ADVOCATES for the West
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Sent via U.S. Mail and email
Jack Depperschmidt
NEPA Document Manager
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Idaho Operations Office
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Re: Initial Comments by Former Idaho Governors Cecil Andrus and Philip Batt on Draft "Supplement Analysis on Two Proposed Shipments of Commercial Nuclear Fuel to Idaho National Laboratory for Research and Development Purposes," and

Request for Extension Of Time To Submit Full Comments

Dear Mr. Depperschmidt:

I am writing on behalf of former Idaho Governors Cecil D. Andrus and Philip E. Batt (hereafter, "the Governors") to submit the following initial comments on the above-referenced draft Supplement Analysis (hereafter, "SA") regarding DOE's proposal to make two shipments of commercial spent nuclear fuel to Idaho.

In addition, I am writing to request that DOE extend the comment period on the above-referenced draft SA because DOE has failed to timely produce relevant documents sought by Governor Andrus under the Freedom of Information Act; and documents referenced in the draft SA are not readily available for review and preparation of comments. The Governors request that DOE extend the comment period for at least 30 days after Governor Andrus has been provided with all the requested FOIA documents and documents noted below from the draft SA that are not publicly available.

I. BACKGROUND INFORMATION

Governor Andrus served as Governor of Idaho from 1971-77 and again from 1987-1995. Governor Andrus, since the early 1970s, has monitored, commented upon and expressed grave concerns about inadequate protection of the Snake Plain Aquifer that underlies much of the site, which is threatened by the legacy of radioactive and hazardous wastes generated at the INL site and/or stored there.

Governor Andrus personally organized Idaho's Blue Ribbon Commission to comment upon the AEC's WASH-1535 document. His concerns directly led to the program to repackage

and remove transuranic waste from the INL site for shipment to the WIPP site in New Mexico and the cessation of utilization of reinjection wells at the INL site.

Upon resuming the governorship in the late 1980s and early 1990s, Governor Andrus initiated highly visible actions to challenge DOE's management of nuclear and hazardous wastes at the INL site, bringing litigation that obtained a federal court injunction against spent nuclear fuel shipments to the DOE site, based on DOE's NEPA violations.

Governor Andrus' successor in office, Governor Batt, continued those efforts to hold DOE accountable, and ensure protection of the Snake River Plain Aquifer and Idaho's interests in safe and responsible management of spent nuclear fuel and radioactive and hazardous wastes at INL.

In particular, Governor Batt's administration challenged the legal adequacy of the 1995 Programmatic Environmental Impact Statement (PEIS) that DOE prepared in response to the prior court ruling that DOE was in violation of NEPA in its administration of spent nuclear fuel and other wastes at INL. That litigation was resolved by the landmark 1995 Batt Settlement Agreement, which is attached as Appendix A to the draft SA, and which was signed by both Governor Batt and Attorney General Alan Lance, and was approved by the federal court. Importantly, the Batt Settlement Agreement was subsequently approved by an overwhelming majority of Idaho voters through a public referendum on whether to accept or reject it.

The federal court retains jurisdiction to enforce the 1995 Batt Settlement Agreement, which imposes deadlines for DOE to clean up and remove from Idaho a wide range of radioactive and hazardous materials. These include requirements that:

(a) DOE remove all transuranic (TRU) wastes by a "target date" of end 2015 and "in no event later" than end 2018 (Batt Agreement, § B);

(b) DOE remove all spent nuclear fuel (except for testing) from Idaho by end 2035, and treat all high-level waste so it is ready for removal from Idaho by that date (Batt Agreement, § C);

(c) DOE must treat all existing wastes (including spent fuel, high-level waste and TRU waste) "to permit ultimate disposal outside the State of Idaho," including the treatment of sodium-bearing liquid wastes to be completed by end 2012 (Batt Agreement, § E & e.6).

The Batt Agreement also prohibits shipments of commercial spent nuclear fuel to INL, while allowing limited amounts of further naval and DOE spent fuel shipments to INL. *See* Batt Agreement, § D. Regarding commercial spent nuclear fuel – i.e., spent nuclear fuel from commercial light-water reactors, such as the shipments proposed here – the Batt Agreement is

explicit that "DOE will make no shipments of spent fuel from commercial nuclear power plants to INEL." *See* Batt Settlement Agreement, § D.2.e (underscore added).[1]

The Batt Agreement does contain a provision allowing Idaho "in its sole discretion, to waive performance by the federal parties of any terms, conditions and obligations contained in this Agreement." *Id.*, § J.1. Obviously, DOE must obtain a formal waiver under this provision of the Batt Agreement's prohibition in § D.2.e of commercial spent nuclear fuel shipments, before it can lawfully undertake the two proposed shipments here.

