</sup> The Department is aware of this issue. In its Consent-Based Siting Briefing, DOE identifies as a key issue "how to balance the need for flexibility and adaptability in a staged process with the need for assurance that the process will move forward. Rigid deadlines have been a hallmark of previous waste

The importance of timeliness in developing a fair consent-based siting approach is vividly demonstrated by the criticism DOE has received for its delay. More than eighteen years have elapsed since the Department missed the January 31, 1998 statutory deadline to begin disposal of the nation's commercial spent nuclear fuel. More than seven years have passed since DOE deemed the Yucca Mountain repository project "unworkable" and unilaterally terminated the program. And more than three years have passed since DOE published its January 2013 Strategy for the Management and Disposal of Used Nuclear Fuel and High Level Radioactive Waste ("DOE Strategy"), wherein DOE announced that it would pursue a consent-based strategy. If DOE does create a consent-based siting process for new projects, stakeholders will need assurance that the process is likely to yield results that justify the effort and expense.

## **6. Compliance with the Obligations of the Decision Made**

It is axiomatic that a fair process is one in which all parties to an agreement comply with the terms of that agreement, fulfill commitments made, and satisfy any conditions that may have been established. It would be ideal to have an iron-clad means of enforcing a consent-based siting decision, but as a practical matter, even that could be subjected to years of litigation and inaction.

As noted above, the Department's decision to jettison the Yucca Mountain repository program without any basis or authority to do so is exactly the kind of failure to meet an obligation that DOE should avoid going forward. Not only is DOE's action patently unfair, but it has already forced U.S. taxpayers to foot the bill for almost \$5 billion in damages to compensate Standard Contract holders and their customers.<sup>21</sup> No siting process will be successful if the parties do not abide by the decision culminating from that process.

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management efforts that have not worked well. At the same time, Congress, stakeholders, and the public must have confidence that progress is being made." DOE Consent-Based Siting Briefing, at p. 11.

<sup>21</sup> U.S. Department of Energy, Office of the Inspector General and Office of Audits and Inspection, "Audit Report: Department of Energy Nuclear Waste Fund's Fiscal year 2015 Financial Statement Audit," OAI-FS-16-03, at attachment pg. 20 (December 2015). By its own estimate, DOE's liability could reach \$ 29 billion, assuming that the Department meets its NWPA obligation to remove commercial spent nuclear fuel from interim storage facilities by 2021.

*IPC Question 2: What models and experience should the Department of Energy use in designing the process? The challenges and opportunities of site selection drive us to continue to learn from previous or ongoing examples. From your perspective, what experience and models do you think are the most relevant to consider and draw from in designing the process for selecting a site?*

## **II. NEI Response to IPC Question 2**

There are several real-world examples of domestic and international nuclear waste storage and disposal projects that should be considered as DOE seeks to establish a new, consent-based process for siting nuclear waste storage and disposal facilities. As DOE has recognized,<sup>22</sup> some of these examples provide useful information on how to design such a process. There are also lessons to be learned from those efforts that failed.<sup>23</sup> As a general precept it may be reasonable to expect that a current host jurisdiction will be more receptive to siting a nuclear waste storage and disposal facility if the host community is familiar and comfortable with safely-conducted nuclear activities, such as nuclear power generation or low-level radioactive waste disposal. It also stands to reason that where host communities have built positive working relationships with a plant owner or operator and the local and/or Federal regulatory agencies that provide oversight, community members may be more inclined to consent to a proposal to site a new storage and disposal facility. By contrast, when DOE or a private developer is seeking to site its facility in a community that has not had previous experience with a nuclear (or even another large industrial facility), the care and attention given to the kinds of outreach described above becomes even more critical.

Further, there may be value in DOE's considering use of site-specific advisory boards similar to the eight "local" Environmental Management Site-Specific Advisory Boards (EMSSABs) that have been constituted pursuant to the Federal Advisory Committee Act ("FACA"). The use of these boards allows the general public to have access to information relevant to specific DOE sites undergoing environmental remediation. Advisory board presentations, reviews and recommendations are publicly available. The recommendations are not legal requirements. While only one FACA-chartered agency-wide EM SSAB exists, these 8 local boards<sup>24</sup> have been organized under its umbrella

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<sup>22</sup> See DOE Consent-Based Siting Briefing, pp. 13-14.

