



ADVOCATES for the West

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March 5, 2015

Via Certified Mail and Email

Hon. Ernest J. Moniz

Secretary

U.S. Department of Energy

1000 Independence Ave, S.W.

Washington D.C. 20585

The.Secretary@hq.doe.gov

Re: Notice of Intent To Sue Over Commercial Spent Nuclear Fuel
Shipments To Idaho National Laboratory

Dear Secretary Moniz:

I am writing on behalf of former Idaho Governors Cecil D. Andrus and Philip E. Batt to advise you of the Governors' grave concerns regarding the Department of Energy's planned shipments of commercial spent nuclear fuel to the Idaho National Laboratory (INL). Governors Andrus and Batt are so concerned about these proposed shipments that they have engaged my legal services to prepare and prosecute federal court litigation as described below, in the event that a successful resolution cannot be achieved in response to this letter.

As you know, Governors Andrus and Batt have aggressively worked to protect the interests of Idaho from contamination threats – particularly to the Snake River Plain Aquifer – from high-level and other nuclear wastes at the INL site.

As a result of the leadership of Governors Andrus and Batt, the State of Idaho entered into a Settlement Agreement in 1995 (commonly called the “Batt Agreement”) with the Department of Energy (DOE) and the U.S. Navy to settle federal court litigation filed by the State to prevent shipment of spent nuclear fuel to the INL for storage.¹ The lawsuit stemmed from decades of frustration over the federal government's inability to make and keep commitments to the people of Idaho for the cleanup of what is now the INL site.

The 1995 Settlement Agreement prohibits further shipments of commercial spent nuclear fuel to INL, while requiring DOE to clean up nuclear waste materials and move them off-site for permanent storage. Small amounts of further naval and DOE spent fuel shipments to INL are permitted by the Batt Agreement, but the Agreement is explicit that “DOE will make no

¹ The Settlement Agreement is available on Idaho Department of Environmental Quality's website at <http://www.deq.idaho.gov/inl-oversight/oversight-agreements/1995-settlement-agreement.aspx>

shipments of spent fuel from commercial nuclear power plants to INEL." See Settlement Agreement, ¶ D.2.e (underscore added).²

On January 6, 2011, Idaho Governor C.L. "Butch" Otter and Idaho Attorney General Lawrence Wasden executed a Memorandum of Agreement (the "2011 MOA") between Idaho and the Department of Energy, Idaho Operations Office (DOE-ID), under which DOE-ID and Idaho purported to agree to a "conditional waiver" of the prohibition on commercial spent fuel shipments to INL, in order to allow so-called "research quantities" of commercial spent nuclear fuel to be shipped to INL in the future. See "Memorandum of Agreement Concerning Receipt, Storage, and Handling of Research Quantities Of Commercial Spent Nuclear Fuel At The Idaho National Laboratory" (copy attached as Exhibit A).

The public was not informed before DOE entered into this 2011 MOA; and it appears that DOE did not perform any kind of disclosure or analysis of this proposed action pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq.

The 2011 MOA is apparently not operative at this time because DOE is not in compliance with the 1995 Settlement Agreement in other respects. Nevertheless, on December 31, 2014, you wrote Governor Otter and Attorney General Wasden to request that Idaho agree to a further "waiver" of paragraph D.2.e in the Agreement so as to allow two shipments of commercial spent nuclear fuel to INL, projected for June 2015 and January 2016. See December 31, 2014 letter (copy attached as Exhibit B).

According to your letter and a similar letter dated December 16, 2014 from Richard B. Provencher, manager of the DOE's Idaho Operations Office (copy attached as Exhibit C), these two proposed shipments will each consist of 25 spent fuel rods containing an estimated total of 40-50 kg of heavy metal. DOE asserts that these shipments are intended for research purposes, specifically: "work to be conducted on the technical and economic feasibility and non-proliferation acceptability of electrochemical recycling of commercial light water reactor fuels, and for fuel performance studies for the nuclear industry." See Exhibit C, p. 1 (underscore added).