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 Batt Agreement 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 Appendix B to the draft SA).

The public was not informed before DOE entered into this 2011 MOA; and 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.

It is also now obvious that DOE has been planning to bring the two proposed shipments of commercial spent fuel addressed in the draft SA for some time, again without informing the public. For instance, the draft SA cites a 2012 DOE document entitled: "Environmental Checklist for the Shipment of Sister Rods from North Ana to INL" (DOE-ID-14-005, April 11, 2012), which is not available to the public on the DOE website; but apparently addresses these proposed shipments.

In September 2013, presentations were made before the Idaho "LINE Commission" on INL matters, at which the proposed shipments were discussed, at least briefly. According to an Idaho Public TV recording of that session, Admiral John Grossenbacher of the DOE-INL office acknowledged that plans were underway for the North Anna spent nuclear fuel shipments; and his discussion indicated that DOE envisions bringing not just the current proposed shipment of 25 spent fuel rod assemblies from North Anna; but in fact anticipates eventually shipping 20 tons of North Anna spent fuel material to INL in the future. Here is a link to that recording: http://164.165.67.41/insession/LINEComm/LINE_Commission09-26-13.mp4.

In addition, it appears that DOE has already committed substantial funds to larger programs for which the two proposed shipments here play only a part; and envisions those

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[1] 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.

programs lasting a decade at a cost of $100-200 million to federal taxpayers. According to the December 16, 2014 from Richard B. Provencher, manager of the DOE's Idaho Operations Office to Idaho Governor Otter and Attorney General Wasden, seeking Idaho's waiver of the Batt Agreement's prohibition of commercial spent nuclear fuel shipments, these two proposed shipments are 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, the letter 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.*

Subsequently to the December 16th letter, DOE Secretary Moniz sent a similar letter dated December 31, 2014 to Governor Otter and Attorney General Wasden, seeking their agreement to waive the Batt Agreement prohibition for the two proposed shipments. Governors Andrus and Batt – like the rest of the public – were not informed of this DOE waiver request.

As soon as the former governors learned of it, they publicly stressed their opposition to any waiver of the Batt Agreement to allow commercial spent nuclear fuel shipments into Idaho, when DOE remains in noncompliance with the requirements and deadlines of the 1995 Batt Settlement in numerous respects – including the fact that the WIPP facility has been closed since February 2014, so no TRU waste shipments have been made from Idaho since then; and the 900,000 gallons of high-level sodium-bearing wastes stored in aging tanks above the Snake River Plain Aquifer have not been treated in accordance with the Batt Agreement's 2012 deadline, with no end in sight for either of these violations.

Governors Andrus and Batt have held two news conferences and published guest editorials that have received widespread coverage in the Idaho media concerning the proposed DOE shipments and Batt Agreement waiver requested by DOE, at issue here. On their behalf, the undersigned also sent a notice letter to DOE Secretary Moniz on March 5, 2015, advising that they would institute federal court litigation over the DOE's legal violations in pursuing the proposed two shipments here without NEPA compliance and without full disclosure of DOE's plans for public review and comment under NEPA.

The draft SA is evidently DOE's response to that notice letter, pretending it is complying with NEPA. As discussed in Section III below, however, the draft SA is wholly inadequate and does not satisfy DOE's NEPA obligations in any respect.

II. REQUEST FOR EXTENSION OF COMMENT DEADLINE.

On January 22, 2015, Governor Andrus submitted a Freedom of Information Act (FOIA) request to DOE seeking all documents pertaining to the DOE's proposed shipments of commercial spent nuclear fuel and DOE's request for an Idaho waiver of the Batt Agreement's prohibition of commercial spent nuclear fuel shipments. That request is assigned DOE FOIA number HQ-2015-00734-F.

Through communications during spring 2015, the request was narrowed and DOE granted Governor Andrus' fee waiver request. However, DOE did not provide a formal response to the FOIA request within the statutory deadlines imposed by FOIA; and did not provide timely responsive documents.

On June 17, 2015 – after the draft SA was released for public comment – DOE staff responded to Governor Andrus' inquiry about the status of the FOIA by advising that responsive documents would be provided "in a few weeks." After the undersigned advised DOE that this was unacceptable given the pending comment period and in violation of FOIA, DOE staff advised on June 30, 2015 that responsive documents would be provided by July 10, 2015, *i.e.*, the Friday before Monday, July 13, 2015, when the comment period on the draft SA closes, according to DOE's public announcement of the comment period.