<sup>23</sup> These non-technical failures of the nuclear waste program would include the termination of the Yucca Mountain program, the termination of the Nuclear Waste Negotiator's Monitored Retrievable Storage (MRS) facility siting efforts, the termination of the second repository program, and the termination of the Hanford (Washington) and Deaf Smith County (Texas) site characterization efforts, among others. These examples illustrate that consent-based siting is not necessarily the panacea for the problems that have beset the nuclear waste program. While consent from the host jurisdictions may reduce the likelihood of failure, many factors, including political will, contribute to a program's success or failure.

<sup>24</sup> These local boards include the Hanford Advisory Board, Idaho National Laboratory Citizens Advisory Board, Northern New Mexico Citizens' Advisory Board, Nevada SSAB, Oak Ridge SSAB, Savannah River Site Citizens Advisory Board, and Portsmouth SSAB and Paducah Citizens Advisory Board.

charter. DOE has a long history with these sites and these local EMSSABs, and has developed extensive practices for dissemination of information to the public through the local boards as well as receiving recommendation and other inputs from them. Building on this experience, DOE should consider establishing somewhat similar local boards for sponsored consent-based sites, not as an approval entity but rather as a local, multi-interest group of citizens who may make observations and recommendations.

## **A. Lessons Learned from Successful Facility Siting Efforts**

### **1. Olkiluoto Island Geologic Repository, Finland**

The 2015 decision to grant a license to construct a geologic nuclear waste disposal facility at Olkiluoto Island in Finland suggests that building on previous positive experience can be an effective means of obtaining consent for a future project. As summarized in the 2012 Blue Ribbon Commission Report (at p. 49), Finland began its efforts to site a deep geologic repository with a three-step process: a nationwide screening process was undertaken in 1983; preliminary site investigations were conducted from 1986 to 1992; and detailed site investigations and environmental impact assessments on four sites were conducted from 1993 through 2000. All four sites were found to be technically suitable for a geologic repository but local support for a repository was strongest in the sites that each already hosted two operating nuclear reactors—Olkiluoto Island in the community of Eurajoki, and the community of Loviisa.<sup>25</sup>

Although the local Olkiluoto community arguably had a basis for concluding that a repository could be constructed and operated safely (and that Finnish regulators would ensure that was the case), the Eurajoki municipal council voted against the Olkiluoto site when it was first identified as a potential site in 1987. In its efforts to reverse Eurajoki's initial opposition to the repository, the company charged with developing the repository addressed the need for more effective financial benefits for hosting the facility (including tax revenues and a municipal compensation package), and also improved its community engagement program.<sup>26</sup> By the time the municipal council voted again in 2000 on a decision in principle to host a repository, it voted 20-7 in favor of the project. The Finnish government followed with a positive decision-in-principle in December 2000, and Finland's parliament overwhelmingly approved of the program by a vote of 159 to 3 in May 2001.

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<sup>25</sup> The two reactors at Olkiluoto commenced operation in 1978 and 1980, respectively. A third nuclear reactor is now under construction at Olkiluoto, and a repository for low and intermediate level waste began operating at the same site in 1992.

<sup>26</sup> Gibney, Elizabeth, *Why Finland Now Leads the World in Nuclear Waste Storage*, *Nature*, Dec. 2, 2015, available at <http://www.nature.com/news/why-finland-now-leads-the-world-in-nuclear-waste-storage-1.18903> (last visited May 5, 2016).

Although any ultimate licensing decision is based on technical matters related to safety and environmental stewardship, the 2015 decision granting the Olkiluoto repository license also was supported by the community. This is attributable, at least in part, to its twenty years of experience with other safely operated nuclear projects. The community also had an understanding of and appreciation for the associated regulatory processes, which apparently allowed it to put into context various actions by the project developer.

## **2. Waste Control Specialists Consolidated Interim Storage Facility**

On April 28, 2016, Waste Control Specialists (“WCS”) submitted to the NRC a license application to construct and operate a Consolidated Interim Storage Facility (“CISF”) for commercial used nuclear fuel at its 14,000 acre facility in Andrews County, Texas. As proposed, the CISF would be built adjacent to WCS’s existing low level radioactive waste (“LLRW”) disposal facilities.<sup>27</sup> We understand that this project has been received positively at both the local and state levels.