Enclosure 1 to Mr. Provencher's December 16th letter provides few details about the proposed spent fuel shipments to INL and the research proposed to be conducted. See Exhibit C, Encl. 1. It states that the research is part of the DOE's Office of Nuclear Energy's planned workscope for 2015-2020, and "project funding is expected to be in the range of \$10-20M per year through approximately 2021." *Id.*, p. 1. In addition, Enclosure 1 states that the "electrochemical recycling study is entering the fourth year of a 10-year study," and the "fuel provides critical feedstock for the program." *Id.*

² The only exception to this ban on commercial spent fuel shipments is for spent fuel from Fort St. Vrain, which can only be shipped to INL if a permanent repository or interim storage facility for spent fuel located outside of Idaho has opened and is accepting wastes from Idaho, and treatment is needed at INL to make the spent fuel suitable for disposal or storage in such a facility. See Batt Agreement, ¶ D.2.d. That exception does not apply here.

These statements indicate that the “electrochemical recycling” project is a significant project that will span at least a decade and require \$100-200 million in federal funding, and that DOE plans additional commercial spent fuel shipments to INL for the same research project in future, beyond the two shipments proposed in your letter of December 31st.

However, neither your letter nor Mr. Provencher’s letter provides any useful description of the overall research program; what INL facilities it may use; how many commercial spent fuel shipments may be planned for INL as part of the program; whether the program is anticipated to be expanded in the future; whether the research is intended to lead to commercial-scale “electrochemical recycling” of commercial spent nuclear fuels at the INL site; or other crucial information to evaluate the possible scope, scale and impacts of the DOE’s current plans.

In addition, your letter and Mr. Provencher’s letter provide scant information about how the “electrochemical recycling” program will work, particularly the nature of waste materials that may be generated and how they will be treated, stored, and transported out of Idaho. The letters simply assert that “four types of wastes will be generated,” including contact-handled low-level waste, low-level liquid wastes, remote-handled low-level wastes, and contact-handled and remote-handled transuranic solid wastes (which is actually five types of wastes, not four). *See* Exhibit C, Encl. 1, p. 2. DOE claims that these wastes “are not expected to exceed a few cubic meters,” including 1 cubic meter of TRU wastes; and contends that all wastes will be treated and stored at INL using existing facilities and procedures. Again, critical questions about the wastes to be generated, and how they will be treated, stored, and whether they will eventually be removed from Idaho, are all unanswered – omissions that are particularly troubling given DOE’s failure to meet the Batt Agreement’s requirements for treatment and disposal of other radioactive and chemical wastes at the INL site.

With respect to spent nuclear fuel material, the letters do not explain how the spent fuel will be treated or disposed of, other than to claim that “small sections of the fuel may be archived in the commercial fuel library” – apparently meaning indefinite storage at INL – and “[a]ll other used fuel material will be consumed by testing in the electrochemical recycling study.” *Id.*

This latter assertion is counter-intuitive, and not supported by facts or analysis. By definition, electrochemical “recycling” of spent nuclear fuel seems intended to treat commercial spent fuel rods so as to be to reuse the heavy metal components for further nuclear power generation. How will the planned research thus result in “consuming” the heavy metal materials in the spent fuel rods? This and other basic questions are not addressed in any way by the DOE letters.

In fact, it appears that the “electrochemical recycling” program at issue is simply a form of what is typically called “pyroprocessing,” which is a high temperature method of recycling reactor waste into fuel. Pyroprocessing has long been a highly controversial treatment method, partly because it entails intensive chemical treatment of used spent fuels at high temperatures and generates extremely hazardous wastes for which no cost-effective and permanent treatment method has yet been proven. It bears noting that there is significant public and professional

opposition to pyroprocessing because of its intensive energy requirements, hazardous waste generation, and nuclear proliferation aspects.

Although Governors Andrus and Batt have publicly raised significant questions and concerns about the DOE proposal to ship commercial spent nuclear fuel to INL – including what it means in terms of waste generation and storage at INL, and the precedent set by DOE asking Idaho's governor and attorney general to “waive” the prohibition of the 1995 Settlement Agreement on commercial spent fuel shipments – neither DOE nor the State of Idaho have addressed those questions and concerns.

Indeed, Governor Otter and Attorney General Wasden stated in a letter dated January 8, 2015 that “the State indicates its support for these projects” and “will grant a one-time, conditional waiver to allow receipt of the proposed SNF shipments at INL if DOE and Idaho are able to agree upon an enforceable commitment and timeframe for timely resolving the 1995 Settlement Agreement noncompliance issues.” See January 8, 2015 letter (attached as Exhibit D).