Late on Friday, July 10, 2015, DOE finally provided a response to Governor Andrus' FOIA request, in which DOE asserted that it was withholding or redacting the vast majority of documents on various grounds. The documents provided by DOE were heavily redacted, with dozens and dozens of pages completely or largely blacked out. Essentially, the only documents provided by DOE to Governor Andrus were press reports and a few other documents already publicly available, such as DOE's waiver request to Idaho in December 2014, *i.e.*, the very correspondence that triggered the FOIA request.

DOE's stonewalling in releasing relevant documents to Governor Andrus is unacceptable. Governor Andrus will insist on full disclosure of responsive documents from DOE, including by bringing court enforcement action if necessary after exhausting any required administrative appeal remedies.

Where Governor Andrus sought relevant DOE documents six months ago concerning the waiver request and proposed shipments, and DOE has still not provided any meaningful documents, it is wholly unacceptable for DOE to expect Governor Andrus to submit full comments by the July 13th deadline. DOE's violation of FOIA in failing to provide a timely response and responsive documents cannot now be allowed to prejudice Governor Andrus in preparing comment letters on the draft EA, as surely DOE must recognize.

In addition, the draft SA references what appear to be important documents concerning the proposed shipments, which are not readily available to the Governors or the public. Although the "References" section of the draft SA includes links to DOE and other websites where many of the cited sources can be retrieved, it cites and references the following documents for which no links are provided and which are not publicly available for review in preparing comments:

- DOE 2012: "Environmental Checklist for the Shipment of Sister Rods from North Ana to INL." DOE-ID-14-005 (April 11, 2012);

- DOE 2015a: "Data Call To Support Two Shipments of Commercial Fuel to the INL Site for Research and Development Purposes" (April 2015);

- INL 2014a: "INL Checklist for the Joint Fuel Cycle Studies – Integrated Recycling Test" INL-14-044 R1 (June 23, 2014);

- NRC 2015: "Backgrounder on Transportation of Spent Fuel and Radioactive Materials" (Note: link was provided but does not work, gets "PAGE NOT FOUND" message).

The essential purpose of NEPA, of course, is for federal agencies to inform the public about the potential impacts of their proposed actions, and to explore alternatives to them. Without the requested FOIA documents and other reference documents listed above, the Governors cannot adequately analyze the draft SA and prepare fully-informed comments.

The Governors request that DOE make the above-cited documents immediately available for their review and review by the public; and they request a 30-day extension of the comment deadline, after they have been provided all the requested FOIA documents as well as those listed above, in order to submit fully informed comments on the draft EA. The Governors also reserve the right to submit additional comments as relevant information becomes available; and to raise in any possible judicial proceedings DOE's failure to provide full information for the public to review and comment on the draft SA.

III. INITIAL COMMENTS ON DRAFT SA.

Without waiving the foregoing extension request or his rights to submit comments after receiving all requested documents, Governors Andrus and Batt submit the following initial comments on the draft SA, which are based on review the draft SA and publicly available documents cited therein, as well as the facts discussed above:

A. The Draft SA Is False And Misleading.

DOE has an unfortunate track record of failing to inform the citizens (and elected leaders) of Idaho regarding its plans for shipping, storing and transporting out of Idaho radioactive and hazardous wastes relating to the INL site. Regrettably, the draft SA only furthers that track record by making plainly false and misleading assertions concerning the proposed commercial spent nuclear fuel shipments.

Specifically, the draft SA states – on its very first page – that the proposed commercial spent nuclear fuel shipments could occur "as early as August 2015" from the Byron plant and January 2016 from the North Anna plant. *See* draft SA, p. 1 (emphasis added).

In the same vein, the draft SA cites (and attaches as Appendix B), the January 2011 Memorandum of Agreement between DOE and Idaho Governor Otter and Attorney General Wasden, which it says allows waiver of the Batt Agreement ban on commercial spent fuel shipments to INL. *Id.*, p. 3. And it references a January 2015 "expression of support" from

these Idaho elected officials for waiver of the Batt Agreement ban for the two proposed shipments. *Id.*, p. 4, n. 6.

The obvious implication to the public is that Idaho's Governor and Attorney General have already agreed to waive the Batt Agreement and allow the two proposed Byron and North Anna commercial spent fuel shipments. But that impression is flatly untrue and DOE knows it.

On January 8, 2015, Governor Otter and Attorney General Wasden sent a letter to DOE expressing "conditional support" for the two proposed shipments, but the letter made clear that any waiver of the Batt Agreement prohibition would be contingent "upon an enforceable commitment and timeframe for timely resolving the 1995 Settlement Agreement noncompliance issues." As noted above, those "noncompliance issues" include DOE's failure to meet the 2012 deadline for treating the 900,000 gallons of high-level sodium-bearing wastes currently stored in three aging tanks above the Snake River Plain Aquifer; as well as the cessation of shipments of TRU wastes to the Waste Isolation Pilot Plant (WIPP) in New Mexico, which stopped accepting shipments in February 2014 due to explosions there, causing DOE to fall behind in its shipments of TRU wastes from INL to WIPP under the Batt Agreement.