WCS’s history of safe disposal operations has been a significant factor in its approach to obtaining consent for the CISF. Construction of the first hazardous waste landfill began in 1995 at the WCS Andrews County Facility. WCS now holds multiple state and federal licenses and permits to treat, store, and dispose of LLRW at its Andrews County facility. WCS operates several other independent storage and disposal facilities: a Hazardous Waste Facility, a Byproduct Disposal Facility, a LLRW storage pad, a Federal Waste Facility, and the Texas Compact Waste Facility. WCS began disposing of commercial LLRW disposal from the Texas Compact (the States of Texas and Vermont) in 2012. In 2013, WCS began providing similar disposal options for DOE at the Federal Waste Facility. The Texas legislature began allowing LLRW disposal from additional states in 2011 and in 2014, the WCS LLRW license was amended to allow the disposal of large quantities of depleted uranium.

The stringent regulatory scheme under which the CISF facility will be licensed and operated also is likely to have helped foster confidence its activities can be carried out safely and competently. Licensing, permitting, and oversight for WCS’s hazardous material and LLRW disposal operations are currently managed by a strong state regulator, the Texas Commission on Environmental Quality (TCEQ).<sup>28</sup> For the proposed CISF, the NRC will determine whether a license should be granted and will oversee CISF performance once it is operational. The NRC also will review the fabrication of the storage casks, inspect the operations of the interim storage facility prior to cask loading, observe initial cask loadings, and periodically inspect cask loading operations. The Texas TCEQ would likely continue to monitor additional site activity as part of the state giving its consent.

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<sup>27</sup> The sources of information for this discussion include the WCS website (e.g., <http://www.wcstexas.com/about-wcs/economic-impact>) and the website for the proposed CISF (e.g., <http://wcsstorage.com/project-overview/>; <http://wcsstorage.com/faq/>).

<sup>28</sup> Under the NRC Agreement State program, Texas has the authority to license and inspect byproduct, source, or special nuclear materials used or possessed within its borders.

In addition to WCS's history and the rigorous regulatory framework under which this facility would be licensed and operate, WCS has made significant efforts to earn consent from the local community and the State of Texas. WCS engaged in months of discussions with various members of the local community. When WCS presented its proposal to Andrews County in December 2014, the Andrews County Commissioners Court unanimously adopted a resolution of support for the project.<sup>29</sup> The resolution notes that Andrews County currently receives five percent of the gross receipts from disposals at the two operating LLRW facilities (thus far totaling over \$7.85 million to Andrews County), expected to total more than \$3 million per year. Further, the county resolution notes that the TCEQ believes a consolidated interim storage facility in Texas "is not only feasible but could be highly successful," provided the project "minimizes local and state opposition through stakeholder meetings, finding volunteer communities, financial incentives, and a process that is considered fair and technically rigorous."

WCS earned, and continues to have, consent for its operations through its positive history and outreach, and the additional opportunities for public participation as part of the regulatory licensing process. Thus, while mandating a new consent-based siting process would not be productive for the WCS CISF project at this point, DOE could usefully engage in additional outreach to enhance the likelihood of the WCS project's success.

### **3. Holtec Storage Facility**

On April 29, 2015, Holtec International announced that it had signed a memorandum of agreement (MOA) with the Eddy-Lea Energy Alliance (ELEA)—a company owned by New Mexico's Eddy and Lea counties and the cities of Carlsbad and Hobbs. The MOA set forth the parties' intent to establish a facility to store commercial used nuclear fuel until a geologic repository for permanent disposal becomes available. Holtec anticipates submitting an application for a NRC license later this year.

Holtec is undertaking activities intended to facilitate the development of the community's and the state's "consent." Apart from Hotec's proposal and history, the counties are familiar with nuclear operations generally. The Department of Energy has been disposing of long-lived low-level radioactive wastes (LLRW) in the Waste Isolation Pilot Plant (WIPP) in Eddy County since 1999 and in 2010, URENCO USA began operating a nuclear fuel enrichment facility in Lea County.