As with the 2011 MOA, neither DOE nor Idaho provided any notice to the public of the two proposed commercial spent fuel shipments addressed in the DOE letters (Exhibits B and C), referenced above; nor has DOE conducted any public disclosure or evaluation of the proposed action in conformance with NEPA. Neither has the State of Idaho provided any public notice, explanation, evaluation or assessment of granting a “waiver” under the 1995 Settlement Agreement to allow the proposed shipments of commercial spent nuclear fuel to INL.

The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, is our “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). In enacting NEPA, Congress “recognized the profound impact of man's activity on inter-relations of all components of the natural environment,” and set out to “create and maintain conditions under which man and nature can exist in productive harmony.” See *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2011) (amended opinion), quoting 42 U.S.C. § 4331(a).

NEPA requires not only that an agency consider every significant environmental impact of a proposed action, but also that it reveal this information to the public. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). This “hard look” at an action's impacts fosters both informed decision-making and informed public participation. *Natural Resources Defense Council v. USFS*, 421 F.3d 797, 810 n.27 (9th Cir. 2005).

NEPA requires federal agencies to prepare a detailed EIS for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). An agency may prepare an Environmental Assessment (“EA”) to briefly put forth sufficient evidence and analysis to determine whether to prepare an EIS or a Finding of No Significant Impact (“FONSI”). 40 C.F.R. § 1508.9. However, an agency may only issue a FONSI for actions with no significant impact on the human environment. *Id.* § 1508.13. If an action *may* have a significant effect on the environment, or even if there are *substantial questions* as to whether it may, an EIS must be prepared.

Governors Andrus and Batt are particularly troubled that DOE has not undertaken any public disclosure and analysis pursuant to NEPA before embarking on the proposed action to ship commercial spent nuclear fuel to INL for the asserted “electrochemical recycling” research purposes. Numerous aspects of this proposed action trigger NEPA’s requirements before DOE may proceed.

The precedent set by the 2011 MOA and the proposed spent fuel shipments addressed in Exhibits B-D, in which DOE has sought to “waive” the prohibition of the Batt Agreement – which itself resolved Idaho’s prior litigation alleging NEPA violations by DOE regarding shipments of spent nuclear fuel to INL – is highly controversial alone, and underscores the need for full public disclosure and accountability under NEPA here.

Moreover, the many unanswered questions concerning the scope, scale and potential impacts of the “electrochemical recycling” project at DOE, such as those raised above, also demand that DOE complete full NEPA analysis before proceeding with the proposed commercial spent nuclear fuel shipments to INL.

It bears underscoring here that DOE has undertaken substantial NEPA analysis in recent years before undertaking new programs or changes in the operations of its nuclear facilities around the country. By way of example, DOE has recently prepared Environmental Impact Statements (EISs) for continued management, operation and activities at the Nevada National Security Site and Off-Site Locations in the State of Nevada (DOE EIS-0426); Hanford Tank Management and Closure at the Hanford Site, WA (DOE EIS-0391); and for the Y-12 National Security Complex Project at Oak Ridge, TN (DOE EIS-0387). DOE has also prepared Supplemental EISs for a wide range of activities at existing facilities, such as for the “Nuclear Facility Portion of the Chemistry and Metallurgy Research Building Replacement Project at Los Alamos National Laboratory, New Mexico,” (DOE EIS-0350-S1); for “Production of Tritium in a Commercial Light Water Reactor,” (DOE EIS-0288-S1); and for “Surplus Plutonium Disposition,” (DOE EIS-283-S2).

In light of the history concerning DOE’s management of the INL site and prior NEPA litigation resulting in the 1995 Settlement Agreement, Governors Andrus and Batt believe it is vital that DOE work to maintain transparency with the people of Idaho, including by fully disclosing and evaluating under NEPA the proposed waiver of the Settlement Agreement’s prohibition on commercial spent nuclear fuel shipments as well as the nature of the electrochemical recycling program planned for INL, of which the proposed two shipments in June 2015 and January 2016 are evidently just the beginning.

Unless DOE agrees to undertake timely and complete NEPA analysis before proceeding with the proposed shipments, Governors Andrus and Batt are prepared to bring litigation in federal court to enforce NEPA’s requirements. We hope, however, that litigation can be avoided; and urge you to agree that DOE will live up to its NEPA obligations before proceeding further with the proposed commercial spent fuel shipments to INL.

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Please do not hesitate to contact Governors Andrus and/or Batt directly in response to this letter, or to contact myself. Thank you for your attention to this matter.

Very truly yours,



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