Subsequently, Idaho Attorney General Lawrence Wasden has continued to make clear to DOE that Idaho does not agree to any waiver of the Batt Agreement ban for the proposed commercial spent nuclear fuel shipments to INL. On February 27, 2015, Attorney General Wasden wrote to DOE Secretary Moniz regarding the proposed shipments, in which he reiterated that the 2011 MOA was "conditional" only, and is not effective now to waive the Batt Agreement prohibition "because of DOE's noncompliance with the 1995 Settlement Agreement." *See* February 27, 2015 letter (Attachment 1 hereto).

The letter also underscored Attorney General Wasden's statements to DOE at a January 8, 2015 meeting that he would not agree to waive the Batt Agreement ban to allow the two shipments "until such time as the Integrated Waste Treatment Unit is operational and DOE has entered into an enforceable commitment to resolve the 1995 Settlement Agreement noncompliance issues. Further, I told your representatives that if DOE took title to the commercial spent fuel rods . . . it did so at its own risk." *Id.*, p.1.

The February 27th letter further noted that DOE no longer anticipates that the Integrated Waste Treatment Unit (which is to be used to treat the 900,000 gallons of high-level sodium-bearing wastes) may be operational by end 2015, as DOE previously represented; and that the Unit might not be operational until spring 2016. *Id.*, p. 2. Even more alarming, a subsequent March 2015 settlement agreement between DOE and Idaho Department of Environmental Quality over DOE's violation of the 1992 consent order for cleanup of these same wastes further indicated that the Integrated Waste Treatment Unit may never become operational, as it provides for a monetary penalty for DOE to pay in that event.

Attorney General Wasden's February 27th letter reiterated unequivocally that Idaho does not agree to waiver of the Batt Agreement for the proposed commercial spent nuclear fuel shipments "until such time as the Integrated Waste Treatment Unit is operational and DOE has

entered into an enforceable commitment to resolve the 1995 Settlement Agreement noncompliance issues." *See* Attachment 1, p. 2.

Given this clear position – communicated to DOE well before the draft SA was released to the public in June 2015 – it is false and misleading for DOE to state in the draft SA that the first proposed (Byron) shipment could occur as early as August 2015 and the second proposed (North Anna) shipment could occur in January 2015; and that DOE has obtained a waiver of the Batt Agreement from Idaho for these shipments. In fact, the opposite is true: there is no waiver; and there is no remote chance that any waiver could be granted for the shipments on this timeline.[2]

By making such false and misleading statements in the draft SA, DOE further erodes the public confidence; and violates its NEPA duty requiring that federal agencies "shall insure the professional integrity, including scientific integrity" of their NEPA documents. *See* 40 C.F.R. § 1502.24.

Moreover, the discussion above underscores that DOE should grant the comment extension request made above – there is no hurry to complete the SA, as there is no reasonable likelihood that the planned shipments can remotely proceed on the described schedule.

B. **DOE May Not Rely On The SA To Fulfill Its NEPA Duties.**

Not only is there no hurry to complete the SA, but Governors Andrus and Batt wish to emphasize now – and forcefully – that DOE cannot fulfill its NEPA duties by following its current intended path of using the SA to conclude that existing NEPA documents are adequate and therefore no further NEPA analysis is required.

To the contrary, as explained below, DOE must fulfill its NEPA duty to disclose the public its full proposed actions; identify a reasonable range of alternatives to the proposed actions; and rigorously evaluate the potential impacts of the proposed actions and alternatives, in compliance with NEPA, the CEQ NEPA regulations, and the DOE NEPA regulations. The SA process that DOE is proposing to use here does not comply with NEPA's requirements; and the prior NEPA documents relied on by DOE in the draft SA are certainly not adequate to satisfy NEPA with respect to the proposed shipments.