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<sup>29</sup> Among other things, the resolution acknowledges that "WCS has consistently shown its commitment to the environment and the citizens of Andrews County by . . . designing and operating safe, state-of-the-art radioactive materials facilities, working to ensure that Andrews County shares in economic benefits because of WCS operations, and working to ensure that local stakeholders are kept informed and made an integral part of the decision-making process concerning WCS operations" ([http://www.co.andrews.tx.us/docs/WCS\\_Resolution.pdf](http://www.co.andrews.tx.us/docs/WCS_Resolution.pdf)).



Further, as the project developer, Holtec has also engaged in extensive outreach with the local community/counties and the State of New Mexico. Following months of discussions with the local community/counties and State government officials, New Mexico Governor Susana Martinez wrote to U.S. Secretary of Energy Dr. Ernest Moniz, to express her “support of the community leaders who continue to spearhead the effort to bring a consolidated interim storage facility for spent fuel to southeastern New Mexico.”<sup>30</sup> Holtec is continuing to engage the community and state as it finalizes the NRC license application. As is the case with the WCS CISF project, no new consent-based siting process is needed for the Holtec project. Here too, DOE could usefully engage in additional outreach to support the project’s success.

#### **4. Nye County, Nevada, Early Warning Drilling Program (re Yucca Mountain)**

The Nye County, Nevada Early Warning Drilling Program<sup>31</sup> illustrates how government funding of technical research can engender local community consent. The early warning drilling program was initiated as part of the Nye County Nuclear Waste Repository Project Office Independent Scientific Investigations Program. The purpose of Nye County’s program was to provide geologic and hydrologic information that county officials believed should be included as part of DOE’s characterization of the Yucca Mountain repository. Nye County sought to perform technical studies of an area located in a complex hydro-geologic system in the vicinity of Yucca Mountain. The Early Warning Drilling Program investigated (1) the origin of certain spring deposits; (2) the geology and hydraulic properties of the valley floor sediments; (3) recharge; and (4) ground-water flow patterns. Once it developed an understanding of the information resulting from the research, Nye County concluded that DOE’s proposed monitoring system could be better designed to protect Nye County’s water resources.

The Early Warning Drilling Program provided resources that enabled the local community to educate itself and reach its own conclusion on whether to support a proposed nuclear waste disposal facility. This is the type of support that could be provided to a potential host community, so that it can independently evaluate any risks associated with a proposed project.

#### **5. Cigéo Deep Geologic Disposal Facility**

Cigéo is the proposed nuclear waste geologic disposal facility to be built in France by ANDRA, the public entity in charge of the long-term management of all radioactive

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<sup>30</sup> Letter from the honorable Susana Martinez, Governor of New Mexico, to Dr. Ernest Moniz, Secretary of U.S. Department of Energy, April 10, 2015 (letter discussed the support from New Mexico to bring a consolidated interim storage facility to southeastern New Mexico).

<sup>31</sup> The sources of information for this discussion include the Nye County Nuclear Waste Repository Project Office website at <http://www.nyecounty.com/ewdpmain.htm>.

waste in France.<sup>32</sup> In 2006, the French Parliament implemented reversible deep geologic disposal as the solution for the long-term management of high level radioactive wastes. In 2009-2010, the French government approved an approximately 30km<sup>2</sup> site in a primarily rural area in northeastern France for further study.

Pursuant to the requirements of the Aarhus Convention, in 2013 France's National Public Debate Commission commenced the mandatory debate on Cigéo. A special public debate commission was convened and conducted several months of preparatory work, including consultation meetings and informing the public about the proposed process and project. The public debate, held from May 2013 through early 2014, included two large public meetings and small group discussions in villages surrounding the proposed site. Online debate sessions were also held, and a citizens' conference was conducted in 2014. The local press agreed to publish the public's questions and the answers provided by the special debate commission every Sunday. The public debate period was extended by an additional two months, as allowed by law, giving the community a voice.