The Governors submits that, in light of the precedential and controversial nature of DOE's proposed actions here – which involve asking Idaho to waive a unique court-enforced settlement agreement that requires DOE to clean up wastes at the INL site and forbids commercial spent nuclear fuel shipments until it has done so, yet DOE is violating that settlement even while seeking to bring commercial spent nuclear fuel for new programs at INL –

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[2] We note that the Idaho Attorney General submitted comments on the draft SA which reiterate that Attorney General Wasden has not agreed to waive the Batt Agreement prohibition for the two shipments proposed by DOE, and that the draft SA misrepresents the status of DOE's compliance with the 1995 Batt Agreement as well as the validity of the 2011 MOA. *See* June 18, 2015 comment letter from Deputy Attorney General Clive Strong (Attachment 2 hereto).

an EIS is required under NEPA. At a minimum, DOE must prepare an Environmental Assessment (EA) to determine whether it needs an EIS; and it cannot use the SA process to short-circuit its NEPA obligations.

1. NEPA's Requirements.

NEPA requires an Environmental Impact Statement ("EIS") for all "major federal actions significantly affecting the quality of the human environment." 42. U.S.C. § 4332(2)(C). "Environmental information [must be made] available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). Among other things, an EIS must consider a reasonable range of alternative actions and assess site specific and cumulative impacts. 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. §§ 1502.14,1502.16, 1508.25. An agency must first prepare a draft EIS and offer that draft to the public for their comments. The agency must then consider and respond to the public's comments in its Final EIS.

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).

One of NEPA's fundamental goals is to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. The scope of NEPA review is quite broad, including disclosure and consideration of all reasonable alternatives, 40 C.F.R. § 1502.14(a), and direct, indirect and cumulative effects on "ecological. . . aesthetic, historic, cultural, economic, social, or health" interests. 40 C.F.R § 1508(b). The federal agency must "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated"; "[d]evote substantial treatment to each alternative considered in detail including the proposed action"; and "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency." 40 C.F.R. § 1502.14(a)-(c).

To satisfy NEPA's "hard look" requirement, a federal agency must present the environmental impacts of the proposed action and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among the options by the decision maker. 40 C.F.R. § 1502.14. Because the purpose and need statement required by 40 C.F.R. § 1502.13 defines the scope of reasonable alternatives, an agency may not narrowly construe the purpose and need so as to define away competing reasonable alternatives and foreclose consideration of a reasonable range of alternatives.

Under CEQ's regulations implementing NEPA, federal agencies may prepare an Environmental Assessment (EA) to assist in the NEPA process. 40 C.F.R. §§ 1501.4(b), 1508.9. An EA is a more limited review of environmental factors associated with a federal action, performed to assist the agency in determining whether a lengthier and more thorough EIS is warranted because the proposed action may have significant impacts, or whether to issue a

Finding of No Significant Impact ("FONSI"). 40 C.F.R. § 1508.9. 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.

Ten "intensity" factors help determine whether an agency action may cause significant impacts. *Id.* § 1508.27(b). The presence of even one of the factors may be sufficient to require preparation of an EIS. Factors that must be considered here include:

> (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
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> (2) The degree to which the proposed action affects public health or safety.
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> (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
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> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
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> (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
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> (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
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> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts. . . .
>
> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Id.

Both EAs and EISs must discuss a proposed action's direct, indirect, and cumulative effects. 40 C.F.R. § 1502.16. Direct effects are "caused by the action and occur at the same time and place," whereas indirect effects are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* § 1508.8. Cumulative effects are "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." *Id.* § 1508.7.

An adequate analysis of the environmental impacts of a project also must include a

consideration of the direct, indirect, and cumulative impacts of the project. 40 C.F.R. §§ 1508.7, 1508.8, 1508.25(c). Cumulative impacts are the impacts on the environment that result from incremental impacts of the action when added to all other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. 40 C.F.R. § 1508.7. "Cumulative impacts can result from individually minor but collectively significant actions." 40 C.F.R. § 1508.7.

NEPA obligates the agency to make available to the public high-quality information including accurate scientific analyses, expert agency comments, and public comments before decisions are made and actions are taken. 40 C.F.R. § 1500.1(b). The agency's discussion and analysis must be based on professional and scientific integrity. 40 C.F.R. § 1502.24. CEQ's NEPA regulations provide that information used to inform NEPA analysis "must be of a high quality" and that "[a]ccurate scientific analysis . . . [is] essential to implementing NEPA." 40 C.F.R. § 1500.1(b). The agency's discussion and analysis must be based on professional and scientific integrity. 40 C.F.R. § 1502.24. To take the required "hard look" at a proposed project's effects, an agency may not rely on incorrect assumptions or data.

NEPA analysis must also consider a reasonable range of alternatives to the agency's proposed action. 40 C.F.R. § 1502.14(a). Consideration of alternatives is the "heart" of the NEPA analysis. *Id.* Consideration of reasonable alternatives furthers NEPA's goals of objective and thorough analysis, by guaranteeing that agency decision-makers assess "all possible approaches to a particular project . . . which would alter the environmental impact and the cost-benefit balance." *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988). Hence, the "existence of a viable but unexamined alternative renders an [EIS] inadequate." *NRDC v. USFS*, 421 F.3d at 813 (citation omitted). *See also Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 813-14 (9th Cir. 1999) (holding that consideration of only "two virtually identical" action alternatives was inadequate). Because BLM did not consider a reasonable range of alternatives, particularly an alternative that was more protective of the environment, it violated NEPA.

"Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." *Id.* § 1500.1(b). Agencies may tier environmental analyses to an earlier EIS. *Id.* § 1502.20. However, tiering is only permissible if the previous document actually discussed the impacts of the project at issue.

An agency has a continuing obligation to comply with NEPA and must prepare a supplemental NEPA analysis when "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" emerge. *Id.* § 1502.9(c)(1)(ii) (applicable to APHIS as set forth in 7 C.F.R. § 372.1).

2. The SA Process Unlawfully Short-Circuits DOE's NEPA Duties Here.

The draft SA asserts that DOE has followed NEPA regulations and guidance in utilizing the SA process to determine whether a supplemental EIS might be required for the two proposed shipments. DOE ignores the fact that the SA process is not applicable to the current proposed

shipments. In truth, DOE is seeking to use the SA to sidestep complying with its NEPA duties to fully and candidly disclose to the public what its plans are, what their potential environmental impacts may be, and what may be reasonable alternatives to its proposals.

In Section 1.3, the draft SA states that DOE is following its NEPA regulations and its "Recommendations for the Supplement Analysis Process" (DOE 2005). Figure 3.1 of the draft SA illustrates how the Supplement Analysis process supposedly was used in this case.

As stated in Section 1.3, and demonstrated in the remainder of the draft SA, DOE begins with an "initial screening review" that "considers if there are substantial changes to the proposal or significant new circumstances or information relevant to environmental concerns" that would trigger the need for a supplemental EIS. *See* draft SA, p. 2. DOE's "Recommendations for the Supplement Analysis Process" (DOE 2005) explains that these inquiries follow from the CEQ NEPA regulations at 40 C.F.R. Section 1502.9(c), which directs that federal agencies must prepare supplements to EISs where: "(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *See* DOE 2005, citing 40 C.F.R. 1502.9(c)(1).

Applying that framework to the two proposed shipments here, the draft SA identifies the 1995 "Programmatic Spent Nuclear Fuel Management and Idaho National Engineering Laboratory Environmental Restoration and Waste Management Programs Final Environmental Impact Statement" (DOE/EIS-0203) (hereafter, "1995 PEIS") as the principal NEPA document that DOE is relying on for NEPA coverage of the proposed shipments. *See* draft SA, Sections 1.3 & 1.4.

DOE also cites the 1996 "Final Environmental Assessment on Electrometallurgical Treatment Research and Demonstration Project in the Fuel Conditioning Facility at Argonne National Laboratory West" (DOE EA-1148) (hereafter "1996 EA"); the 1997 "Waste Isolation Pilot Plant (WIPP) Disposal Phase Final Supplemental Environmental Impact Statement (DOE/EIS-006-S-2 (hereafter "WIPP SEIS"); the 2013 Final Site-Wide Environmental Impact Statement of the Department of Energy/National Nuclear Security Administration (NNSA) Nevada National Security Site (NNSS) and Off-Site Locations in the State of Nevada" (DOE/EIS 0426) (hereafter 2013 NNSS EIS"); and the 2008 Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada" (DOE/EIS-0250F-SI) (hereafter, Yucca Mtn. EIS"). *Id.*

The draft SA claims that these NEPA documents were evaluated to determine if they need to be supplemented under the Supplement Analysis framework described above, by evaluating if "there are substantial changes in the proposed action that are relevant to environmental concerns" or there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." Unsurprisingly – given DOE's refusal to candidly describe and assess its proposed shipments for the public – it concludes that these documents are adequate to cover the proposed shipments. Thus, DOE

intends to use the SA here as its only form of NEPA compliance, since the cited prior EISs and EA supposedly disclose all the information that is needed.

That conclusion is wrong, and DOE's analytical framework is wrong. Nowhere did any of the above-referenced NEPA documents address DOE's proposed actions here, which are to obtain a waiver of the 1995 Batt Agreement's prohibition of commercial spent nuclear fuel shipments to Idaho, so that DOE can supposedly initiate new programs of research and development that have never before occurred, even while it is in serious non-compliance with its duties under the Batt Agreement to clean up and remove existing nuclear and hazardous wastes from the INL site.