The license application to construct Cigéo is expected to be filed in 2017 and construction is expected to begin in 2020. A pilot phase of disposal could start as soon as 2025. After Cigéo commences operation, ANDRA has proposed to hold regular meetings for stakeholders (review bodies, elected representatives, representatives of civil society, waste generators, etc.) to provide a forum for examining, among other things, feedback on the project's operation and the latest scientific and technical knowledge on geologic disposal.

The efforts undertaken at Cigéo to build community consent provide a number of useful insights that should be considered if DOE develops a consent-based siting program in the U.S. Indeed, the U.S. Nuclear Waste Technical Review Board ("NWTRB") has recognized the Cigéo project's long-standing efforts to gain and retain public trust, describing these efforts as a "dynamic and sustained effort to engage interested and affected parties," and establish "a strong and long-standing local presence."<sup>33</sup> The NWTRB observed that education is important to Cigéo's engagement activities, but so are "listening respectfully, responding to all questions, soliciting the residents' opinions and values, and adopting at least some suggestions" from the public. These efforts have resulted in "reservoir of trust" that "means that technical issues can be debated without rancor and that the implementer is given the benefit of doubt as it proceeds to plan for the repository's development." *Id.* It might be said that consent thereby developed may be the ultimate definition of success.

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<sup>32</sup> The sources of information for this discussion include the Cigéo website (<http://cigeo.com/en/>) and the ANDRA website (<http://www.andra.fr/international/>).

<sup>33</sup> Letter from Ewing, R., Chairman, U.S. NWTRB, to the Hon. Rodney P. Frelinghuysen (Sept. 16, 2013), available at <http://www.nwtrb.gov/corr/rce013.pdf>.

## 6. Canadian Nuclear Waste Management Organization

The Canadian Nuclear Waste Management Organization (“CNWMO”) has developed a process for “identifying an informed and willing host community for a deep geologic repository for the long-term management of used nuclear fuel in Canada.”<sup>34</sup> The principles of the CNWMO site selection process include helping to ensure that any community selected to host a repository is informed and willing to host it, ensuring the community carefully considers the repository’s benefits and risks, and ensuring the community is involved in the assessment of any related health, environmental, social, economic, and cultural effects.<sup>35</sup> The CNWMO process requires that CNWMO representatives take actions both to build trust and educate community members.

Briefly summarized, the six siting-related steps that the CNWMO follows are:

1. The Canadian NWMO initiates the siting process with a broad program to provide information, answer questions and build awareness among Canadians about the project and siting process.
2. Communities identify their interest in learning more, and the Canadian NWMO provides detailed briefing and conducts an initial screening.
3. For interested communities, a preliminary assessment of potential suitability is conducted.
4. A detailed site evaluation is completed at the site identified as having strong potential to meet project requirements outlined in the preliminary assessment.
5. Communities with confirmed suitable sites decide whether they are willing to accept the project and propose the terms and conditions on which they would have the project proceed.
6. The Canadian NWMO and the community with the preferred site enter into a formal agreement to host the project.<sup>36</sup>

We note that in an effort to build trust and maintain open communication, the Canadian NWMO process gives potential host communities engaged in the site selection process the right to withdraw and end their involvement at any point until a final agreement is signed, subject to all regulatory requirements being met and approval received.<sup>37</sup> While having this feature may be desirable from the perspective of the host community or state, it also creates considerable uncertainty at all steps in the process. It may lead to project sponsors viewing interim commitments as sufficiently unreliable that they are unwilling to invest the millions of dollars up front, as is necessary in these projects.

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<sup>34</sup> Nuclear Waste Management Organization, *Moving Forward Together: Process for Selecting a Site for Canada’s Deep Geological Repository for Used Nuclear Fuel*, p. 3, May 2010.

<sup>35</sup> Nuclear Waste Management Organization, *Guiding Principles*, <https://www.nwmo.ca/en/Site-selection/About-the-Process/Guiding-Principles>.

<sup>36</sup> Canadian Nuclear Waste Management Organization, *Steps in the Process*, <https://www.nwmo.ca/en/Site-selection/Steps-in-the-Process>.

<sup>37</sup> Nuclear Waste Management Organization, *supra* note 34, at 17.

While we fully agree that there should be opportunity to decline to consent, it must come well before the 11<sup>th</sup> hour.

## **B. Lessons Learned from Unsuccessful Facility Siting Efforts**

### **1. The Nuclear Waste Negotiator Process**

The 1987 amendments to the Nuclear Waste Policy Act added Title IV, establishing the Nuclear Waste Negotiator (*see* 42 U.S.C. §§ 10241–10251). The Negotiator was charged with trying to find a State or Indian Tribe willing to host a repository or monitored retrievable storage (“MRS”) facility<sup>38</sup> at a qualified site “on reasonable terms,” and to “negotiate with any State or Indian Tribe which expresses an interest in hosting a repository or monitored retrievable storage facility.” NWPA Sec. 402(b)(2), 42 U.S.C. § 10242.

Once confirmed, the Negotiator began an effort to identify States and Tribes willing to consider hosting a repository or monitored retrievable storage (MRS) facility. After a significant outreach program, sixteen Tribes and four counties asked to participate in the Negotiator’s program. The Negotiator created a phased program, inviting those jurisdictions to participate in the initial phases without commitment to subsequent phases. Each phase entitled participants to receive defined grants from the Negotiator to fund exploration of their interest in becoming a volunteer host. For example, Phase I participants each received a grant of \$100,000. Eight Tribes applied for the \$200,000 Phase IIA grants, the other Phase I participants having withdrawn.<sup>39</sup> The participating tribes retained experts, visited existing dry storage facilities and reprocessing plants, and otherwise educated themselves on what hosting an MRS facility would entail. Applications for \$2.8 million Phase IIB grants were received from the Mescalero Apache Tribe and some of the other Phase 2A participants.

Despite the expressions of interest, prior to the disbursement of Phase IIB grants, members of Congress sponsored an amendment to the FY 1993 energy and water appropriations bill that blocked further funding for the Negotiator’s grants to any of the interested Tribes. The Negotiator’s efforts fell victim to politics, which provides a cautionary tale about the need to potentially cast a wide net in terms of outreach. That is, while it is unclear at this point whether the Negotiator’s efforts ultimately would have been successful, DOE and private project sponsors should not overlook the host state’s congressional delegations as well as others in Congress who may be asked to vote on a bill affecting a particular project. Reaching out to as many stakeholders as possible may facilitate consent but may not be sufficient to eliminate all objections.

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<sup>38</sup> A “monitored retrievable storage facility” is defined as a facility for storing high-level radioactive waste and spent nuclear fuel from civilian nuclear activities that permits monitoring and management “for the foreseeable future” and “as long as may be necessary,” and provides for ready retrieval. NWPA §§ 2(34) and 141(b)(1), 42 U.S.C. §§ 10101(2)(34) and 10161 (b)(1)(A-D).

<sup>39</sup> Two local communities were interested in Phase IIA participation but were blocked by their governors.

## 2. DOE's North Dakota Borehole Drilling Test Project

The cancellation of the recent borehole drilling test project in North Dakota illustrates how certain action and inaction can impede efforts to earn community consent. Following the Department's announcement of a research and development plan for deep borehole disposal in its January 2013 Strategy, DOE announced in January of this year that it had selected a Battelle Memorial Institute-led team to drill a test borehole of over 16,000 feet into a rock formation near Rugby, North Dakota. The described purpose was to "explor[e] the science needed for utilization of deep boreholes in crystalline rock formations," including for potential disposal of some high level radioactive wastes."<sup>40</sup> Two months later, the Department cancelled the project "in response to formal opposition from the local county commission." The reason articulated for this outcome was that "local officials and residents worried the study would lead to future nuclear waste storage in the area."<sup>41</sup> This concern was compounded by the fact that residents and county officials "felt out of the loop during the process," pointing to the somewhat extraordinary fact that county officials "learned of the project by reading the newspaper in January."<sup>42</sup>

This example is clear on its face. Even though DOE followed the procurement process associated with the project, overcoming opposition and potentially gaining consent depends on early and ongoing outreach to the community, members of the public, State and federal representatives and many others. The failure to effectively do so in this case contributed to the cancellation of the proposed project.

We note, however, that this example is not intended to stand for the proposition that early and extensive outreach necessarily will lead to consent from the host community state and others. Rather, it demonstrates that without such outreach and attention to all constituent interests, it is highly likely that those who oppose the project will not be persuaded to reconsider and that those "on the fence" will not have the information to develop the trust necessary to consent to a proposed project going forward.