The draft SA never acknowledges – much less evaluates – the fact that the Batt Agreement's prohibition on commercial spent nuclear fuel shipments to Idaho represents a nationally unprecedented, court-enforced commitment by DOE not to bring commercial spent fuels into the state, at least until it has complied with its duties under the Batt Agreement to treat, clean up, and remove existing radioactive and hazardous wastes at the INL site. The draft SA also never acknowledges – much less evaluates – the controversial and precedential nature of its request that Idaho waive the Batt Agreement ban even while DOE is in noncompliance with many other requirements of that Agreement.

DOE's principal reliance on the 1995 PEIS to justify avoiding new NEPA analysis of the proposed shipments and waiver request is clearly unfounded, and will not withstand judicial scrutiny. Again, the Batt Settlement represented a court-approved settlement of challenges brought by the State of Idaho to the 1995 PEIS. The 1995 PEIS could not possibly have evaluated what it might mean for INL and the State of Idaho for commercial spent fuel shipments to be prohibited until existing wastes are treated and removed; nor what it might mean for DOE to later breach its promises and obligations under the Batt Agreement, yet still ask for a waiver so it can go ahead and start bringing commercial spent fuel into the State for new research and development programs that have only recently been identified as potential valuable to the commercial nuclear industry.

It bears underscoring that the 1995 PEIS examined the future of defense spent fuel storage and treatment on a nationwide basis affecting all DOE's facilities – not commercial spent nuclear fuel. And the 1995 PEIS examined proposed actions regarding storage and treatment of existing defense wastes at the INL site – not commercial spent nuclear fuel. DOE's effort to invoke snippets of the 1995 PEIS to claim its analysis fully covered the current proposed actions fails to acknowledge these fundamental limitations on the 1995 PEIS, and further disregards the history of the last 20 years leading up to the current proposals – including DOE's entry into the Batt Settlement Agreement (which itself substantially revised and limited DOE's plans from those identified in the 1995 PEIS) and its current violations of that Agreement.

Likewise, DOE's invocation of the other NEPA documents fails to acknowledge that this is a new – and unprecedented proposal – which could not possibly have been evaluated in those prior NEPA analyses. In particular:

• 1996 EA: The 1996 EA on electrometallurgical treatment demonstration does not address the actions proposed here, *i.e.*, shipment of spent nuclear fuel from commercial light-water reactors for supposedly new research and development programs. Instead, that EA only addressed treating sodium-bonded wastes from the Experimental Breeder Reactor-II ("EBR-II") at the INL site, for which treatment was needed to prepare the wastes for shipment to a permanent repository. As stated in the Purpose and Need section of that 1996 EA:

> DOE has a legally binding commitment to remove SNF from the State of Idaho by the year 2035, including that from EBR-II. Without some form of treatment, EBR-II fuel is unlikely to be suitable for disposal in a geologic repository because the fuel is saturated with sodium, a reactive material. . . DOE has identified electrometallurgical treatment as a promising technology to treat EBR-11 SNF, but an appropriate demonstration is needed to provide DOE with sufficient information to evaluate its technical feasibility.

See 1996 EA, Purpose And Need. Where the 1996 EA thus was limited to analysis of whether or not to proceed with a demonstration project for treatment of a particular form of waste in order to prepare it for transport and storage at a permanent repository, DOE cannot plausibly claim that the 1996 EA somehow addressed its current proposal to ship very different kinds of spent nuclear fuel from commercial light-water reactors for different research and testing purposes.

• 1997 WIPP EIS: DOE's reliance on the 1997 WIPP EIS is likewise inapposite – and another instance of DOE misleading the public in the draft SA.

The draft SA asserts that TRU wastes generated by the research and development projects for the two proposed commercial spent nuclear fuel shipments here will be sent to WIPP, and thus will comply with the 1995 Batt Settlement Agreement requirements for removing all TRU wastes no later than end 2018. *See* draft SA, pp. 5-6, 21.

But the 1997 WIPP EIS evaluated using WIPP for permanent storage of DOE defense TRU wastes, not TRU wastes derived from commercial light water reactors. In fact, federal law prohibits use of WIPP for storage of non-defense TRU wastes. *See* Record of Decision for the Deparment of Energy's Waste Isolation Pilot Plant Disposal Phase, 63 Fed. Reg. 3624 (Jan. 23, 1998) ("Under this decision, DOE will dispose of up to 175,600 cubic meters (6.2 million cubic feet) of TRU waste generated by defense activities at WIPP after preparation (i.e., treatment, as necessary, including packaging) to meet WIPP's waste acceptance criteria"); *id.* at 3625 ("The WIPP Land Withdrawal Act, as amended in 1996 . . . specifies that only defense TRU waste may be disposed of at WIPP"); and *id.* at 3628 ("Under this decision, the wastes to be disposed of include both CH and RH defense TRU waste (except PCB commingled TRU waste) placed in retrievable storage after 1970, and TRU waste generated for approximately the next 35 years by plutonium stabilization and management activities, environmental restoration (including defense TRU waste from future remediation of sites where TRU waste was buried before 1970), decontamination and decommissioning, waste management, and defense testing and research").

The draft SA does not explicitly acknowledge these limitations on TRU waste shipments to WIPP. Instead, the draft SA makes the following assumption that TRU waste from the proposed two shipments will be sent to WIPP:

> With regard to TRU wastes, the proposed action evaluated in this SA would require the use of the HFEF Hot Cell, which contains both defense- and nondefense-related materials and contamination. Because it would be impracticable to clean out any defense-related contamination, wastes associated with the proposed action could be eligible for disposal at WIPP (DOE 2012). Therefore, this SA assumes the TRU wastes from the proposed action would be disposed of at WIPP."

See draft SA, p. 21 (emphasis added).

This assumption appears clearly erroneous, in light of the language above from the WIPP Record of Decision making clear that WIPP may not accepted commercial TRU wastes. Indeed, this assumption is directly contrary to a 1996 DOE General Counsel legal memo and EM Guidance concerning TRU civilian and defense waste, which directed that future non-defense wastes commingled with defense waste cannot be shipped to WIPP in light of the statutory limitations in the WIPP Authorization act. *See* October 16, 1996 Memorandum (Attachment 3 hereto) (stating: "For the future, however, to remain faithful to the congressional intent, TRU waste generated in defense nuclear activities should be segregated from TRU waste generated in civilian nuclear activities, and only the defense portion should be shipped to WIPP.").

DOE fails to candidly acknowledge this legal limitation that directly affects its proposed action here; and instead sidesteps that limitation by asserting that since the commercial spent nuclear fuels will be treated at a defense-waste facility at INL, which cannot be cleaned before handling the commercial fuels, then the resulting mix of prior defense-related TRU and commercial-related TRU waste "could" be sent to WIPP.

Such wishful thinking is hardly the basis for avoiding preparation of an EIS in this case. Again, DOE has a duty to candidly disclose its proposed actions and their likely impacts, and to prepare an EIS when it embarks on a controversial or precedent-setting activity. Seeking to sidestep WIPP's limitations by now mixing commercial and defense wastes together so that they can be sent to WIPP is surely a precedent-setting action – and one that is highly controversial – that requires an EIS.

Moreover, the draft SA is further plainly erroneous in asserting that TRU wastes from the two proposed shipments will be shipped to WIPP within the end 2018 deadline for all TRU wastes at INL to be transported out of the state. The draft SA does acknowledge that WIPP stopped accepting shipments in February 2014 – and it remains closed to this day. *See* draft SA, p. 10. But the draft SA provides no further details on this closure; how long it is expected to last; and whether the WIPP site will ever reopen. Again, it simply assumes that the WIPP site will reopen in time for DOE to meet its obligation under the Batt Settlement to ship all TRU wastes out of Idaho by end 2018, without any justification or analysis to back it up.

The fact that the WIPP site encountered such serious unexpected problems that it has been closed for nearly a year and a half now also underscores that DOE cannot rely on the 1997 WIPP EIS for NEPA coverage of its proposed shipments here. Surely that closure and its ramifications constitute "significant new information" requiring, at a minimum, a supplemental EIS if DOE is going to rely on the 1997 WIPP EIS now.

In summary, DOE cannot utilize the SA process here to comply with its NEPA duties regarding the two proposed shipments. Its prior NEPA documents cited in the draft SA cannot possibly be deemed to cover the new proposed actions here; and the draft SA fails to acknowledge the many limitations of those documents with respect to the changing events that have occurred since they were issued. DOE should conduct a full public airing, through an EIS, of its proposed actions seeking a waiver of the Batt Agreement to newly allow commercial spent nuclear fuel shipments to INL even when the cleanup requirements of the Batt Agreement have not been met, and when DOE is likely to remain in violation for a long time.

CONCLUSION

For the foregoing reasons, DOE should (1) grant the requested comment period extension; (2) forego utilizing an SA for NEPA justification of the proposed commercial spent nuclear fuel shipments to INL, and (3) develop a fair and legally-adequate EIS for the proposed actions which fully discloses DOE's plans, and analyzes likely impacts as well a reasonable range of alternatives.

Please do not hesitate to contact me, by phone or email below, if you need further clarification or explanation of these comments and the extension request. Thank you for your cooperation and assistance in this matter.

Very truly yours,

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