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<sup>40</sup> *Energy Department Selects Battelle Team for a Deep Borehole Field Test in North Dakota*, Jan. 5, 2016, available at <http://www.energy.gov/articles/energy-department-selects-battelle-team-deep-borehole-field-test-north-dakota>.

<sup>41</sup> *DOE Axes North Dakota Borehole Project*, Mar. 4, 2016, available at <http://www.exchangemonitor.com/publication/exchange-monitor/doe-axes-north-dakota-borehole-project-2/>.

<sup>42</sup> *Id.*

*IPC Question 3: Who should be involved in the process for selecting a site, and what is their role? The Department believes that there may be a wide range of communities who will want to learn more and be involved in selecting a site. Participation in the process for selecting a site carries important responsibilities. What are your views on who should be involved and the roles participants should have?*

### **III. NEI Response to IPC Question 3**

NEI believes the following entities should be involved in a consent-based process for selecting a nuclear waste site.

Federal Government (DOE). For proposed sites for which DOE either is the project developer or will be a consumer of the waste storage or disposal services, the Department will need to take action to earn the trust, and in turn the consent, of the host state and community. As noted elsewhere in these comments, DOE's siting process must be fair, transparent, and rational. It must allow affected parties to express their views, provide flexibility in the form of consent required, impose and adhere to a reasonably expeditious schedule for decision-making, and provide for compliance with the obligations of the siting decision once made.

As the project developer, DOE should undertake outreach programs to address the host community's concerns, and to provide financial and technical assistance to host communities and States. These resources will be needed for the host jurisdictions to educate residents, conduct their own technological inquiries, evaluate differing views about the project, etc.<sup>43</sup> These efforts must be initiated early and should continue during facility operation. Federal financial and technical assistance to host communities and States should facilitate their ability to gauge support for the project. Absent that information, the host jurisdiction may not be in a position to formally propose a site for hosting a facility, or formally accept a proposal to host a facility. (Such a collaborative approach is consistent with that generally described in the DOE Consent-Based Siting Briefing.)

Applicant (if other than DOE). Although the Department's Invitation for Public Comment does not specifically address the question of regulatory authority for a new consent-based siting process, we assume that the Department would implement the process. If not, the other Federal or private entities involved should be responsible for implementing the process and undertaking the role outlined above. Further, the applicant must ensure that it continues to build on any existing consent (for projects to be located in communities with significant nuclear experience), and works to earn and

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<sup>43</sup> The Report of the Blue Ribbon Commission (p. 47) makes a similar point concerning the importance of crafting a siting process that is "standards and science-based" in the sense that "the public can have confidence that all facilities meet rigorous, objective, and consistently applied standards of safety and environmental protection." See also the DOE Consent-Based Siting Briefing, p. 10.

maintain the consent with the host community(ies), through information sharing, responsiveness to concerns raised, education, and other activities.

Host State/Tribe/Locality. These entities must be involved in the process for selecting a nuclear waste site. Further, DOE will be responsible for educating the host community, county, and/or state about the process of nuclear waste facility siting, the relevant licensing and regulatory oversight processes, and the potential benefits that may be provided for hosting a storage or disposal facility. Additionally, DOE should ensure the host jurisdictions have a public forum (formal or informal) to articulate safety concerns, to discuss potential economic benefits, and otherwise engage with federal government representatives. The host jurisdictions must be engaged as early in the process as possible, and interactions must continue following operation.

Nuclear Industry. The nuclear industry looks forward to the opportunity to assist in providing information to communities interested in hosting a storage or disposal facility. Additionally, any consent based siting process must recognize the industry's integral interest in storage and disposal of used nuclear fuel.

*IPC Question 4: What information and resources do you think would facilitate your participation? The Department of Energy is committed to ensuring that people and communities have sufficient information and access to resources for engaging fully and effectively in siting. What information and resources would be essential to enable you to learn the most about and participate in the siting process?*

#### **IV. NEI Response to IPC Question 4**

As a minimum, the Department should provide a definitive project description and a statement of the criteria to be used in a consent-based siting effort. The industry and other stakeholders should be given as much information as possible so that each can perform an in-depth evaluation of the potential site in a timely fashion. Additionally, DOE's resolution of key issues such as those listed at pp. 11-12 of the Consent-Based Siting Briefing will provide additional clarity and detail that should facilitate the informed participation of all interested parties.

*IPC Question 5: What else should be considered? The questions posed in this document are a starting point for discussion on the design of the process for consent-based siting of nuclear waste facilities, the Department of Energy would like to hear about and discuss any related questions, issues, and ideas that you think are important.*

#### **V. NEI Response to IPC Question 5**

As this question recognizes, the Department's proposal to create a consent-based siting process for future nuclear waste facilities raises a number of important legal, practical,

and policy issues. DOE will need to resolve these complex issues before moving forward with a proposed process. A list of initial questions that warrant DOE's consideration appears below.

### **A. Legislative Issues**

According to the Department's *Strategy for the Management and Disposal of Used Nuclear Fuel and High-Level Waste*, Jan. 2013 ("Strategy"),<sup>44</sup> DOE intends to have (1) a pilot interim storage facility operating in 2021 (focusing on accepting used fuel from shutdown sites); (2) a larger, full scale interim storage facility operating four years later in 2025 that has "sufficient capacity to provide flexibility in the waste management system" and allows for acceptance of enough used nuclear fuel to reduce expected government liabilities; and (3) a geologic repository available by 2048. See also DOE's summary of the Administration's Strategy at 80 Fed. Reg. 79,872 (Dec. 23, 2015).

The Invitation for Public Comment does not discuss how the Department plans to meet these proposed milestones in the Strategy. The public will need that that information to prepare meaningful and comprehensive responsive comments. For example, will the Department seek the legislative authority that it has long stated it needs for interim storage and, if so, when? Does DOE intend to develop more than one interim storage facility, or repository? If so, how much capacity does the Department anticipate is needed for each facility?

Is there any basis in the Nuclear Waste Policy Act for the use of a DOE consent-based siting process in connection with future nuclear waste storage or disposal facilities?

Does the Department plan to seek legislative authority specifically for a consent-based siting process before initiating that process? If so, what would be the statutory basis for DOE to create and implement a consent-based siting process?

### **B. Issues relating to the Concept of "Consent-based Siting"**

How does DOE intend to manage and administer the project?

DOE abolished its Office of Civilian Radioactive Waste Management—will it re-establish OCRWM, establish another office, or try to run the project out of the Office of Nuclear Energy?

What type of authority will the DOE or the administering individual/entity have? How will DOE establish and monitor accountability for the program?

What criteria does DOE plan to use to distinguish among multiple sites?

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<sup>44</sup> See <http://www.energy.gov/downloads/strategy-management-and-disposal-used-nuclear-fuel-and-high-level-radioactive-waste>.



From what entities must consent to the siting of a new nuclear waste facility be obtained?

Does consent given at an initial or early stage of the siting process have to be “refreshed” or reconfirmed at subsequent stages of the siting process?

Is there a point at which further consent from the consenting host jurisdiction is no longer needed? If so, when is that point?

Will a siting commitment negotiated through the DOE consent-based siting process be subject to veto by a state legislature or by Congress, in the event an elected official disagrees with the decision of a host community that has volunteered to site a nuclear waste facility?

Under what circumstances, if any, may consent to the siting of a nuclear waste facility be revoked? What entities (community/town, county, state) would have authority to revoke consent?

What, if any, consequences should attach to the host community’s withdrawal of consent at various stages of the process? For example, could monetary and other benefits provided to the host jurisdiction be withdrawn?

How can the consent-based siting process ensure that any result is fair and effective from the perspective of Standard Contract holders?

What steps, if any, can or should be taken to prevent rescission of consent, once the process becomes final?

Putting aside the question of the source of funding (Nuclear Waste Fund vs. general appropriations), does the Department propose to provide financial assistance to potential host communities through the consent-based siting process? How will DOE gauge the appropriate level of funding?

What types of interested parties should be entitled to such funding (*e.g.*, tribes, host communities, host counties, host states, environmental organizations, potential private participants, private participants (such as site developers, vendors, utilities)?